

**COURT'S VACATUR OF NAVIGABLE WATERS RULE
INTRODUCES NEW LEVEL OF GAMESMANSHIP
INTO ADMINISTRATIVE LAW**

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COURT'S VACATUR OF NAVIGABLE WATERS RULE INTRODUCES NEW LEVEL OF GAMESMANSHIP INTO ADMINISTRATIVE LAW

INTRODUCTION

In the last week of August, the U.S. District Court for the District of Arizona, in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, opted to shake things up a little bit. Instead of issuing a relatively routine order granting the federal government's request to voluntarily remand the Navigable Waters Protection Rule ("NWPR") for reconsideration, it decided to vacate the NWPR.

Vacating a rule is nothing new; however, vacating a rule on the merits before the parties finished summary judgment briefing, and leaving the country guessing as to whether or not the order has nationwide effect, is a bit unorthodox. The court will now consider whether to reinstate the 2015 Clean Water Rule—which has already been enjoined and remanded in 28 states.¹ The decision raises serious issues, not just about the Clean Water Act, but about administrative law. Every time the Executive Branch changes parties, there is a procession of rulemaking reversals and challenges where agencies are forced to defend their predecessor administration's rules. The Arizona court's ruling has now introduced the potential for additional gamesmanship

¹ Three courts issued preliminary injunctions against the Clean Water Rule. *Texas v. EPA*, 2018 WL 45118230 (S.D. Tex. Sept. 12, 2018); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D. N.D. 2015). Two of those courts granted summary judgment to the challengers but did not vacate the Clean Water Rule. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

in legal proceedings that are already awkward and create regulatory uncertainty.

I. BACKGROUND

The Clean Water Act implements a series of programs to protect and improve water quality in the nation’s rivers, streams, estuaries, and lakes.² Since Congress lacks the constitutional power to regulate all water everywhere, the Clean Water Act is limited to “navigable waters.”³ Despite the adjective “navigable” having a pretty clear meaning, Congress decided to define the term “navigable waters” as “the waters of the United States, including the territorial seas.”⁴ The term “waters of the United States” is not defined in the Clean Water Act. This lamentable omission launched a nearly 50-year saga to define the term through rulemakings. The five word phrase “waters of the United States” has spawned millions of pages of rulemakings, comments on those rulemakings, reports, debates, and court decisions attempting to settle on a lasting definition. Some definitions have been adjudged too narrow,⁵ and some too broad.⁶ The Supreme Court contributed a pair of confusing decisions that wrote the amorphous term “significant nexus” into the definition

² 33 U.S.C. § 1251, *et seq.*

³ *See, e.g.*, 33 U.S.C. §§ 1251(a)(1), 1342(a), 1344(a); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng’rs*, 531 U.S. 159, 172-73 (2001) (discussing constitutional limits).

⁴ 33 U.S.C. § 1362(7).

⁵ *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

⁶ *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018).

(*Rapanos*)⁷ and created a non-exhaustive, multi-factored balancing test when groundwater is involved (*County of Maui*).⁸

The U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps,” collectively, the “Agencies”) each administer portions of the Clean Water Act and are charged with resolving the riddle of “waters of the United States.” The regulatory definition of “waters of the United States” was relatively unchanged from 1986 to 2015.⁹ In 2015, the Obama Administration embarked on a controversial expansion of the definition. The Clean Water Rule, issued in 2015, largely relied on the *Rapanos* “significant nexus” phrase and an internal EPA report espousing that, since virtually all waters, wetlands, and floodplains are physically, chemically, and/or biologically connected in some way to downstream navigable waters, they all should be regulated under the Clean Water Act.¹⁰ The Trump Administration quashed the rule in short order. First, it repealed the Clean Water

⁷ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁸ *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. ___, 140 S. Ct. 1462 (2020). For commentary on *County of Maui*, see Sam Boxerman, [SCOTUS County of Maui Argument: Whiskey, Septic Tanks, and Limiting Principles](#), WLF Legal Pulse (Nov. 11, 2019) and Sam Boxerman, [Ninth Circuit Blows Limiting Principle on “Point Source” Out of Water with CWA Ruling](#), WLF Legal Pulse (Feb. 16, 2018).

⁹ See 51 Fed. Reg. 41,206 (Nov. 13, 1986) (promulgating definition that was operative until 2015).

¹⁰ See EPA, Draft, [Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#), EPA/600/R-11/098B (Sept. 2013) (“Connectivity Report”); 80 Fed. Reg. 37,053 (June 29, 2015)

Rule (the “Repeal Rule”) and then, in a separate action, issued the NWPR.¹¹ Needless to say, all three rulemakings kept courts hopping.¹²

II. THE ARIZONA COURT CHALLENGE TO THE NWPR

A group of tribes challenged both the Repeal Rule and the NWPR in the U.S. District Court for the District of Arizona, one of several challenges to the rules lodged around the country. Each tribe generally spoke of the importance of the waters within or near their reservations, alleged they were injured by the mere withdrawal of federal Clean Water Act jurisdiction over waters, and identified some upstream mining, pipeline, or other project that may be built in the future as illustrating an impending injury.¹³ Local industry groups, and Chantell and Michael Sackett of *Sackett v. EPA* fame,¹⁴ intervened to support the rules.

The Plaintiffs filed a motion for summary judgment with the intervenors opposing and filing their own cross-motion. The Agencies, however, moved for a voluntary remand of the NWPR and to hold the Repeal Rule challenge in abeyance,

¹¹ The Repeal Rule, 84 Fed. Reg. 56,626 (Oct. 22, 2019), was preceded by an action to extend the Clean Water Rule’s applicability date by two years, called the Suspension Rule, giving the administration some time to work. 82 Fed. Reg. 5,200 (Feb. 6, 2018). A court issued a nationwide injunction against the Suspension Rule. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D. S.C. 2018). The Agencies issued the NWPR the year following the Repeal Rule. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

¹² This included the Supreme Court, which ruled that Clean Water Act rulemakings with nationwide applicability, such as the Clean Water Rule, must be filed in U.S. District Courts instead of U.S. Circuit Courts. *Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, 138 S. Ct. 617 (2018).

¹³ *Pascua Yaqui Tribe v. U.S. Env’t Prot. Agency*, Case No. 20-cv-00266, Complaint, Doc. # 1 at ¶¶ 7-13.

¹⁴ 566 U.S. 120 (2012).

citing its announcement that it would reconsider, and likely revise or rescind entirely, the NWPR.¹⁵ The Plaintiffs supported a remand but demanded that the court first vacate the NWPR, claiming that the NWPR's reduction in federal jurisdiction will cause irreparable harm.¹⁶

The court analyzed vacatur under the Ninth Circuit's two-part test from *California Communities Against Toxics*,¹⁷ one that is roughly analogous to the D.C. Circuit's *Allied Signal* test.¹⁸ First, the court makes a determination regarding the seriousness of the agency's errors and then analyzes the extent of disruption that vacating the rule under review could cause. The problem, however, was that the Agencies had not finished summary judgment briefing. Undeterred, the district court treated the Agencies' motion for voluntary remand as a confession of error—a very serious error justifying vacatur of the NWPR.

In support of this confession-by-remand-request theory, the court cited an unpublished case where EPA actually requested vacatur¹⁹ and *California Communities Against Toxics*, where the Ninth Circuit actually refused to vacate the rule under

¹⁵ *Pascua Yaqui Tribe*, Case No. 20-cv-00266, Defendants Opposed Motion for Voluntary Remand, Doc. No. 72. The Agencies announced their plan to revise or rescind the NWPR using a two-step process and requested public comment. *See* 86 Fed. Reg. 41,911 (Aug. 4, 2021).

¹⁶ Plaintiffs' Memorandum in Opposition to Motion for Voluntary Remand Without Vacatur and Motion for Abeyance or Briefing, Case No. 20-cv-00266, Doc. No. 74.

¹⁷ 688 F.3d 989 (9th Cir. 2012).

¹⁸ 988 F.2d 146 (D.C. Cir. 1993).

¹⁹ *Safer Chemicals, Healthy Families v. EPA*, 791 Fed. App'x 653, 656 (9th Cir. 2019).

review.²⁰ To the court, it was enough that the Agencies to presented generalized “substantial concerns about certain aspects of the NWPR ... including whether the NWPR adequately considered the [Clean Water Act]’s statutory objective” and “the effects of the NWPR on the integrity of the nation’s waters,” particularly with respect to ephemeral waters.²¹ From this, the court divined that the NWPR has “fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of ‘waters of the United States.’”²²

With a purported finding of error in hand, the court turned to the first prong of the test—the seriousness of the Agencies’ purported errors. The court declared that maintaining the NWPR “would risk serious environmental harm.”²³ This conclusion was drawn from the unsurprising fact that there was “a substantial reduction in waters covered under the NWPR compared to previous rules and practices.”²⁴ Thus, the mere withdrawal of federal jurisdiction over waters, wetlands, and other water features (including vast stretches of arid lands), when compared to the massive expansion of federal jurisdiction under the 2015 Clean Water Rule, was deemed to be an environmental injury in itself.

²⁰ *Pascua Yaqui Tribe*, Case No. 20-cv-00266, Order, Doc. No. 99 (“Slip Op.”), at 7.

²¹ *Id.* at 9.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (internal quotation omitted).

As for the second prong, whether vacatur would cause disruption, the business-group intervenors claimed that re-instating pre-2015 regulations would “increase regulatory uncertainty,” an argument the court brushed aside by stating that “regulatory uncertainty typically attends vacatur of any rule....”²⁵ The court promised that the “pre-2015 regulatory regime is familiar to the Agencies and industry alike, and the Agencies have expressed an intent to repeal the NWPR and return to the pre-2015 regulatory regime....”²⁶ Thus, with the NWPR vacated, the court requested the parties to propose a schedule for further proceedings with respect to plaintiffs’ challenge to the Repeal Rule.²⁷

III. THE AFTERMATH

The Agencies lost no time in embracing defeat. On the Friday before the long Labor Day weekend, September 3, EPA announced on its website that the NWPR was dead.²⁸ Due to the *Pascua Yaqui Tribe* opinion, “the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.”²⁹ This surrender comes despite another district court rejecting plaintiffs’

²⁵ *Id.* at 10.

²⁶ *Id.*

²⁷ *Id.* at 11.

²⁸ EPA, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-waters-united-states?source=email>.

²⁹ *Id.*

demand for vacatur on September 1 (the day after the *Pascua Yaqui Tribe* order and two days before the website notice) and the Agencies' protest in briefing that the district court either lacked the power to issue a nationwide ruling or that the plaintiffs failed to make the case for one.³⁰ Thus, with one website posting, EPA and the Corps successfully repealed a regulation that, not only was faring relatively well in the initial legal skirmishes,³¹ but would have taken a year or more to repeal through notice-and-comment rulemaking.

The Agencies' apparent capitulation makes an appeal by them unlikely but an appeal by the intervenors is still possible—and there are certainly grounds for one on procedural, substantive, and standing issues. Procedurally, although the Agencies arguably waived any opposition to summary judgment by filing for a motion to remand instead, the court gave no indication it found waiver. Even if it did, the business intervenors and the Sacketts opposed the plaintiffs' motion for summary judgment and filed their own cross-motions for summary judgment. Yet, the court

³⁰ See *Pascua Yaqui Tribe*, Case No. 20-cv-00266, Defendants' Reply in Support of Opposed Motion for Voluntary Remand, Doc. No. 83 at 4 ("And, to the extent that the 'vacatur' Plaintiffs seek would preclude application of the NWPR to persons not before this Court, it is inconsistent with the principle that '[r]emedies ... ordinarily 'operate with respect to specific parties.'") (quoting *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (alteration in original).

³¹ The Northern District of California denied a request to preliminarily enjoin the NWPR, finding that the 18 State Attorneys General who filed the suit were not likely succeed on the same arguments raised in the *Pascua Yaqui Tribe* litigation. *California v. Wheeler*, 567 F. Supp. 3d 864, 872-76 (N.D. Cal. 2020). Another court did issue a preliminary injunction, *Colorado v. USEPA*, 445 F. Supp. 3d 1295 (D. Colo. 2020), but this was reversed as an abuse of discretion. *Colorado v. USEPA*, 989 F.3d 874 (10th Cir. 2021).

never addressed the intervenors' motions substantively. In fact, the court's order *denied* plaintiffs' summary judgment motion without prejudice.³² Instead, its ruling was based solely on the Agencies "concerns" within their motion for a voluntary remand. Thus, the court seemed to find substantive legal error without considering merits briefing.

Substantively, the court's finding of error is anomalous. Nowhere did it analyze the actual NWPR itself. The closest it came was noting the Agencies' "concern" over "whether the NWPR adequately considered the [Clean Water Act]'s statutory objective...."³³ Yet, a concern that one agency interpretation did not "adequately" consider the Clean Water Act's statutory objectives (which are numerous, not singular) is not alone grounds for error. As the D.C. Circuit has stated, "[w]hen an agency must balance a number of potentially conflicting objectives ... judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives...."³⁴ And it is axiomatic that an agency interpretation of a statute it administers need only be "reasonable," even if different interpretations are also reasonable.³⁵ The *Pascua Yasqui Tribe* decision never considered the

³² See Slip Op. at 11, denying Doc. No. 47, plaintiffs' motion for summary judgment.

³³ *Id.* at 8 (quoting Defendants' Opposed Motion for Voluntary Remand).

³⁴ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999).

³⁵ See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 980 (2005).

reasonableness of any aspect of the NWPR’s interpretation of the Clean Water Act, much less determine that the Agencies’ new-found “concerns” rendered that interpretation unreasonable.

Further, in attempting to reassure the parties that vacatur would not cause any practical disruption, the court’s decision includes a notable error regarding exactly what the Agencies were proposing. “[T]he EPA and Corps of Engineers have provided notice of their intent to restore the pre-2015 regulatory definition of ‘waters of the United States’ while working to develop a new regulatory definition.”³⁶ This is *not* what the Agencies propose. This purported restoration would include “updates to be consistent with relevant Supreme Court decisions” issued since 1986.³⁷ Any proposed rule that includes “updates” to account for *SWANCC*, *Rapanos*, and *County of Maui* will be controversial to say the least, involving tens of thousands of public comments and a torrent of lawsuits across the country. Whatever the result of this rulemaking, it will not be “familiar to the Agencies and industry alike,” as the court assured.³⁸

Lastly, the court overlooked the plaintiffs’ questionable standing prior to granting their requested relief. To the plaintiffs, and the court, the mere withdrawal

³⁶ *Id.* at 10.

³⁷ 86 Fed. Reg. at 41,911.

³⁸ Slip Op. at 10.

of federal jurisdiction over ephemeral streams, wetlands, or arid areas is a *per se* environmental harm. Both skip several steps in leaping from the diminution of federal jurisdiction to a cognizable injury. First, wherever federal jurisdiction is withdrawn, state, local, or tribal jurisdiction is established. Regulation abhors a vacuum; where one set of laws retreat, another set of laws advance. Thus, except in rare and unusual circumstances, there are no “unregulated” waters as some governmental body has the authority to regulate them, even if that body chooses, for policy reasons, to do so differently.

Second, the plaintiffs and the court apparently presume that limiting federal jurisdiction guarantees that somebody somewhere will begin polluting waters or wetlands in violation of state, local, or tribal law. The closest that plaintiffs come to establishing an injury in this sense is to name a handful of projects that may be constructed in the future and declare that they will pollute waters in the future.³⁹ Not only did the tribes fail to identify an imminent injury, without further information there is no certainty that a future project will cause pollution. Each will be subject to

³⁹ See *Pascua Yaqui Tribe*, Case No. 20-cv-00266, Complaint, Doc. No. 1 at ¶¶ 17 (alleging that a *proposed* copper mine would “destroy[] a “vast network of ephemeral streams” and degrade downstream water quality); 18 (*proposed* sulfide mineral mines and *proposed* pipeline will adversely affect water quality); 20 (*proposed* mine will destroy and alter wetlands “some of which may lose Clean Water Act protections under the Navigable Waters Rule). Although these, and other, allegations to support standing could have been bolstered via declarations attached to the Tribes’ summary judgment motion, that motion did not even include a cursory assertion of standing. See *Pascua Yaqui Tribe*, Case No. 20-cv-00266, Plaintiffs’ Memorandum in Support of Motion for Summary Judgment and to Complete Record, Doc. No. 48.

an array of federal, state, and local permitting conditions under other laws, making future pollution speculative, not certain.

Third, even assuming future pollution—and that this future pollution is caused by the NWPR’s limitation of federal Clean Water Act jurisdiction, an issue also unaddressed by either the plaintiffs or the court—the tribes never allege how some unidentified increase in unidentified pollutants will injure their various interests in hunting, fishing, religious, or ceremonial interests. The plaintiffs, and the court, simply assume that any future pollution will be so massive and severe that an injury to the plaintiffs’ interests is a given.⁴⁰

IV. THE CONFUSING FALLOUT OF THE COURT’S DECISION

The *Pascua Yaqui Tribe* decision creates at least one short-term and two long-term problems. In the short-term, the decision does not specify whether the vacatur has nationwide effect. Assuming it does, then in the long-term, absent sending nearly all future Clean Water Act challenges to a multidistrict litigation docket, the Agencies will have to run a virtually impossible gauntlet where, if they lose even a single challenge, rules will be vacated, enjoined, or stayed nationwide. Further, treating a motion for voluntary remand as a tacit confession of error gives new administrations a quick and easy tool for repealing the prior administration’s favored regulations

⁴⁰ All of these issues can be raised on appeal even though it appears that no party challenged plaintiffs’ standing before the district court. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009).

without complying with the Administrative Procedure Act (“APA”).

A. The Geographic Extent of the Decision

As noted above, the *Pascua Yaqui Tribe* decision made no mention of whether it applies to just Arizona, the Plaintiffs’ states (Michigan, Minnesota, Arizona, and New Mexico), or nationwide. The prospect of a nationwide vacatur is especially confusing given that other courts have declined to enjoin or vacate the NWPR in other district courts, including in Massachusetts where the court was informed of the *Pascua Yaqui Tribe* decision.⁴¹ The Agencies’ website notice, choosing to interpret the decision as being applicable nationwide, may only temporarily alleviate the confusion should the intervenors successfully appeal the decision. Should they do so, and the Agencies have not finished their “Step One” rulemaking, the parties and the Arizona district court will then have to hash out where the decision applies. This would only be further complicated if the Arizona district court has also vacated the Repeal Rule, and depending on the geographic scope of *that* ruling, reinstated the 2015 Clean Water Rule in as many as 22 states.

⁴¹ See *Wheeler*, 567 F. Supp. 3d at 872-76 (denying preliminary injunction as plaintiffs were not likely to prevail on the merits); *Colorado*, 989 F.3d at 878 (reversing preliminary injunction as an abuse of discretion); *South Carolina Coastal Conserv. League v. Regan*, No. 20-cv-1687 (D. S.C. July 14, 2021) (remanding without vacatur over plaintiffs’ opposition); *Conserv. Law Found’n. v. EPA*, Case No. 20-cv-10820, Memorandum and Order of Remand and Dismissal, Doc. No. 122, at 2 (Sept. 1, 2021) (remanding without vacatur and dismissing the case). This makes the Agencies’ website notice all the more frustrating to the NWPR’s supporters as the Agencies chose to simply toss away their victories.

B. Running the Gauntlet

The question of the *Pascua Yaqui Tribe* decision's scope is the product of parties challenging nationally applicable Clean Water Act rules in several district courts at once. This sets up a scenario, which may be played out after the Agencies issue their "Step One" regulation, where challengers file lawsuits in as many district courts as they can. The Agencies can win dozens of lawsuits, yet if they lose just one, the regulation is vacated everywhere—even in states where the Agencies prevailed. Under the *Pascua Yaqui Tribe* scenario, if the Agencies cannot run this gauntlet perfectly, one dissenting district court effectively overrules the others (until the appeals resolve). For challenges to the 2015 Clean Water Rule, the courts took the unusual step of establishing a multidistrict litigation docket.⁴² Although usually reserved for mass tort, antitrust, and product liability cases, the *Pascua Yaqui Tribe* decision shows that multidistrict litigation dockets may be necessary for challenging any significant Clean Water Act rulemaking.

C. A Tacit Confession-of-Error Doctrine?

Other courts may see *Pascua Yaqui Tribe* as precedent for construing the mere motion for a voluntary remand as an effective confession of error.⁴³ Such motions for

⁴² See *In re Clean Water Rule*, 140 F. Supp. 3d 1340 (J.P.M.L. 2015).

⁴³ Note that the Sixth, Seventh, D.C., and Federal Circuits have rejected construing a motion for remand to reconsider a position as confessing error. See *Citizens Against the Pellissippi Parkway Extension v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004); *Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir.

a voluntary remand pending reconsideration are ubiquitous in administrative litigation after a change of administrations. Applying the *Pascua Yaqui Tribe* decision to these scenarios would introduce a whole new level of gamesmanship into administrative law by allowing agencies to do in a matter of weeks what would take a year or more through the APA. Rescinding a prior administration's rulemaking is not easy, as the Trump Administration demonstrated. To buy time for regulatory reviews, it tried to freeze dozens of relatively recent Obama Administration regulations by staying compliance dates or extending effective dates.⁴⁴ This largely failed.⁴⁵ It then had to go through the APA processes to revise or rescind those regulations. This process, including proposed rules with a legal rationale satisfying *FCC v. Fox Television Stations, Inc.*,⁴⁶ reviewing and responding to public comments, and issuing a final rule, takes at least a year and often longer if the rule is not the agency's top priority. The resulting petitions for review consume a few years more.

2006); *Utility Solid Waste Activities Gp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). The Ninth Circuit has not confronted the issue.

⁴⁴ See, e.g., 82 Fed. Reg. 25,730 (June 5, 2017) (staying portions of rule on methane regulation for the oil and gas sector pending administrative reconsideration); 82 Fed. Reg. 29,246 (June 28, 2017) (extending deadline for initial area designations for the ozone national ambient air quality standards by three years); 82 Fed. Reg. 11,823 (Feb. 27, 2017) (postponing effective date for Office of Natural Resources Revenue royalty valuation rule after its legality was challenged in court).

⁴⁵ See, e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (granting summary vacatur of rule staying portions of the oil and gas methane rule); *Becerra v. Dep't of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (Department of the Interior could not delay royalty valuation rule effective date as it failed to seek public comment and it lacked statutory authority for the delay). EPA also withdrew its extension of the ozone designation deadline after a lawsuit. 82 Fed. Reg. 37,318 (Aug. 10, 2017).

⁴⁶ 567 U.S. 239 (2012) (explaining the standard for administrative agencies to change prior regulations or policies).

How much easier it would be for a new administration to simply wait for a friendly challenge to a predecessor's rulemaking and request a voluntary remand. After offering up some vague statements about the rule's questionable legality and the need for reconsideration, the court can simply vacate the rulemaking. The agency could rescind a troublesome regulation in a matter of weeks. No detailed legal rationale, no public comments, no responses to those comments, no petitions for review, and more limited legal options for those who supported the rule.⁴⁷ Viewing a request for voluntary remand as a tacit confession of error would provide a quick and easy method outside of the APA for agency action. If the *Pascua Yaqui Tribe* decision stands, this could become a common occurrence. Indeed, this scenario is not too far from the Agencies throwing in the towel via website notice, taking the loss they apparently desired.

CONCLUSION

Unless corrected on appeal, the *Pascua Yaqui Tribe* decision could create significant problems for administrative law that would need correction. The concept of a nationwide vacatur could become as controversial as nationwide injunctions⁴⁸

⁴⁷ Rule supporters with the foresight to intervene in the numerous nationwide challenges would be able to appeal the court's decision, but would have to demonstrate that the *court* abused its discretion, an arguably higher bar than demonstrating procedural errors under the APA in a new rule or that it was arbitrary and capricious.

⁴⁸ See, e.g., *Dep't of Homeland Security v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring in denial of application for stay) (criticizing the use of nationwide injunctions).

and their legality will have to be definitively confronted where the Clean Water Act can lead to dozens of lawsuits in separate district courts. This issue may be stanching to some degree through the use of multidistrict litigation dockets but the *Pascua Yaqui Tribe's* treatment of a motion for voluntary remand as a confession of error would remain. And if it remains, the gamesmanship that could ensue would tarnish the image of agencies as non-partisan, reasoned experts far more than past controversies over sue-and-settle practices.