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

15 State of California, *et al.*,
Plaintiffs,
16 v.
17 Jane Nishida, *et al.*,
Defendants.

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

**STATE INTERVENORS’
OPPOSITION TO DEFENDANTS’
MOTION FOR AN ENLARGEMENT
OF TIME/STAY OF PROCEEDINGS**

Hr’g Date: June 3, 2021
Hr’g Time: 1:30 pm
Dep’t: San Francisco Courthouse,
Courtroom 3, 17th Floor
Judge: Honorable Richard Seeborg
Action Filed: May 1, 2020

1 Pursuant to Local Rule 6.3(b), the States of Georgia, West Virginia, Alabama, Alaska,
2 Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana,
3 Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas,
4 Utah, and Wyoming (“State Intervenors”), by and through their undersigned counsel, hereby
5 oppose the Environmental Protection Agency and U.S. Army Corps of Engineers’ (“Agencies”)
6 motion for an enlargement of time to continue all existing deadlines in this case and to stay the
7 proceedings. *See* ECF No. 221 (“Mot.”). The Agencies’ speculation about a hypothetical rule-
8 making process that may never occur does not justify extending this Court’s already generous
9 briefing deadlines at this late juncture, and staying this case would harm the parties, not benefit
10 them.

11 **I. The Agencies have not shown good cause to extend deadlines or stay this litigation.**

12 As the Agencies’ motion points out, courts generally may extend deadlines and stay
13 proceedings “[s]o long as the requesting party can show ‘good cause.’” Mot. 2 (citations
14 omitted). But the only cause the Agencies identify is that President Biden recently directed “all
15 agencies” to conduct an environmental review of all “regulations, orders, guidance documents,
16 policies, and any other similar agency actions” adopted in the last four years. Executive Order
17 13990, 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021); *see also* Mot. 2. The Agencies argue that an
18 extension of deadlines and stay of these proceedings is warranted to allow time for them to
19 decide whether to “maintain[], modif[y], or otherwise reconsider[]” the Navigable Waters
20 Protection Rule (“Rule”) pursuant to that Executive Order. Mot. 3.

21 The Executive Order does not create good cause to extend briefing deadlines or stay these
22 proceedings. The Rule arguably falls within the Executive Order’s exceptionally vast scope, but
23 by that order’s terms, so does every rule adopted in the last four years that touches on broad
24 policy goals like public health, the environment, or conservation. And beyond that, nothing
25 about the Executive Order suggests that the Rule will in fact be modified or rescinded,
26 imminently or otherwise. On the contrary, the Executive Order identifies a litany of specific
27 rules for agencies to “consider ... suspending, revising, or rescinding” over the next six months,
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1 and the Rule is *not* among these priorities. *See* 86 Fed. Reg. 7037-38. The supplemental “fact
2 sheet” the Agencies cite, Mot. 3 n.3, does not show otherwise; it sets forth a selection of EPA
3 regulations that fall within the Executive Order’s scope, but it does not modify the terms or
4 priorities set forth in the order itself. Meanwhile, the Senate has just passed an amendment to
5 President Biden’s COVID-19 relief budget resolution that authorizes the Senate Budget
6 Committee to reallocate funds to ensure that the Rule is preserved. 167 Cong. Rec. S453 (daily
7 ed. Feb. 4, 2021) (passage of amendment 655 to Senate Concurrent Resolution 5); *see also* David
8 Beard, *Budget resolution with COVID relief and stimulus checks passes House, heads toward*
9 *reconciliation*, The Dominion Post (Feb. 5, 2021), [https://www.dominionpost.com/2021/02/](https://www.dominionpost.com/2021/02/05/budget-resolution-with-covid-relief-and-stimulus-checks-passes-house-heads-toward-reconciliation/)
10 [05/budget-resolution-with-covid-relief-and-stimulus-checks-passes-house-heads-toward-](https://www.dominionpost.com/2021/02/05/budget-resolution-with-covid-relief-and-stimulus-checks-passes-house-heads-toward-reconciliation/)
11 [reconciliation/](https://www.dominionpost.com/2021/02/05/budget-resolution-with-covid-relief-and-stimulus-checks-passes-house-heads-toward-reconciliation/) (“Capito’s amendment upholds the Trump administration’s Navigable Waters
12 Protection Rule.”). So Congress has already signaled bipartisan support for *keeping* the Rule,
13 not repealing it. Thus, at this point, there is no basis at all to conclude that the Agencies will
14 “modif[y], or otherwise reconsider[.]” the Rule, as opposed to “maintaining” it. Mot. 3.

15 Further, that possibility would not be good cause for delay in any event. It is *always* a
16 possibility that agencies may modify or rescind an existing rule. As the Agencies themselves
17 point out, “[a]gencies have inherent authority” to reconsider their rules “on an ongoing basis.”
18 *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Nat’l Cable &*
19 *Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). If the ever-present
20 possibility that an agency might modify a rule constitutes “good cause” to extend or stay
21 litigation, then any litigation of any rule could be stayed at any time. But, of course, this is not
22 the case: federal courts often refuse to stay cases based on the mere chance that a federal agency
23 may try to replace it at some time in the future. *See, e.g., Arizona Yage Assembly v. Barr*, No.
24 3:20-CV-03098-WHO, 2020 WL 5629833, at *8 (N.D. Cal. Sept. 21, 2020) (refusing to grant a
25 stay even after new rulemaking began because “it is impossible to predict when the regulations
26 will be finalized”); *California v. United States Env’tl. Prot. Agency*, 360 F. Supp. 3d 984, 993
27 (N.D. Cal. 2018) (denying a stay despite the EPA actively preparing a new rule because of “the
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1 ordinary uncertainty in the rulemaking process, which creates at least a ‘fair possibility’ of
2 harm”). At the least, much more concrete indication that the Rule is imminently likely to be
3 modified or repealed would be required. The Executive Order does not justify further delay of
4 this litigation.

5 **II. Extending briefing deadlines or staying this case would cause harm to the parties.**

6 “Where it is proposed that a pending proceeding be stayed, the competing interests which
7 will be affected by the granting or refusal to grant a stay must be weighed.” *Lockyer v. Mirant*
8 *Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted). Those interests include “the
9 possible damage which may result from the granting of a stay, the hardship or inequity which a
10 party may suffer in being required to go forward, and the orderly course of justice measured in
11 terms of the simplifying or complicating of issues, proof, and questions of law which could be
12 expected to result from a stay.” *Id.* “[I]f there is even a fair possibility that the stay for which
13 [the requesting party] prays will work damage to [someone] else,’ then the party seeking a stay
14 ‘must make out a clear case of hardship or inequity in being required to go forward.’” *California*
15 *v. United States Env’tl. Prot. Agency*, 360 F. Supp. 3d 984, 993 (N.D. Cal. 2018) (quoting *Landis*
16 *v. North American Co.*, 299 U.S. 248, 255 (1936)). The Agencies have not made that showing.

17 Far from making a “clear case” of hardship, the Agencies’ asserted harms are
18 predominately speculative. They explain that they “*may*” determine that the Rule should be
19 modified, and if so they “*could* be forced to take positions [they] would then need to change.”
20 Mot. 4 (emphases added). While it is true that “the ordinary uncertainty in the rulemaking
21 process” may create a “fair possibility of harm” befalling parties if litigation is stayed pending
22 rulemaking, *California*, 360 F. Supp. 3d at 993- (citing *Landis*, 299 U.S at 254-55), this is one
23 reason federal courts have *declined* to exercise their “discretion” to hold in abeyance cases, like
24 this one, when they present legal questions that would necessarily inform an agency’s
25 consideration of “potential regulatory changes.” *Util. Solid Waste Activities Grp. v. EPA*, 901
26 F.3d 414, 426 (D.C. Cir. 2018) (per curiam). At a minimum, the “fair possibility” of additional
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1 rulemaking is not equivalent to a “clear case of hardship.” *California*, 360 F. Supp. 3d at 993-94.
2 In other words, the Agencies’ uncertainty about the future does not make out a “clear case.”

3 The Agencies point to only one other “harm”: The parties and the Court would be “required
4 to expend resources” in continuing this litigation. Mot. 5. This argument fails on its face, as
5 “being required to defend a suit, without more, does not constitute a ‘clear case of hardship or
6 inequity’ within the meaning of *Landis*.” *Lockyer*, 398 F.3d at 1112. In any event, summary
7 judgment briefing is nearly complete. Judicial economy is not served by staying disposition of a
8 nearly “fully briefed and argued” motion. *California*, 360 F. Supp. 3d at 994 (citing *CMAX, Inc.*
9 *v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Just so here, where the Court has already considered
10 preliminary injunction briefing, conducted a hearing, and issued a preliminary decision, and
11 where the Plaintiff States, Agencies, and State Intervenors have already filed their primary
12 summary-judgment submissions.

13 If anything, a stay would cause harm, not prevent it. For many years now, the States, the
14 federal government, and private parties alike have been plagued with legal uncertainty as to the
15 scope of permissible federal jurisdiction to regulate under the Clean Water Act. Pinson Decl. ¶ 2–
16 3. Most recently, the 2015 Rule triggered a years-long period of patchwork, shifting regulation.
17 *See* Doc. 107-1 at II.A.2. The Agencies adopted the 2020 Rule to restore a clearer, simpler
18 standard so that states, businesses, and environmental organizations could operate under a more
19 predictable regulatory regime, and this suit could finally resolve important questions about the
20 scope of the EPA’s jurisdiction and authority. Pinson Decl. ¶ 4–5 In short, clarity on the
21 important constitutional and statutory questions presented in this case will help bring certainty to
22 the States and regulated parties, as well as the Agencies themselves as they consider additional
23 rulemaking. *Id.* The Agencies’ request for a stay would frustrate that interest in legal certainty,
24 and for no good reason.

25 CONCLUSION

26 This Court should deny the Agencies’ motion to enlarge deadlines and stay this case. The
27 2020 Rule is in effect in 49 States and undoubtedly will remain in effect 60 days from now, when
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1 the Agencies requested stay would expire. And if the Agencies intend to seek further stays
2 indefinitely for the entirety of a hypothetical rulemaking process for a hypothetical replacement
3 rule, this Court should reject that possibility at the outset, too. *Dependable Highway Exp., Inc. v.*
4 *Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (“[S]tays should not be indefinite in
5 nature.”). This Court should not countenance this transparent attempt to run out the clock in this
6 almost fully briefed, plainly justiciable lawsuit, wasting judicial and party resources and
7 continuing the legal uncertainty with respect to this critical issue.

8 Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I served this opposition to plaintiffs’ motion for a preliminary injunction and cross-motion for summary judgment by filing it with this Court’s ECF system.

/s/ Andrew A. Pinson
Andrew A. Pinson

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

15 State of California, *et al.*,
Plaintiffs,
16 v.
17 Jane Nishida, *et al.*,
Defendants.

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

**DECLARATION IN SUPPORT OF
STATE INTERVENORS’
OPPOSITION TO MOTION FOR
ENLARGEMENT OF TIME/STAY
OF PROCEEDINGS**

Hr’g Date: June 3, 2021
Hr’g Time: 1:30 pm
Dep’t: San Francisco Courthouse,
Courtroom 3, 17th Floor
Judge: Honorable Richard Seeborg
Action Filed: May 1, 2020

1 I, Andrew Pinson, declare as follows:

2 1. I am the Solicitor General of Georgia. I am an attorney representing the
3 Intervenor-Defendant Georgia. I make this declaration based on my own personal knowledge,
4 and if called to testify could and would testify as stated herein. I make this declaration in
5 opposition to the Defendants’ Motion for an Enlargement of Time/Motion for Stay in the
6 Proceedings.

7 2. Many of the State Intervenors have consistently taken an active role in the
8 rulemaking process—and resulting litigation—around the Navigable Waters Protection Rule,
9 as well as the prior rule that it replaced.

10 3. These efforts were undertaken because of the important sovereign interests
11 Georgia and other States have in maintaining the power to regulate and manage their
12 sovereign land and waters. The definition of “waters of the United States” impacts all States,
13 business, and organizations that must navigate the regulatory scheme.

14 4. Accordingly, Georgia and the other Intevenor-States will benefit from any legal
15 clarity that these proceedings bring to the scope of the Agencies’ power over Georgia’s and
16 the other Intervenor-States’ water resources.

17 5. Georgia and the other State Intervenors will suffer a corresponding harm if future
18 rulemakings proceed without the benefit of legal clarity. An extension or stay of these
19 proceedings will only prolong the uncertainty surrounding Defendants’ authority, and will
20 potentially lead to the promulgation of unlawful rules by Defendants.

21 I declare under penalty of perjury under the laws of the United States that the
22 foregoing is true and correct to the best of my knowledge. Executed this 16th day of
23 February, 2021, in Atlanta, Georgia.

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