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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 State of California, *et al.*,  
16 *Plaintiffs,*  
17 v.  
18 Michael Regan, *et al.*,  
19 *Defendants.*

Case No. 3:20-cv-3005-RS

**STATE INTERVENORS’  
RESPONSE TO DEFENDANTS’  
MOTION FOR VOLUNTARY  
REMAND WITHOUT VACATUR**

Date: September 9, 2021  
Time: 1:30 pm  
Dept: San Fransisco Courthouse,  
Courtroom 3 – 17<sup>th</sup> Floor  
Judge: Honorable Richard Seeborg

Action Filed: May 1, 2020

1 The statutory term “waters of the United States” sets the scope of federal regulatory  
2 jurisdiction under the Clean Water Act. The history of regulatory action and litigation about that  
3 term is long and winding, but only a little is relevant here. Last year, the U.S. Environmental  
4 Protection Agency and the U.S. Army Corps of Engineers published a new rule interpreting the  
5 term “waters of the United States”: the Navigable Waters Protection Rule. 85 Fed. Reg. 22,250  
6 (April 21, 2020); *see also* ECF No. 171 at 2, 5–6. Plaintiffs, a group of 20 states and cities, sued  
7 those agencies to challenge that rule. Plaintiffs claimed that the NWPR was illegal because it  
8 didn’t seize enough regulatory power—among other things, the rule did not assert jurisdiction  
9 over “ephemeral waters” and certain isolated wetlands—and they sought a preliminary  
10 injunction to prevent the rule from going into effect. At the time, the Agencies vigorously  
11 opposed that request and defended the rule, and another group of 23 States (the undersigned)  
12 intervened to defend the rule, too. After briefing and a hearing, this Court denied Plaintiffs’  
13 request, explaining that they had “little more than policy arguments that the narrowness of the  
14 2020 Rule serves poorly to carry out the objectives of the CWA,” ECF No. 171 at 11, and that  
15 the Agencies’ choice of a narrower approach to exercising federal jurisdiction was not arbitrary  
16 or capricious in violation of the APA, *see id.* at 12–14. After that ruling, the NWPR went into  
17 effect, and it remains in effect across the country.

18 After a change in administration, however, the Agencies now seek voluntary remand of the  
19 NWPR without vacatur “because the Agencies have completed their review of the NWPR and  
20 have decided to commence a new rulemaking to revise or replace the rule.” ECF No. 250 at 6.  
21 Although the State Intervenors continue to believe resolution of the legal issues in this case  
22 would benefit the parties—particularly as the Agencies conduct new rulemaking—they do not  
23 oppose remand without vacatur on this narrow basis, which appears to meet the lenient standard  
24 for voluntary remand in this circuit. *See California Cmtys. Against Toxics v. EPA*, 688 F.3d 989,  
25 992 (9th Cir. 2012) (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)  
26 (“Generally, courts [in this circuit] only refuse voluntarily requested remand when the agency’s  
27 request is frivolous or made in bad faith.”)).  
28

1 But there is one caveat. Although granting this motion on the narrow basis that the  
2 Agencies are starting a new rulemaking is appropriate, it would not be proper to grant the motion  
3 based on the Agencies' vague assertions of "concerns" with "certain aspects of the NWPR."  
4 ECF No. 250 at 13. These "concerns," which apparently now include whether the rule  
5 "adequately considered the CWA's statutory objective" in defining "waters of the United States"  
6 and the effects of the rule on the integrity of the nation's waters," *id.*, were squarely presented by  
7 Plaintiffs in this litigation. *See* ECF No. 171 at 9, 14 (explaining that "Plaintiffs ... argue the  
8 2020 rule ... is inconsistent with the 'text, structure, and purpose' of the Clean Water Act," and  
9 that the rule might cause "substantial environmental harm"). Until just a few months ago, the  
10 Agencies defended their consideration of these issues in the NWPR without qualification. *See*  
11 ECF Nos. 106 (opposition to plaintiff's motion for a preliminary injunction) 168 (supplemental  
12 brief opposing a preliminary injunction), 215 (opposition to plaintiff's motion for summary  
13 judgment). And this Court has already made clear that Plaintiffs' arguments with respect to these  
14 issues failed to identify any legal problems with the rule. ECF No. 171 at 13 (explaining that the  
15 Agencies may reasonably conclude that they have no statutory duty to "extend federal regulation  
16 to the broadest permissible extent ... in the name of providing *all* of the benefits for water  
17 quality the science suggests might be achievable"); *see also id.* ("That the Agencies now choose  
18 a different approach, and a different balance between federal and state responsibilities does not  
19 mean they have disregarded the primary objective of the statute in an arbitrary or capricious  
20 manner that is likely to warrant setting aside the Rule."). The Court was right then and still is  
21 now: regardless of changes in the political winds, the NWPR is plainly valid, and the Agencies'  
22 newfound "concerns" are not.

23 In other words, the Agencies' vague, already-rejected "concerns" about the merits of the  
24 NWPR rule are not "substantial and legitimate concerns" that would support voluntary remand.  
25 *See Util. Solid Waste Activities v. EPA*, 901 F.3d 414, 436–37 (D.C. Cir. 2018) (refusing the  
26 EPA's request for a voluntary remand to "reconsider its interpretation of the statute," in part  
27 because "this claim involves a question—the scope of the EPA's regulatory authority—that is  
28 intertwined with any exercise of agency discretion going forward"). Any such remand must be

1 grounded only on the Agencies' decision to start a new rulemaking and the attendant desire to  
2 conserve judicial and agency resources. *Cf. Nat'l Res. Def. Council v. U.S. Dept. of Interior*, 275  
3 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) ("Voluntary remand also promotes judicial economy by  
4 allowing the relevant agency to reconsider" a rule or policy "without further expenditure of  
5 judicial resources"); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013) ("a  
6 voluntary remand at this time will save the Court's and the parties' resources").

7 For the same reason, voluntary remand on this narrow basis must be without vacatur.  
8 Vacatur is the traditional remedy under the APA when a court determines that a rule is unlawful.  
9 5 U.S.C. § 706. But Plaintiffs here have failed to meet their burden of showing that the NWPR  
10 violates the APA: they failed even to show a likelihood of success on the merits sufficient to  
11 support a preliminary injunction, ECF No. 171 at 8–14, and they consented to a stay of their  
12 motion for summary judgment, ECF Nos. 222, 238, 246. There is no legal basis for vacating a  
13 valid rule. 5 U.S.C. § 706 (providing that "[t]he reviewing court shall ... set aside agency  
14 action" only if it is "arbitrary, capricious ..., in excess of statutory jurisdiction" or otherwise  
15 illegal); *see also National Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C.  
16 2009) ("granting vacatur here would allow the Federal defendants to do what they cannot do  
17 under the APA, repeal a rule without public notice and comment, without judicial consideration  
18 of the merits"). So even if the Agencies sought vacatur (and they do not, *see* ECF No. 250 at  
19 15), that remedy is not permitted here.

20 Put simply: The NWPR is plainly a valid rule that appropriately balances federal regulatory  
21 interests with the States' sovereign interests in their own land and waters. As a result, the rule is  
22 now in effect across the country. If the Agencies nonetheless want to reconsider this valid rule  
23 while it remains in effect, that is their prerogative. And the State Intervenors do not oppose  
24 remanding the rule to the Agencies on that narrow basis to conserve judicial and agency  
25 resources.  
26  
27  
28

1 Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 9, 2021, I served this response to defendants’ motion to voluntary remand without vacatur by filing it with this Court’s ECF system.

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