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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA (Oakland)

12
13 ANIMAL LEGAL DEFENSE FUND,
14 Plaintiff,
15
16 vs.
17 DAVID BERNHARDT, ET AL.,
Federal Defendants.

Case. No. 4:19-cv-06812-JST

**FEDERAL DEFENDANTS'
MOTION TO STAY AND
MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: October 7, 2021¹
Time: 2:00 pm PDT
Place: Courtroom 6, 2nd Floor
Judge: The Honorable Jon S. Tigar

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23 ¹ The parties stipulated to a briefing schedule for the motions to stay and Federal
24 Defendants do not intend to alter that schedule with the noted hearing date. ECF
145 at 4; ECF 131. October 7, 2021 was the earliest available hearing date on the
Court's calendar.

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that, on October 7, 2021, Federal Defendants will
3 move this Court to stay the above-captioned case. This motion will be made before
4 the Honorable Jon S. Tigar, United States District Judge, Oakland Courthouse,
5 1301 Clay Street, Oakland, CA 94612.

6 Federal Defendants move the Court for an order staying this case until the
7 United States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries
8 Service (“NMFS”) (collectively, “Services”) make final decisions acting on their
9 announced intent to rescind 84 Fed. Reg. 44753 (Aug. 27, 2019), and revise 84 Fed.
10 Reg. 45020 (Aug. 27, 2019) and 84 Fed. Reg. 44976 (Aug. 27, 2019) (collectively,
11 “2019 ESA Rules”) pursuant to Executive Order 13990, and requiring the parties to
12 file a joint status report with the Court within one week after all final decisions are
13 made, informing the Court of whether and how the parties plan to proceed with the
14 litigation.

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16 In the alternative, if the Court declines to stay the case until final decisions
17 on the 2019 ESA Rules have been issued, Federal Defendants move the Court to
18 stay proceedings until the Services have published the proposed rules to revise the
19 joint 2019 ESA Rules.

20 This motion is based on the accompanying Memorandum of Points and
21 Authorities and the Declarations of Gary D. Frazer (“Frazer Decl.”) and Samuel D.
22 Rauch III (“Rauch Decl.”).

1 Counsel for the parties have conferred on this motion. Plaintiffs have
2 indicated that they will oppose this motion. Intervenor-Defendants have reserved
3 the right to respond.

4 Federal Defendants are filing this motion in all three related cases, but the
5 motion is substantively identical in each case.
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INTRODUCTION

The Court should stay this case because the Services are actively working to rescind or revise the challenged 2019 ESA Rules.² To proceed with summary judgment briefing before the Services' rulemaking processes are complete would not only waste judicial and party resources, it would interfere with the rulemaking processes that are already underway.

Pursuant to Executive Order 13990 signed by President Biden on January 20, 2021 (titled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis"), the White House has directed the Services to evaluate and, where appropriate, revise or rescind environmental and public health related regulations that were issued under the Trump Administration. 86 Fed. Reg. 7037 (Jan. 20, 2021). In a publication accompanying that Executive Order, the White House specifically directed the Services to review the three Endangered Species Act ("ESA") regulations challenged in this action, *i.e.*, 84 Fed. Reg. 45020 ("Section 4 Rule"), 84 Fed. Reg. 44753 ("Section 4(d) Rule"), and 84 Fed. Reg. 44976 ("Section 7 Rule").³ As a result of the Services' review of these

² This Court has related the three cases: *Center for Biological Diversity v. Haaland*, 19-cv-5206 (N.D. Cal. Aug. 21, 2019); *California v. Haaland*, 19-cv-6013 (N.D. Cal., Sept. 25, 2019); *Animal Legal Def. Fund v. Haaland*, 19-cv-06812 (N.D. Cal., Oct. 21, 2019). For purposes of this memorandum in support of Federal Defendants' Motion to Stay, the cases are referred to collectively in the singular tense. The Court has also related *California v. Haaland*, 21-cv-00440-JST (N.D. Cal.), with the above-related cases, which challenges the 2020 Critical Habitat Rules. The parties in that case plan to inform the Court how they intend to proceed by August 19, 2021.

³ The Section 4 and Section 7 Rules were promulgated jointly by FWS and NMFS and the Section 4(d) Rule was promulgated by FWS alone. Accordingly, the Services

1 regulations, on June 4, 2021, FWS announced its intent to rescind the Section 4(d)
2 Rule and the Services announced their intent to revise the Section 4 and Section 7
3 Rules.

4 If briefing on the merits of this case were to proceed before the Services make
5 final decisions on the 2019 ESA Rules, the Services may be forced to prematurely
6 formulate and take positions in litigation filings before they have arrived at final
7 positions. Additionally, the Services may be forced to adopt such positions before
8 they have even received or considered public comments on the proposed revisions (a
9 fundamental part of the rulemaking process under the Administrative Procedure
10 Act (“APA”)). Not only would it be a waste of the Court’s and parties’ resources to
11 adjudicate rules that the Services are in the process of revising and rescinding, it
12 could damage the integrity of the rulemaking process and potentially create public
13 confusion over how the relevant portions of the ESA will be implemented.

14 Additionally, without a stay, agency resources would be diverted from the
15 ongoing rulemaking processes because the small group of FWS and NMFS staff
16 with the subject-matter expertise to work on the proposed revisions to the 2019 ESA
17 Rules are the same staff who would be responsible for providing litigation support
18 in this case. Conversely, Plaintiffs’ interests will not be harmed by a stay because
19 this is a facial challenge to the 2019 ESA Rules and Plaintiffs are free to challenge
20 any final agency action in which the existing rules are applied in a way that harms
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24 are undertaking joint rulemaking processes to revise the Section 4 and Section 7
Rules, and FWS alone is proposing to rescind the Section 4(d) Rule.

1 Plaintiffs’ interests with respect to an ESA listed species. Indeed, Plaintiffs’ alleged
 2 interests may actually be harmed if the case is *not* stayed because the diversion of
 3 agency resources necessary to provide support for Federal Defendants’ anticipated
 4 summary judgment briefing would likely delay the rulemaking processes and
 5 prolong the Services’ anticipated schedule for issuing the revised rules.⁴

6 Accordingly, Federal Defendants respectfully request that the Court stay the
 7 litigation until the Services complete the rulemaking processes and issue final
 8 decisions on the 2019 ESA Rules.⁵

9 BACKGROUND

10 To achieve the conservation purposes of the ESA, Congress authorized the
 11 Secretaries of the Departments of the Interior and Commerce to “promulgate such
 12 regulations as may be appropriate to enforce” it. 16 U.S.C. § 1540(f); *Babbitt v.*
 13 *Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995) (“When it
 14 enacted the ESA, Congress delegated broad administrative and interpretive power
 15 to the Secretar[ies]”). The Secretaries of Interior and Commerce, acting through the
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17
 18 ⁴ The Services’ anticipated schedule for revising the 2019 ESA Rules is set forth in
 19 the Declaration of Samuel D. Rauch III (NMFS) at ¶¶ 8-10, and the Declaration of
 Gary D. Frazer (FWS) at ¶ 8, attached and discussed herein.

20 ⁵ If the Court declines to issue a stay until the final decisions revising the 2019 ESA
 21 Rules have been issued, Federal Defendants request, in the alternative, that the
 22 Court stay proceedings until the Services have published the joint Section 4 and 7
 23 proposed rules. As demonstrated by the Services’ June 2021 announcement of their
 24 intent to revise the joint 2019 ESA Rules, the ongoing rulemaking process has the
 potential to moot, narrow, and/or alter the issues in dispute. Thus, staying the case
 until the proposed joint rules are published would at least allow the Court and the
 parties to assess whether the claims can be narrowed or whether an additional stay
 is warranted to allow the Services to complete rulemaking.

1 Services, share responsibility for implementing the ESA.⁶ 16 U.S.C. § 1532(15). The
 2 three 2019 ESA Rules challenged by Plaintiffs in this action are the product of such
 3 rulemaking by the Services to implement, interpret, and clarify Sections 4, 4(d), and
 4 7(a)(2) of the ESA.

5 The Section 4 Rule, promulgated jointly by FWS and NMFS on August 27,
 6 2019, made several revisions to the regulatory text governing the procedures for
 7 adding, removing, and reclassifying endangered or threatened species and
 8 designating their critical habitat under the ESA. 84 Fed. Reg. 45020. The Section 7
 9 Rule, also promulgated jointly by FWS and NMFS on August 27, 2019, made a
 10 number of revisions to the regulations guiding Section 7 consultation under the
 11 ESA. 84 Fed. Reg. 44976. And the Section 4(d) Rule, issued by FWS on August 27,
 12 2019, removed the “blanket” extension of ESA Section 9 protections afforded to
 13 “endangered” species to all species listed as “threatened” as well. 84 Fed. Reg.
 14 44753. *See also*, ECF 46 at 12-23 (detailing the changes).

15
 16 Plaintiffs filed their motions for summary judgment asserting challenges to
 17 the merits of the three 2019 ESA Rules on January 19, 2021. ECF 86; ECF 116;
 18 ECF 130. The next day, President Biden issued Executive Order 13990, titled
 19 “Executive Order on Protecting Public Health and the Environment and Restoring
 20

21
 22 ⁶ Generally, Interior’s jurisdiction extends to terrestrial and freshwater species and
 23 Commerce’s jurisdiction covers marine and anadromous species. The Secretary of
 24 the Interior has delegated her authorities under the ESA to FWS, and the Secretary
 of Commerce has similarly delegated her authorities to NMFS. 50 C.F.R. §
 402.01(b).

1 Science to Tackle the Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 20, 2021). Under his
 2 Executive Order, President Biden declared it a policy of his Administration to:

3 listen to the science; to improve public health and protect
 4 our environment; to ensure access to clean air and water;
 5 to limit exposure to dangerous chemicals and pesticides; to
 6 hold polluters accountable, including those who
 7 disproportionately harm communities of color and low-
 8 income communities; to reduce greenhouse gas emissions;
 9 to bolster resilience to the impacts of climate change; to
 10 restore and expand our national treasures and
 11 monuments; and to prioritize both environmental justice
 12 and the creation of the well-paying union jobs necessary to
 13 deliver on these goals.

14 *Id.* To that end, the Order directed all federal agencies to “immediately review and,
 15 as appropriate and consistent with applicable law, take action to address the
 16 promulgation of Federal regulations and other actions during the last 4 years that
 17 conflict with these important national objectives” *Id.* On the same day it issued
 18 Executive Order 13990, the White House also published a fact sheet which directed
 19 the Services to review the 2019 ESA Rules at issue in this action.⁷

20 In compliance with Executive Order 13990, the Services reviewed various
 21 rules promulgated over the last four years, including the 2019 ESA Rules. Following
 22 their review and evaluation of the challenged rules, on June 4, 2021, the Services
 23 made an announcement publicly declaring FWS’s intent to propose rulemaking to
 24

⁷ See The White House, Fact Sheet: List of Agency Actions for Review, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (last visited Aug. 13, 2021) (“White House Fact Sheet”).

1 rescind the Section 4(d) Rule and the Services' intent to revise the other two rules at
 2 issue in this case (the Section 4 and 7 Rules).⁸

3 In light of the Services' intention to rescind and revise the contested rules,
 4 the parties jointly requested, and the Court granted a series of stays, the most
 5 recent of which expired on July 19, 2021, to allow the parties time to determine how
 6 to proceed given the Services' forthcoming revisions to and rescinding of the 2019
 7 ESA Rules. ECF 95; ECF 129; ECF 143. The Court has since terminated Plaintiffs'
 8 motions for summary judgment pending resolution of this motion to stay. ECF 86;
 9 ECF 116; ECF 130.

10 Given the pending litigation, the Services have developed an expedited
 11 schedule for rulemaking to revise and rescind the 2019 ESA Rules that adheres to
 12 the requirements of the APA and other procedural agency rulemaking
 13 requirements. Frazer Decl. at ¶¶ 6-7. The schedule also takes into account the
 14 constraints and realities of the Services' workload and limited resources. For
 15 instance, in addition to working on revising and rescinding the 2019 ESA Rules, the
 16 same NMFS and FWS staff are working on addressing other ESA regulations
 17 issued by the prior Administration that are also being revised or rescinded pursuant
 18 to Executive Order 13990. Frazer Decl. at ¶ 7 (citing 85 Fed. Reg. 81411 (Dec. 16,
 19 2020), 85 Fed. Reg. 82376 (Dec. 18, 2020)). These other ESA regulations are also the
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 22 ⁸ See Press Release: U.S. Fish and Wildlife Service and NOAA Fisheries to Propose
 23 Regulatory Revisions to Endangered Species Act,
 24 [https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-
 noaa-fisheries-to-propose-regulatory-& ID=36925](https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-to-propose-regulatory-&ID=36925) (last visited Aug. 13, 2021)
 ("Services' Press Release").

1 subject of litigation in which some of these plaintiffs are similarly pressing for
2 expeditious rulemaking schedules. *Id.* (noting other litigation: *Conservation Council*
3 *for Hawai'i, et al. v. Haaland et al.*, 1:21-cv-00040, *Center for Biological Diversity v.*
4 *Haaland et al.*, 1-21-cv-00041, *State of California, et al., v. Haaland, et al.*, 4:21-cv-
5 00440).

6 Notwithstanding the constraints in resources, the Services plan to submit
7 proposed rules, proposing to revise and rescind the 2019 ESA Rules, to the Office of
8 Management and Budget (“OMB”) of the Executive Office of the President for
9 review by October 18, 2021. Frazer Decl. at ¶ 8. After allowing for the 90-day period
10 that OMB is permitted to review a proposed rule under Executive Order 12866, the
11 Services plan to submit Notices of Proposed Rulemaking to the Federal Register for
12 publication by January 27, 2022. *Id.* After the Notices of Proposed Rulemaking are
13 published, the Services plan to accept public comments on the proposed rules over a
14 60-day period and to consider any well-founded requests for extensions of that
15 period on a case-by-case basis. Rauch Decl. at ¶ 9. Finally, the Services anticipate
16 sending the final rules to OMB by August 23, 2022 and the Final Action Notices to
17 the Federal Register for publication of the final rules by December 2, 2022. Rauch
18 Decl. at ¶ 10. The Services’ anticipated rulemaking schedule is summarized in the
19 table below.
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| Rulemaking Process Step | Section 4 Rule | Section 7 Rule | Section 4(d) Rule |
|--|------------------|------------------|-------------------|
| Proposed rule to Office of Management and Budget | October 18, 2021 | October 18, 2021 | January 14, 2022 |
| Proposed rule to Federal Register | January 27, 2022 | January 27, 2022 | April 25, 2022 |
| Final rule to Federal Register | December 2, 2022 | December 2, 2022 | January 27, 2023 |

Frazer Decl. at ¶ 8.

FWS's rulemaking for rescinding the Section 4(d) Rule is anticipated to proceed on a slightly different track because the same FWS staff members who are responsible for that rule are also responsible for drafting the revised Section 4 Rule. Frazer Decl. at ¶ 9. FWS has prioritized the Sections 4 and 7 Rules over the Section 4(d) Rule because it has determined that a longer timeline for the Section 4(d) rescission will not have any effects on species in the interim. *Id.* As stated in the rule, FWS will provide "threatened" species with appropriate protections at the time of listing – which can include providing the same protections that apply to endangered species through species-specific 4(d) rules. *Id.* (citing 84 Fed. Reg. 44,753 (Aug. 27, 2019)). Accordingly, FWS need only issue a species-specific 4(d) rule concurrent with a species' listing or reclassification as "threatened" in order to afford it protections until the final rule rescinding the Section 4(d) Rule is issued. *Id.*

1 There is only a limited number of agency staff and attorneys at the Services
 2 who possess the necessary experience and expertise to craft regulations under the
 3 complex ESA statutory and regulatory regime. Rauch Decl. at ¶ 6. Those
 4 individuals are undertaking a significant amount of work to meet the anticipated
 5 schedule set forth above as well as their work on other ESA rulemakings initiated
 6 pursuant to Executive Order 13990. Frazer Decl. at ¶ 10. If agency staff is
 7 additionally required to provide litigation support to aid in briefing this case on its
 8 merits, the Services anticipate that the rulemakings will be delayed. *Id.*

9 ARGUMENT

10 I. The Court Should Exercise Its Broad Discretion to Stay this Case As the 11 Services' Already-Underway Administrative Process Could Moot or 12 Narrow Plaintiffs' Claims.

13 The Supreme Court has held that “the power to stay proceedings is incidental
 14 to the power inherent in every court to control the disposition of the causes on its
 15 docket with economy of time and effort for itself, for counsel, and for litigants.”
 16 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A district court has broad discretion
 17 in granting a motion for stay, particularly in order to conserve judicial resources
 18 and alleviate crowded dockets. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112
 19 (9th Cir. 2005). A court weighs three factors in determining whether to grant a stay:
 20 (1) “the orderly course of justice measured in terms of the simplifying or
 21 complicating of issues, proof, and questions of law which could be expected to result
 22 from a stay;” (2) “the hardship or inequity which a party may suffer in being
 23 required to go forward,” and (3) “the possible damage which may result from the
 24

1 granting of a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Moreover,
2 the Ninth Circuit has explained that a stay is appropriate where, as here, it would
3 be “efficient for [a court’s] docket and the fairest course for the parties [is] to enter a
4 stay . . . pending resolution of independent proceedings which bear upon the case.”
5 *Leyva v. Certified Grocers of Cal.*, 593 F.2d 857, 863-64 (9th Cir. 1979). “This rule
6 applies whether the separate proceedings are judicial, *administrative*, or arbitral in
7 character, and does not require that the issues in such proceedings are necessarily
8 controlling of the action before the court.” *Id.* (emphasis added).

9 The Court should stay this case pending completion of the Services’
10 rulemaking process to revise and rescind the 2019 ESA Rules—a process that is
11 already underway—because the stated intent of that process is to evaluate and
12 change the regulations challenged in this case. The expenditure of judicial and
13 party resources on briefing and adjudicating the merits of the 2019 ESA Rules
14 before that process is complete would be wasteful, as the issues raised may be
15 mooted or narrowed. Further, not only will the outcome of the rulemaking process
16 likely bear upon the merits of this case, immediately proceeding with the litigation
17 would put Federal Defendants in the compromising position of having to defend
18 regulations they are actively trying to revise but cannot officially represent whether
19 or how they will be revised because the administrative process (including the review
20 and consideration of public comments) has not been completed. Absent a stay
21 Federal Defendants would have to divert their limited resources from working on
22 the revised 2019 ESA Rules to simultaneously provide support for summary
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judgment briefing in this litigation, which would likely delay the rulemaking process and leave the current rules Plaintiffs claim are harmful in place longer. Plaintiffs, on the other hand, would not be harmed by such a stay because they would have the opportunity to submit public comments on the proposed revisions and potentially achieve the same result(s) they seek here, thus eliminating or narrowing the need for continued litigation.

1. The “Orderly Course of Justice” Factor is Met Because the Requested Stay Can Be Expected to Simplify the Disputed Issues and Promote Judicial Economy.

In applying the “orderly course of justice” factor discussed above, courts find that “considerations of judicial economy are highly relevant.” *Gustavson v. Mars, Inc.*, No. 13–cv–04537–LHK, 2014 WL 6986421, at *3 (N.D. Cal. Dec. 10, 2014) (citation omitted); *Fuller v. Amerigas Propane*, No. 09-2616 TEH, 2009 WL 2390358, at *2 (N.D. Cal. Aug. 3, 2009) (staying an action “primarily” on the basis of judicial economy, “which furthers the [orderly course of justice] factor”); *Matera v. Google*, No. 15-CV-04062-LHK, 2016 WL 454130, at *2-3 (N.D. Cal. Feb. 5, 2016) (granting a stay until resolution of a pending Supreme Court case based on “the orderly course of justice” factor, including judicial economy considerations, because the case “may provide substantial guidance” as to whether the plaintiffs had standing); *see also Gallion v. Charter Commc’ns*, 287 F. Supp. 3d 920, 933 (C.D. Cal. 2018) (granting a stay because “substantial savings in judicial resources outweigh any potential prejudice to plaintiff”), *aff’d sub nom. Gallion v. United States*, 772 F. App’x 604 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 194 (2020).

As discussed above, on January 20, 2021, President Biden issued Executive

1 Order 13990 directing all federal agencies to review certain administrative actions
 2 taken under the previous Administration for the purpose of considering whether
 3 those actions should be suspended, revised, or rescinded. 86 Fed. Reg. 7,037. Along
 4 with President Biden’s Executive Order, the White House published a fact sheet
 5 directing the Services to specifically review the 2019 ESA Rules. *See* White House
 6 Fact Sheet. As a result of the Services’ review, on June 4, 2021, they announced
 7 their intent to initiate rulemaking to rescind the Section 4(d) Rule and revise the
 8 Section 4 and Section 7 Rules at issue in this litigation. *See* Services’ Press
 9 Release.⁹

10 To require the parties to proceed with briefing on the merits of this case
 11 before the Services complete the administrative process to rescind and revise the
 12 2019 ESA Rules would be contrary to the interests of judicial economy. Rather, the
 13 “orderly course of justice” factor weighs in favor of granting a stay because a
 14 simplification of the issues can “be expected to result from a stay” after the Services’
 15 rulemaking process is complete. *CMAX*, 300 F.2d at 268. While the Services will
 16 likely propose specific revisions to the Sections 4 and 7 Rules, they have already
 17 decided to accept public comment on *all aspects* of those rules. Frazer Decl. ¶ 6;
 18 Rauch Decl. ¶ 10. Regardless of the specific revisions, because the agencies are
 19 accepting public comment on all aspects, the superseding rules could moot the
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21
 22 ⁹ Agencies have inherent authority to review past decisions and to revise, replace, or
 23 repeal a decision as appropriate to the extent permitted by law and supported by a
 24 reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009);
Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

1 current challenges and a stay would avoid unnecessary adjudication and conserve
 2 the resources of the Court and the parties. *Cal. ex rel. Lockyer v. U.S. Dep't of*
 3 *Agric.*, 575 F.3d 999, 1015 (9th Cir. 2009) (rejecting the government's argument
 4 that revision of an existing rule did not effectuate a substantive regulatory change);
 5 *Twitter, Inc. v. Lynch*, 139 F. Supp.3d 1075, 1081 (N.D. Cal. 2015) ("when
 6 subsequent legislation or rulemaking supersedes challenged regulations or rules,
 7 the challenge is moot.").

8 At the very least the specific revisions will greatly narrow the issues in
 9 dispute. For example, Plaintiffs request that this Court vacate FWS's Section 4(d)
 10 Rule and "reinstate the prior regulatory regime," because the "4(d) Rule's removal of
 11 the 'blanket' extension to threatened species of all protections afforded to
 12 endangered plants and animals under section 9 of the ESA is contrary to the ESA's
 13 conservation purposes" ECF 28 ("Amend. Compl.") at ¶ 129, Prayer for Relief
 14 at ¶ 5. However, FWS has already announced its intent to provide the exact relief
 15 that Plaintiffs are requesting. Specifically, FWS announced that:

17 FWS will propose to reinstate its "blanket 4(d) rule," which
 18 was withdrawn by the previous administration. The
 19 blanket 4(d) rule establishes the default of automatically
 extending protections provided to endangered species to
 those listed as threatened, unless the Service adopts a
 species-specific 4(d) rule.

20 Services' Press Release (citation omitted); *see also* Frazer Decl. at ¶ 4 ("FWS will
 21 propose to rescind the ESA Section 4(d) [R]ule . . . and to reinstate its 'blanket 4(d)
 22 rule,' which extends to species listed as threatened under the ESA the protections
 23 that the statute provides for endangered species . . . ").
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1 By way of further example, Plaintiffs seek to vacate the Services' Section 4
 2 Rule because, among other things, they believe that the "elimination of regulatory
 3 language in [the Section 4 Rule] that species listing, reclassification, and delisting
 4 decisions must be made 'without reference to possible economic or other impacts of
 5 such determination' [was] contrary to . . . the ESA's conservation purposes." Amend.
 6 Compl. at ¶ 127. a. Meanwhile, the Services have already announced that they will
 7 "propose revising the [Section 4 Rule] to reinstate prior language affirming that
 8 listing determinations are made 'without reference to possible economic or other
 9 impacts of such determination,' along with other potential revisions also under
 10 discussion." Services' Press Release; *see also* Frazer Decl. at ¶ 5 ("Although the
 11 Services are currently in the process of determining the entire scope of the
 12 revisions, they will propose to revise the [Section 4 Rule] to reinstate prior language
 13 affirming that listing determinations are made 'without reference to possible
 14 economic or other impacts of such determination.'").

15 Similarly, Plaintiffs seek to set aside the Section 7 Rule because, among other
 16 things, the Services' "changes to the definition of 'effects of the action' in [the
 17 Section 7 Rule] limiting both the type and extent of effects of a proposed federal
 18 agency action that must be considered during the consultation process are contrary
 19 to . . . the ESA's conservation purposes." Amend. Compl. at ¶ 128. b. But here too,
 20 the Services have announced that they intend to "propose to revise the definition of
 21 'effects of the action' and associated provisions to that portion of the [Section 7
 22 R]ule." Services' Press Release; *see also* Frazer Decl. at ¶ 5 ("With respect to the
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1 regulations governing Section 7 consultation, the Services will propose to revise the
 2 definition of ‘effects of the action’ and its associated provisions, core provisions that
 3 are central in implementing ESA Section 7.”).

4 Based on the Services’ plan to take the actions discussed above (keeping in
 5 mind that they are considering other proposed regulatory revisions as well), it is
 6 clear that judicial economy would be served by staying this litigation until
 7 completion of the rulemaking process to revise and rescind the 2019 ESA Rules.
 8 “Publishing the proposed [revised] rules and making timely final decisions on the
 9 proposals is a high priority for the Administration, and the Services have already
 10 begun working on the proposed rules.” Frazer Decl. at ¶ 7. Because the ongoing
 11 administrative process will moot, narrow, and/or alter the scope of the claims at
 12 issue, Federal Defendants respectfully request that the Court afford deference to
 13 the Executive Branch and the prerogatives of the new Administration by granting a
 14 stay for the Services to complete their review and revision of the 2019 ESA Rules
 15 pursuant to Executive Order 13990.

16
 17 **2. Federal Defendants Will Suffer Hardship if the Litigation Proceeds Before the
 Rulemaking Process to Revise and Rescind the 2019 ESA Rules is Complete.**

18 Federal Defendants and the public at large are likely to experience hardship
 19 absent a stay of this litigation. As an initial matter, if a stay is denied and the
 20 parties were forced to proceed with summary judgment briefing on the challenged
 21 2019 ESA Rules while the Services are simultaneously engaged in a process to
 22 revise and rescind those rules, this “would disrupt and compromise the agencies’
 23 policy deliberations, by forcing the agencies to prematurely formulate and publicly
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1 announce (in litigation filings) official government positions on the very issues that
2 the agency is engaged in notice-and-comment rulemaking on.” Rauch Decl. at ¶ 14.
3 This would be harmful to the public in three major ways. First, under the APA,
4 after an agency provides notice of proposed rulemaking, the agency is required to
5 “give interested persons an opportunity to participate in the rule making through
6 submission of written data, views, or arguments with or without opportunity for
7 oral presentation,” and to consider all “relevant matter presented.” 5 U.S.C. § 553
8 (c); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp.3d 922, 948 (N.D. Cal.) (public
9 comment purposes “apply with particular force in important cases.”). If the Services
10 were forced to take positions in litigation on the 2019 ESA Rules before they have
11 received or considered public comments on the proposed revisions (and possibly
12 before they have even finished developing all of the proposed revisions), this would
13 “be contrary to the spirit of proper administrative procedure” and damage the
14 integrity of the process. Rauch at ¶ 14; Frazer Decl. at ¶ 11. Indeed, while litigation
15 positions may change over time, they tend to solidify the agencies’ administrative
16 positions.
17

18 Second, “[i]t would also cause harmful confusion among the public and
19 stakeholders if the [Services] were announcing definitive public positions on the
20 very issues [they are] supposed to be in the midst of notice-and-comment
21 rulemaking upon.” Rauch Decl. at ¶ 14. “Public confusion or misunderstanding of
22 this kind could impede effective and efficient implementation of the ESA in the
23 future.” *Id.*; see also Frazer Decl. at ¶ 11 (“Positions taken by the agency in
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1 litigation could lead to public confusion regarding how [the Department of the
2 Interior] will implement the ESA going forward.”). Here again, although having the
3 Department of Justice argue one position on behalf of the agencies, while those
4 same agencies are in the midst of administratively advancing a different
5 interpretation, is not entirely without precedent and permissible, it has the very
6 real potential to confuse the public’s understanding of the United States’ position on
7 the ESA.

8 Finally, absent a stay until final decisions on the 2019 ESA Rules are made,
9 adjudication of this case could potentially interfere with the executive branch’s
10 rulemaking in an adverse way. For example, “if the Court were to issue a ruling on
11 the claims challenging the 2019 regulations, it could constrain [the Services’]
12 discretion to make regulatory changes and [] affect the outcome of the rulemaking.”
13 Frazer Decl. at ¶ 11.

14 Moreover, if litigation were to proceed without a stay, the increased and
15 competing workload for the Services’ small handful of agency staff and attorneys
16 tasked with reviewing and revising the 2019 ESA Rules pursuant to Executive
17 Order 13990 would be damaging to Federal Defendants and to the public interest.
18 *See Rauch Decl. at ¶ 6* (“The Services rely on a limited number of agency staff and
19 attorneys who possess the necessary experience and expertise to craft regulations
20 under the complex ESA statutory and regulatory regime.”). The Services’ staff are
21 already stretched thin, as each rulemaking process to revise/rescind the three 2019
22 ESA Rules at issue here “require[s] substantial staff time to draft the proposed
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24

1 rules, review and address public comments, and draft the final rules.” Frazer Decl.
2 at ¶ 7. Additionally, the “same limited . . . staff and attorneys are working on
3 rulemakings related to other ESA regulations that were issued by the prior
4 Administration,” including the rescission of two ESA critical habitat rules
5 challenged in a related case before this Court, *State of California, et al., v. Haaland,*
6 *et al.*, 4:21-cv-00440. Rauch Decl. at ¶ 7; Frazer Decl. at ¶ 7. Completing five
7 rulemaking processes within roughly 16 months and with limited staff is not
8 insignificant.

9 Absent the requested stay, the Services would have to devote significant
10 resources to this litigation, including to provide support necessary to respond to
11 renewed summary judgment motions, while also trying to prioritize working on the
12 proposed rules to revise and rescind the 2019 ESA Rules. *See* Rauch Decl. at ¶ 15
13 (“Any time necessary to support the Department of Justice during the preparation
14 of summary judgment briefing to meet court deadlines is time diverted for staff,
15 attorneys, and decisionmakers from the Services’ priority of developing these
16 proposed rules, as well as other ESA rulemaking currently underway.”); Frazer
17 Decl. at ¶ 10 (“Litigation tasks such as reviewing arguments and factual allegations
18 raised by Plaintiffs, assisting agency counsel and the Department of Justice
19 attorneys with the development of arguments in Federal Defendants’ cross-motion
20 summary judgment briefs, and preparing declarations, if necessary, would divert
21 scarce agency resources.”). This disruptive diversion of limited resources would
22 likely result in harm to the public interest, including Plaintiffs’ interests, because
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24

1 “[i]f agency staff are required to provide litigation support on top of [their current]
 2 responsibilities, [the Services] expect that the rulemakings will be delayed.” Frazer
 3 Decl. at ¶ 10.

4 **3. Plaintiffs Will Not Be Prejudiced If the Case is Stayed Until the Services**
 5 **Make Final Decisions on the 2019 ESA Rules.**

6 Plaintiffs will not suffer any prejudice from the requested stay. The Services
 7 have already commenced “ongoing efforts to diligently and expeditiously develop
 8 proposed rules . . . proposing changes to the 2019 ¶ ESA Rules, as described in the
 9 Services’ June announcement.” Rauch Decl. at ¶ 6. The rulemaking schedule that
 10 the Services have developed is as expeditious as possible while accounting for
 11 procedural requirements of the APA, OMB review, and the realities of the Services’
 12 workload and limited resources. Rauch Decl. at ¶ 6. Under the Services’ schedule,
 13 they anticipate having the proposed revised Section 4 and Section 7 Rules
 14 submitted to the Federal Register and published for public comment by January 27,
 15 2022, and the proposed rule to rescind the Section 4(d) Rule submitted to the
 16 Federal Register for public comment by April 25, 2022. Rauch Decl. at ¶ 8; Frazer
 17 Decl. at ¶ 8. Following publication of the proposed rules, the Services built time into
 18 the schedule to accept public comments for 60 days and consider well-founded
 19 requests for extensions on a case-by-case basis, then expects to publish final revised
 20 Section 4 and Section 7 Rules on December 2, 2022 and the final rule rescinding the
 21 Section 4(d) Rule on January 27, 2023. Rauch Decl. at ¶ 9; Frazer Decl. at ¶ 8.¹⁰
 22

23 ¹⁰ No newly listed “threatened” species will be harmed the interim before the Section
 24 4(d) Rule is rescinded because FWS will provide “threatened” species with

Pursuant to Executive Order 13990, agency leadership and staff are actively engaged in reviewing and revising the challenged 2019 ESA Rules, which will moot or at least narrow issues that are central to Plaintiffs' claims in this case. Accordingly, the Court should stay this action until the Services' rulemaking processes to revise and rescind the 2019 ESA Rules have been completed and should

appropriate protections at the time of listing by issuing a species-specific 4(d) rule concurrent with its listing or reclassification up until the final rule rescinding the Section 4(d) Rule is issued. Frazer Decl. at ¶ 9.

1 require the parties to file a status report within one week of the Services' final
2 decisions to inform the Court of whether and how they will proceed with the
3 litigation.¹¹

4
5 DATED: August 13, 2021.
6

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18
19
20

21 ¹¹ In the alternative, the Court should stay proceedings until the Services have
22 published the proposed rules to revise the joint 2019 ESA Rules. Informed by the
23 contents of the proposed joint rules, such a stay would at least allow the Court and
24 the parties to better assess whether an additional stay is warranted so that the
Services can complete the rulemaking processes or, if the litigation were to proceed,
how the issues can be narrowed to conserve the Court's and the parties' resources.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Coby Howell
COBY HOWELL, Senior Attorney