

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10	STATE OF WASHINGTON,)	
		)	No. 2:19-cv-00884-RAJ
11	Plaintiff,)	
		)	STIPULATED MOTION AND
12	v.	)	PROPOSED ORDER TO HOLD THIS
		)	CASE IN ABEYANCE PENDING
13	UNITED STATES ENVIRONMENTAL	)	VOLUNTARY RECONSIDERATION
14	PROTECTION AGENCY and	)	AND RULEMAKING
15	MICHAEL REGAN, Administrator,)	
16	United States Environmental Protection	)	Note on Motions Calendar: June 30,
	Agency,	)	2021
17	Defendants.)	
18	_____)	

19 Defendants U.S. Environmental Protection Agency, et al. (“EPA”) hereby move the
20 Court to enter the proposed order set out below to hold this case in abeyance. During the
21 requested abeyance, EPA intends to reconsider the agency actions challenged in this case and
22 initiate a federal notice-and-comment rulemaking under the Clean Water Act to propose a rule
23 establishing protective federal human health criteria applicable to Washington State’s surface
24 waters. EPA intends to sign this proposed rule within nine months of the date that the Court
25 grants the proposed order, after which time the proposed rule would be subject to public
26 comment. EPA intends to sign a final action on the proposed rule within nine months after EPA
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1 signs the proposed rule. Once EPA takes final action, this lawsuit would likely be moot or
2 otherwise dismissed voluntarily by the Parties.

3 All the other parties in this case – Plaintiff State of Washington, Plaintiff-Intervenors the
4 Sauk-Suiattle Indian Tribe and the Quinault Indian Nation, and Defendant-Intervenors Northwest
5 Pulp & Paper Association, et al., – stipulate to the relief requested by this motion, which is set
6 out below in the proposed order. The grounds for this motion are as follows:
7

8 1) On August 1, 2016, Washington submitted to EPA for its approval 192 new state-
9 developed human health criteria (“HHC”) for 97 pollutants applicable to Washington’s surface
10 waters. EPA approved 45 of Washington’s HHC, and disapproved 143 of those criteria because
11 they either were not adequately protective or otherwise not based on sound science. EPA also
12 undertook a federal notice-and-comment rulemaking and promulgated protective federal HHC
13 that applied in Washington in lieu of the State-developed standards EPA disapproved. 81 Fed.
14 Reg 85,417 (November 28, 2016).
15

16 2) Based on an administrative petition, the prior administration reconsidered these
17 actions and reversed course. Specifically, on May 10, 2019, EPA reversed its prior disapproval
18 of, and instead approved, the State’s HHC. Thereafter, on August 6, 2019, EPA proposed a
19 federal rule to withdraw certain federal HHC that it previously established to apply in
20 Washington State. 84 Fed. Reg. 38,150. After taking comment on that proposal, EPA published
21 its decision withdrawing those federal criteria in the Federal Register on May 13, 2020. 85 Fed.
22 Reg. 28,494. The State objected to EPA reversing its position, and requested that EPA maintain
23 the more stringent federal standards on which the State had since relied.
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25 3) In this case, Plaintiff the State of Washington and Plaintiff-Intervenors the Sauk-
26 Suiattle Indian Tribe and the Quinault Indian Nation challenge (a) EPA’s May 10, 2019 decision
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1 to reverse its prior disapproval of, and instead to approve, Washington State’s less stringent
2 water quality criteria for human health, and (b) EPA’s subsequent rulemaking action to withdraw
3 its previously promulgated, more stringent federal criteria for Washington State. These plaintiffs
4 challenge only EPA’s authority to reconsider its prior actions. The Parties have filed and briefed
5 their respective cross-motions for summary judgment. *See* Dkts. 30, 33, 34, 41, 45 & 49. Those
6 motions were terminated but may be refiled or reactivated. Dkt. entry, dated Mar. 15, 2021.

7
8 . 4) On January 20, 2021, following his inauguration, President Biden issued
9 Executive Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021), which directed federal agencies to
10 review and consider whether they intend to suspend, revise, or rescind certain types of
11 environmental regulations “and other actions during the last 4 years that conflict with the[]
12 important national objectives” identified in that executive order. On February 23, 2021, the Court
13 granted EPA’s unopposed motion seeking an abeyance so it could conduct an initial review as to
14 whether it intended to reconsider the challenged actions. The Court also directed the Parties to
15 file a motion (or motions) to govern further proceedings by June 24, 2021, Dkts. 79-80, which
16 date was extended to June 30, 2021, Dkt. 83. This stipulated motion sets out the Parties’ motion
17 to govern.

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19
20 5) Based upon EPA’s initial review of the two actions taken by the prior
21 administration that are challenged in this case as well as the Agency’s preceding actions, EPA
22 has substantial concerns that the State HHC approved by the prior administration may not be
23 adequately protective and may not be based on sound science. EPA therefore intends to initiate a
24 federal rulemaking that proposes to put in place protective federal HHC applicable in
25 Washington State. That rulemaking is governed by the requirements of the Administrative
26 Procedure Act. To conduct the necessary analysis and review, provide for consultation with
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1 affected federally-recognized tribes, and comply with applicable rulemaking requirements, EPA
2 requires up to nine months from the date the Court grants this order to sign its proposed rule,
3 after which time that proposal would be subject to public comment. EPA intends to sign a final
4 action on the proposed rule within nine months after EPA signs the proposed rule. Once EPA
5 takes final action on that proposal, depending on the details of that action, this lawsuit would
6 likely be moot or otherwise dismissed voluntarily by the Parties.
7

8 6) Plaintiffs are concerned that any delay by EPA in meeting the rulemaking
9 schedule set out above could cause undue harm, because the actions challenged in this case
10 remain in effect pending completion of EPA's rulemaking. To accommodate this concern, all
11 Parties stipulate that summary judgment briefing (including the potential reinstatement or
12 refiling of previously filed summary judgment briefs) in this case may proceed if EPA fails to
13 sign a proposed rule within nine months of the Court's order holding this case in abeyance, or
14 fails to sign a final action on that rulemaking within nine months of the proposal. The Parties
15 thus stipulate that, if EPA fails to sign either the proposed rule or final action within the
16 referenced nine month periods, then within ten days of such failure they will file with the Court a
17 proposed schedule for expeditious summary judgment briefing (which may include the
18 reinstatement or refiling of previously filed summary judgment briefs). Should EPA sign the
19 referenced proposed rule or final action on that proposal before summary judgment briefs are
20 filed, such summary judgment briefing will be deferred.
21
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23 7) Courts possesses wide discretion to stay judicial proceedings in situations such as
24 this one. *See generally Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th
25 Cir. 1979); *see, e.g., Northwest Environmental Advocates v. EPA*, Case No. 2:14-cv-00196-RSM
26 (W.D. Wash.), Dkt. 95 (Order Granting Stay Pending Voluntary Reconsideration, dated Oct. 17,
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1 2018). An agency may reevaluate its interpretations “in response to . . . a change in
2 administrations.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981
3 (2005) (internal quotation marks and citations omitted). Likewise, the advent of a new
4 administration may warrant a reevaluation of an agency’s policies and regulatory actions. *See*,
5 *e.g.*, *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012).
6 Although not mandated, “when an agency seeks to reconsider its action, it should move the court
7 to remand or to hold the case in abeyance pending reconsideration by the agency.” *Anchor Line*
8 *Ltd. v. Fed. Maritime Comm’n*, 299 F.2d 124, 125 (D.C. Cir. 1962). In this regard, courts
9 “prefer[] to allow agencies to cure their own mistakes rather than wast[e] the courts’ and the
10 parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.”
11 *Ethyl Corp v. Browner.*, 989 F.2d 522, 524 (D.C. Cir. 1993). Thus, courts should typically grant
12 an agency’s request for an abeyance pending reconsideration or a request for voluntary remand.
13 *See Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (“courts only refuse
14 voluntarily requested remand when the agency’s request is frivolous or made in bad faith”); *SKF*
15 *USA*, 254 F.3d at 1029 (“[I]f the agency’s concern is substantial and legitimate, a remand is
16 usually appropriate.”)

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20 8) The requested abeyance is warranted in this case. As noted, EPA has serious
21 concerns that the HHC established through the agency actions challenged in this case may not be
22 adequately protective and may not be based on sound science. The abeyance will allow EPA the
23 time it needs to undertake a rulemaking to address these concerns, including through outreach to
24 the public through notice-and-comment procedures. An abeyance of judicial proceedings
25 pending the completion of the rulemaking process will also likely avert the need for contested
26 litigation in this case, and thus may preserve judicial resources and those of the Parties.
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29

1 Respectively stipulated to by:

2 /s/ David Kaplan

3 DAVID J. KAPLAN

4 United States Department of Justice

5 Environment Defense Section

6 P.O. Box 7611

7 Washington, DC 20044

8 TESSA M. GORMAN

9 United States Attorney

10 BRIAN KIPNIS

11 Assistant United States Attorney

12 700 Stewart Street, Suite 5220

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14 *Attorneys for Defendant EPA*

15 /s/ Ronald Lavigne

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17 Senior Counsel

18 ANDREW A. FITZ, WSBA #22169

19 Senior Counsel

20 Office of the Attorney General

21 Ecology Division

22 P.O. Box 40117

23 Olympia, WA 98504-0117

24 *Attorneys for Plaintiff State of Washington*

25 /s/ Rob Roy Smith

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27 Kilpatrick Townsend & Stockton LLP

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29 Seattle, Washington 98101

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Quinault Indian Nation

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Attorney for Plaintiff-Intervenor

Suak-Suiattle Tribe

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/s/ James Tupper, Jr.
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LYNNE M. COHEE, WSBA #18496
Tupper Mack Wells PLLC 2025
First Avenue, Suite 1100
Seattle, WA 98121
*Attorneys for Defendant-Intervenors
Northwest Pulp & Paper Ass'n, et al.*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2021, I filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record that have, as required, registered on the ECF system.

/s/ David J. Kaplan

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE,)	
COLUMBIA RIVERKEEPER,	)	No. 2:20-cv-00907-RAJ
SPOKANE RIVERKEEPER, RE)	
SOURCES, PACIFIC COAST	)	STIPULATED MOTION AND
FEDERATION OF FISHERMEN’S	)	PROPOSED ORDER TO HOLD THIS
ASSOCIATIONS, INSTITUTE FOR	)	CASE IN ABEYANCE PENDING
FISHERIES RESOURCES, and MAKAH	)	VOLUNTARY RECONSIDERATION
INDIAN TRIBE,)	AND RULEMAKING
)	
Plaintiffs,)	Note on Motions Calendar: June 30,
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v.)	
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UNITED STATES ENVIRONMENTAL)	
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STIPULATED MOTION AND
PROPOSED ORDER - 1

Case No. 2:20-cv-00907-RAJ

David J. Kaplan.
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044

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3 comment. EPA intends to sign a final action on the proposed rule within nine months after EPA
4 signs the proposed rule. Once EPA takes final action, this lawsuit would likely be moot or
5 otherwise dismissed voluntarily by the Parties.
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8 Paper Association, et al., – stipulate to the relief requested by this motion, which is set out below
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22 Washington State. 84 Fed. Reg. 38,150. After taking comment on that proposal, EPA published
23 its decision withdrawing those federal criteria in the Federal Register on May 13, 2020. 85 Fed.
24 Reg. 28,494.
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1 3) In this case, Plaintiffs challenge (a) EPA’s May 10, 2019 decision to reverse its
2 prior disapproval of, and instead to approve, Washington State’s less stringent water quality
3 criteria for human health, and (b) EPA’s subsequent rulemaking action to withdraw its
4 previously promulgated, more stringent federal criteria for Washington State. The claims in this
5 case have not yet been briefed.

6
7 4) On January 20, 2021, following his inauguration, President Biden issued
8 Executive Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021), which directed federal agencies to
9 review and consider whether they intend to suspend, revise, or rescind certain types of
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24 pending the completion of the rulemaking process will also likely avert the need for contested
25 litigation in this case, and thus may preserve judicial resources and those of the Parties.
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1 Stipulated to by:
2

3 /s/ David Kaplan

4 David J. Kaplan

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25 /s/ Wyatt Golding

26 Wyatt F. Golding

Brian Gruber

27 Anna Brady

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28 STIPULATED MOTION AND

29 PROPOSED ORDER - 7

Case No. 2:20-cv-00907-RAJ

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15 *Attorneys for Defendant-Intervenors*
16 *Northwest Pulp & Paper Ass'n, et al.*

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28 STIPULATED MOTION AND
29 PROPOSED ORDER - 8

Case No. 2:20-cv-00907-RAJ

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2021, I filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record that have, as required, registered on the ECF system.

/s/ David J. Kaplan

STIPULATED MOTION AND
PROPOSED ORDER - 9

Case No. 2:20-cv-00907-RAJ

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