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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI‘I

CONSERVATION COUNCIL FOR)	CIVIL NO. 1:21-00040 JAO-KJM
HAWAI‘I; CENTER FOR)	
BIOLOGICAL DIVERSITY;)	STIPULATION REGARDING STAY;
DEFENDERS OF WILDLIFE;)	ORDER
NATIONAL PARKS)	
CONSERVATION ASSOCIATION;)	
NATURAL RESOURCES DEFENSE)	
COUNCIL; SIERRA CLUB; and)	
WILDEARTH GUARDIANS,)	
)	
Plaintiffs,)	
v.)	
)	
DEBRA HAALAND, U.S. Secretary of)	
the Interior; U.S. FISH AND)	
WILDLIFE SERVICE; GINA)	
RAIMONDO, U.S. Secretary of)	
Commerce; and NATIONAL MARINE)	
FISHERIES SERVICE,)	
)	
Defendants.)	
)	

STIPULATION REGARDING STAY

Subject to the conditions identified below, Plaintiffs and Federal Defendants stipulate to and request that the Court stay this case until June 16, 2022—the date Federal Defendants anticipate completing rulemaking on the U.S. Fish and Wildlife Service’s and the National Marine Fisheries Service’s (“Services”) proposal to rescind the regulation challenged in this case. In support of this stipulation and proposed order to stay the case, the parties jointly state as follows:

1. Plaintiffs filed a Complaint on January 14, 2021, challenging the Services’ Habitat Definition Rule, 85 Fed. Reg. 81411 (Dec. 16, 2020). Shortly thereafter, President Biden issued an Executive Order that, among other things, required the Services to review the Habitat Definition Rule. *See* Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021). Following this review, the Services announced an intent to propose rescinding the Habitat Definition Rule. *See* Notice, Regulation Revisions, www.fws.gov/endangered/improving_esa/regulation-revisions.html. On July 8, 2021, the Services transmitted a draft proposed rescission rule (“Proposed Rescission Rule”) to the Office of Management and Budget (“OMB”) for review under Executive Order 12866. If the Services finalize the Proposed Rescission Rule, the Services’

position is that the legal claims raised in this case would be moot and the Court would not need to resolve Plaintiffs' claims.

2. Under appropriate conditions, a stay of the litigation during an agency's rulemaking process can conserve the parties' and Court's resources, and the Court therefore has discretion to stay the case pending the completion of an ongoing rulemaking process. *See CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) ("A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants."); *see also ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (finding it "prudent and efficient" to give the "relevant agency the opportunity to reconsider and rectify an erroneous decision without further expenditure of judicial resources").

3. Plaintiffs' position is that timely rescission of the Habitat Definition Rule is needed to avoid irreparable harm to endangered and threatened species subject to agency decision-making under the Habitat Definition Rule.

4. Federal Defendants' position is that they have prioritized rulemaking on the Proposed Rescission Rule and desire to complete the rulemaking expeditiously and in a manner that complies with all applicable laws.

5. To further and advance the parties' objectives, the Services have identified, and the parties agree to, the following rulemaking schedule:¹

a. The Services will submit the Proposed Rescission Rule to the Office of the Federal Register ("OFR"), for publication in the Federal Register, no later than October 18, 2021. The Services agree to expedite submission to OFR if OMB completes its review before the end of OMB's 90-day period under Executive Order 12866. The Services will submit the Proposed Rescission Rule to the OFR within 10 days after OMB completes its review, unless OMB completes its review of the Proposed Rescission Rule before it completes the review of a related rescission rule also pending before OMB (the U.S. Fish and Wildlife Service's proposed rule to rescind the Habitat Exclusion Rule, 85 Fed. Reg. 82,376 (Dec. 18, 2020)). In the

¹ The schedule includes deadlines for the Services to take action (e.g., the Services "will submit" a proposed rule "no later than..."). These deadlines are based on certain assumptions, like the Services finalizing a proposed rule with a final rule (as opposed to withdrawing the proposed rule or publishing a revised proposed rule for comment). The deadlines for the Services to act should not be construed as constraining the Services' discretion during the rulemaking to take alternative actions, as discussed further in Paragraph 6.

The schedule is also based on actions outside the Services' control: OMB completion of its reviews under E.O. 12866 and the Office of the Federal Register's publication of rules in a timely manner. Nevertheless, if the actions in Paragraph 5 do not occur as identified, Plaintiffs may file a notice with the Court that will automatically lift the stay, as discussed further in Paragraph 7.

latter scenario, the Services will submit the Proposed Rescission Rule to the OFR no later than 20 days after OMB completes its review of the Proposed Rescission Rule.

b. The Services will provide 30 days for the public to comment on the Proposed Rescission Rule. The Services will consider requests to extend the comment period based on good cause shown. Based on the scope and volume of public comments received, the Services will make good faith efforts to expedite review of, and responses to, public comments.

c. The Services will submit a final rule to OMB for review under Executive Order 12866 by the earlier of (1) four months of the close of public comment or (2) March 7, 2022.

d. The Services will submit a final rule to the OFR no later than June 16, 2022. The Services agree to expedite submission to OFR, if possible, by submitting a final rule to OFR within 10 days of OMB completing its Executive Order 12866 review.

e. The Services will make the final rule effective within 30 days after publication of the rule in the Federal Register.

f. The Services will continue to make good faith efforts to prioritize the rulemaking process as set forth herein and will promptly

inform Plaintiffs when each of the actions described in subparagraphs a, c, and d has occurred.

6. In addition to the rulemaking schedule, the parties agree that, should the Court grant the requested stay of the proceedings, the Services will notify Plaintiffs before finalizing any guidance relating to application of the Habitat Definition Rule. The parties further agree that the stay of litigation does not preclude Plaintiffs from challenging any application of the Habitat Definition Rule in a separate rulemaking that designates critical habitat (should the Services apply the Habitat Definition Rule during the Proposed Rescission Rule rulemaking). And the parties agree that neither a stay of the case nor the schedule identified in Paragraph 5 dictates or constrains the Services' discretion in, or options available to it under the law during, any rulemaking process.

7. Based on the foregoing, the parties agree that a stay of the litigation is warranted. If the actions in Paragraph 5 do not occur as identified, the parties agree to confer in good faith to reach resolution and maintain the stay. If the parties cannot reach a resolution within seven business days, Plaintiffs may file a notice with the Court that will automatically lift the stay. Consistent with this paragraph, the parties agree that Plaintiffs' sole recourse for any noncompliance with this stipulation is to file a notice that automatically lifts the stay. If a notice is filed, the parties shall file a joint proposal for further proceedings within seven

business days and the Services shall file their administrative record within 120 days.

8. The parties further agree that they will file a joint status report addressing further proceedings, or a stipulation to dismiss the case, when a final rule publishes in the Federal Register or by June 16, 2022, whichever is earlier.

WHEREFORE, based on the foregoing, the parties jointly request that the Court issue a stay of the proceedings through June 16, 2022, under the conditions identified above.

DATED: Honolulu, Hawai‘i, August 12, 2021.

/s/ Elena L. Bryant

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Attorneys for Federal Defendants

APPROVED AND SO ORDERED

DATED: Honolulu, Hawaii, August 13, 2021.





Kenneth J. Mansfield
United States Magistrate Judge

Conservation Council for Hawai‘i; et al. v. Haaland; et al., Civil No. 1:21-cv-00040 JAO-KJM; STIPULATION REGARDING STAY; ORDER