

1 ROB BONTA
 Attorney General of California
 2 DAVID A. ZONANA, State Bar No. 196029
 DAVID G. ALDERSON, State Bar No. 231597
 3 Supervising Deputy Attorneys General
 GEORGE TORGUN, State Bar No. 222085
 4 TARA MUELLER, State Bar No. 161536
 Deputy Attorneys General
 5 1515 Clay Street, 20th Floor
 6 P.O. Box 70550
 Oakland, CA 94612-0550
 7 Telephone: (510) 879-1002
 8 Fax: (510) 622-2270
 E-mail: George.Torgun@doj.ca.gov

9 *Attorneys for Plaintiff State of California*

10 *[Additional counsel listed on signature page]*

11
 12 UNITED STATES DISTRICT COURT
 13
 14 NORTHERN DISTRICT OF CALIFORNIA (Oakland)

15
 16 STATE OF CALIFORNIA, ET AL.,

17 Plaintiffs,

18 vs.

19 HAALAND, ET AL.,

20 Federal Defendants.
 21

Case. No. 4:21-cv-00440-JST

**STIPULATION AND
~~PROPOSED~~ ORDER**

22
 23 Pursuant to Civil Local Rule 7-12 and 16-2, the Parties stipulate to continue
 24 a stay of proceedings until July 15, 2022—the date Federal Defendants anticipate
 25
 26
 27

1 completing rulemaking on proposals to rescind the regulations challenged in this
2 case.¹ In support of the joint stipulation, the parties set forth the following reasons:

- 3 1. This case challenges Endangered Species Act (“ESA”) final rules
4 promulgated by the U.S. Fish and Wildlife Service (“FWS”) within the
5 U.S. Department of the Interior, and the National Marine Fisheries
6 Service (“NMFS”) within the National Oceanic and Atmospheric
7 Administration, U.S. Department of Commerce (collectively, the
8 “Services”). *See* 85 Fed. Reg. 81411 (Dec. 16, 2020) (“Habitat Definition
9 Rule”); 85 Fed. Reg. 82376 (Dec. 18, 2020) (“Habitat Exclusion Rule”).²
- 10 2. On January 19, 2021, Plaintiffs filed a complaint in this Court challenging
11 both final rules. ECF 1.
- 12 3. Shortly thereafter, President Biden issued an Executive Order that,
13 among other things, required the Services to review the Habitat Exclusion
14 Rule and Habitat Definition Rule. *See* Executive Order 13990, Protecting
15 Public Health and the Environment and Restoring Science to Tackle the
16 Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). Following this review,
17 the Services announced an intent to propose rescinding the Habitat
18 Exclusion Rule and Habitat Definition Rule. *See* Notice, Regulation
19

20 ¹ On January 27, 2021, the Court related this case to three other related cases:
21 *Center for Biological Diversity v. Haaland*, No. 19-cv-05206, *California v. Haaland*,
22 No. 19-cv-06013, and *Animal Legal Def. Fund v. Haaland*, No. 19-cv-06812 (N.D.
23 Cal).

24 ² Only the Department of the Interior promulgated the Habitat Exclusion Rule. In
25 this stipulation, the term “Services” refers to the Service or Services responsible for
26 issuing whichever rule the given sentence is discussing—in the context of the
27 Habitat Definition Rule, it refers to both FWS and NMFS while in the context of the
Habitat Exclusion Rule, it refers to FWS. Further, where the Habitat Exclusion
Rule is solely at issue in this stipulation, the commitments in this stipulation
extend only to the Department of the Interior.

1 Revisions, [www.fws.gov/endangered/improving_esa/regulation-](http://www.fws.gov/endangered/improving_esa/regulation-revisions.html)
2 [revisions.html](http://www.fws.gov/endangered/improving_esa/regulation-revisions.html).

- 3 4. On June 30, 2021, and July 8, 2021, the Services respectively transmitted
4 draft proposed rescission rules (“Proposed Rescission Rules”) to the Office
5 of Management and Budget (“OMB”) for review under Executive Order
6 12866. If the Services finalize the Proposed Rescission Rules, the Service’s
7 position is that the legal claims raised in this case would be moot and the
8 Court would not need to resolve Plaintiffs’ claims.
- 9 5. Under appropriate conditions, a stay of the litigation during an agency’s
10 rulemaking process can conserve the parties’ and Court’s resources, and
11 the Court therefore has discretion to stay the case pending the completion
12 of an ongoing rulemaking process. *See CMAX, Inc. v. Hall*, 300 F.2d 265,
13 268 (9th Cir. 1962) (“A district court has inherent power to control the
14 disposition of the causes on its docket in a manner which will promote
15 economy of time and effort for itself, for counsel, and for litigants.”); *see*
16 *also California v. U.S. EPA*, 360 F. Supp. 3d 984, 993 (N.D. Cal. 2019) (“A
17 district court's ‘power to stay proceedings is incidental to the power
18 inherent in every court to control the disposition of the causes on its
19 docket with economy of time and effort for itself, for counsel, and for
20 litigants’”) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).
- 21 6. Plaintiffs’ position is that timely rescission of the Habitat Exclusion Rule
22 and Habitat Definition Rule are needed to avoid irreparable harm to
23 endangered and threatened species subject to agency decision-making
24 under the Habitat Exclusion Rule and Habitat Definition Rule.
- 25 7. Federal Defendants’ position is that they have prioritized rulemaking on
26 the Proposed Rescission Rules and desire to complete the rulemaking
27

1 expeditiously and in a manner that complies with all applicable laws.

2 8. To further advance the parties' objectives, the Services have identified,
3 and the parties agree to, the following rulemaking schedule³:

4 a. The Services will submit the Proposed Rescission Rules to the Office of
5 the Federal Register ("OFR"), for publication in the Federal Register,
6 no later than October 18, 2021. The Service(s) agree(s) to expedite
7 submission to OFR if OMB completes its review on either rule before
8 the end of OMB's 90-day period under Executive Order 12866. For the
9 first proposed rule to complete OMB review, the Service(s) will submit
10 the Proposed Rescission Rule to the OFR no later than 20 days after
11 OMB completes review, and for the second proposed rule to complete
12 OMB review, the Service(s) will submit the proposed rule to the OFR
13 no later than 10 days after OMB completes review.

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

21 ³ The schedule includes deadlines for the Services to take action (e.g., the Services
22 "will submit" a proposed rule "no later than..."). These deadlines are based on
23 certain assumptions, but should not be construed as constraining the Services'
24 discretion during the rulemaking to take alternative actions, as discussed further in
25 Paragraph 9.

25 The schedule is also based on actions outside the Services' control: OMB completion
26 of its reviews under E.O. 12866 and the Office of the Federal Register's publication
27 of rules in a timely manner. Nevertheless, if the actions in Paragraph 8 do not occur
as identified, Plaintiffs may file a notice with the Court that will automatically lift
the stay, as discussed further in Paragraph 10.

1 c. For the Habitat Definition Rule, the Services will submit a final rule to
2 OMB for review under Executive Order 12866 by the earlier of (1) four
3 months of the close of public comment or (2) March 7, 2022. For the
4 Habitat Exclusion Rule, FWS will submit a final rule to OMB for
5 review under Executive Order 12866 by the earlier of (1) five months
6 after the close of public comment or (2) April 4, 2022.

7 d. For the Habitat Definition Rule, the Services will submit a final rule to
8 the OFR no later than June 16, 2022. For the Habitat Exclusion Rule,
9 the Services will submit a final rule to the OFR no later than July 15,
10 2022. The Services agree to expedite submission to OFR, if possible, by
11 submitting each final rule to OFR within 10 days of OMB completing
12 its Executive Order 12866 review on that rule.

13 e. The Service(s) will make each of the final rules effective within 30 days
14 after publication of the rule in the Federal Register.

15 f. The Services will continue to make good faith efforts to prioritize the
16 rulemaking process as set forth herein and will promptly inform
17 Plaintiffs when each of the actions described in subparagraphs a, c,
18 and d has occurred.

19 9. In addition to the rulemaking schedule, the parties agree that, should the
20 Court grant the requested stay of the proceedings, the Services will notify
21 Plaintiffs before finalizing any interim guidance relating to application of the
22 Habitat Exclusion Rule or Habitat Definition Rule that would apply pending
23 the rescission of those rules. The parties further agree that the stay of litigation
24 does not preclude Plaintiffs from challenging any application of the Habitat
25 Exclusion Rule or Habitat Definition Rule in a separate rulemaking that
26 designates critical habitat (should the Services apply the Habitat Exclusion
27

1 Rule or Habitat Definition Rule during the Proposed Rescission Rule
2 rulemaking). And the parties agree that neither a stay of the case nor the
3 schedule identified in Paragraph 8 dictates or constrains the Services' discretion
4 in, or options available to it under the law during, any rulemaking process.

5 10. Based on the foregoing, the parties agree that a stay of the litigation is
6 warranted. If the actions in Paragraph 8 do not occur as identified, the parties
7 agree to meet and confer in good faith to try to reach resolution and maintain
8 the stay. If the parties cannot reach a resolution within 7 business days of this
9 initial meet and confer, Plaintiffs may file a notice with the Court that will
10 automatically lift the stay. Consistent with this paragraph, the parties agree
11 that Plaintiffs' sole recourse for any noncompliance with this stipulation is to
12 file a notice that automatically lifts the stay. If a notice is filed, the parties shall
13 file a joint proposal for further proceedings within 7 business days and the
14 Services shall file their administrative record within 120 days.

15 11. The parties further agree that they will file a joint status report addressing
16 further proceedings, or a stipulated dismissal, when both final rules are
17 published in the Federal Register or by July 15, 2022, whichever is earlier.
18

19 WHEREFORE, based on the foregoing, the parties jointly request that the Court
20 issue a stay of the proceedings through July 15, 2022, under the conditions
21 identified above.
22
23
24
25
26
27

1 DATED: September 13, 2021

ROB BONTA
Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General
DAVID G. ALDERSON
Supervising Deputy Attorney General

2
3
4
5 /s/ George Torgun
6 GEORGE TORGUN, State Bar No. 222085
7 TARA MUELLER, State Bar No. 161536
8 ERIN GANAHL, State Bar No. 248472
9 Deputy Attorneys General
10 1515 Clay Street, 20th Floor
11 P.O. Box 70550
12 Oakland, CA 94612-0550
13 Telephone: (510) 879-1002
14 Email: George.Torgun@doj.ca.gov

15
16 MAURA HEALEY
17 Attorney General of Massachusetts

18 /s/ Turner Smith
19 TURNER SMITH (*pro hac vice*)
20 MATTHEW IRELAND
21 Assistant Attorneys General
22 Office of the Attorney General
23 Environmental Protection Division
24 One Ashburton Place, 18th Floor
25 Boston, MA 02108
26 Telephone: (617) 727-2200
27 Email: Turner.Smith@mass.gov

Attorneys for Plaintiffs

1 TODD KIM
Assistant Attorney General
2 SETH M. BARSKY, Chief
MEREDITH FLAX, Assistant Chief
3

4 */s/ Coby Howell (by permission)*
COBY HOWELL, Senior Trial Attorney
5 U.S. Department of Justice
Environment & Natural Resources Division
6 Wildlife & Marine Resources Section
MICHAEL R. EITEL, Senior Trial Attorney
7 U.S. Department of Justice
8 Environment & Natural Resources Division
Wildlife & Marine Resources Section
9 1000 S.W. Third Avenue
10 Portland, OR 97204
Phone: (503) 727-1023
11 Fax: (503) 727-1117
Email: coby.howell@usdoj.gov
12

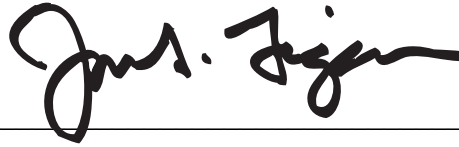
13 *Attorneys for Federal Defendants*
14
15
16

17 * In compliance with Civil Local Rule 5-1(i), the filer of this document attests that
18 all signatories listed have concurred in the filing of this document.
19
20
21
22
23
24
25
26
27

~~PROPOSED~~ ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED:

Dated September 20, 2021 _____:

A handwritten signature in black ink, appearing to read "Jon S. Tigar", is written over a horizontal line.

The Honorable Jon S. Tigar

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27