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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,
 DEFENDERS OF WILDLIFE, SIERRA
 CLUB, NATURAL RESOURCES
 DEFENSE COUNCIL, NATIONAL PARKS
 CONSERVATION ASSOCIATION,
 WILDEARTH GUARDIANS, and THE
 HUMANE SOCIETY OF THE UNITED
 STATES,

Plaintiffs,

v.

DEB 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,

and

STATE OF ALABAMA, *et al.*,

Defendant-Intervenors.

Case No. 4:19-cv-05206-JST

Related Cases: No. 4:19-cv-06013-JST
 No. 4:19-cv-06812-JST

PLAINTIFFS' JOINT OPPOSITION TO
 DEFENDANT-INTERVENORS' JOINT
 MOTION FOR EXPEDITED DECISION
 WITHOUT ORAL ARGUMENT ON MOTION
 FOR STAY PENDING APPEAL

Judge: Hon. Jon S. Tigar

INTRODUCTION¹

There is no good cause for this Court to decide Defendant-Intervenors’ motion for a stay pending appeal on an expedited basis and without oral argument. Defendant-Intervenors fail to demonstrate any concrete harm or prejudice that would occur from this Court deciding the stay motion in the normal course, which Defendant-Intervenors acknowledge could be done within a little over two months after the motion is fully briefed. As this Court has already recognized, the only substantial harm at issue in this matter would be from any continued application of the 2019 Endangered Species Act regulations (the “2019 ESA Rules”)² that Plaintiffs have challenged and the Court has vacated in its Order Granting Motion to Remand and Vacating Challenged Regulation, ECF 168³ (“Order”) and not from reinstatement of the prior ESA rules, which had previously been in effect for over 35 years. Moreover, when Federal Defendants engage in a new rulemaking process with regard to the 2019 ESA Rules, Defendant-Intervenors will have their full rights available under the Administrative Procedure Act (“APA”) to participate and address their concerns. For these reasons, the Court should deny Defendant-Intervenors’ motion for expedited decision without oral argument on their motion for stay pending appeal.

ARGUMENT

Throughout this litigation, Plaintiffs have repeatedly detailed the harm resulting from application of the 2019 ESA Rules, as well as the legal disruptions and public confusion that would occur from leaving the 2019 ESA Rules in place as opposed to reinstating the prior, longstanding regulatory regime. *See, e.g.*, ECF 135; ECF 149 at 12–21. The Court agreed with these assertions in denying the Federal Defendants’ motion to stay the case (ECF 138) and in its latest Order. Consequently, full consideration and oral argument on Defendant-Intervenors’

¹ Plaintiffs are filing the same joint opposition in each of the three related cases.

² The challenged ESA regulations are: 84 Fed. Reg. 45,020 (“Section 4 Rule”), 84 Fed. Reg. 44,753 (“Section 4(d) Rule”), and 84 Fed. Reg. 44,976 (“Section 7 Rule”).

³ Unless otherwise noted, all ECF references are to numbers from the earliest filed case, *Center for Biological Diversity v. Haaland*, No. 4:19-cv-5206-JST (N.D. Cal. filed Aug. 19, 2019).

1 latest stay motion is warranted. By contrast, the three arguments advanced by Defendant-
2 Intervenor to support an expedited decision without oral argument on their stay motion have no
3 merit and should be rejected.

4 First, Defendant-Intervenor fails to identify any “irreparable procedural injury” resulting
5 from the Court’s Order. ECF 173 at 3. While Defendant-Intervenor’s stay motion vaguely
6 references case law regarding the importance of the notice-and-comment process under the APA,
7 the Court’s Order did not cause an APA violation. Defendant-Intervenor has been full
8 participant in these related cases since the outset, and has submitted briefs in response to the
9 Federal Defendants’ motion for a voluntary remand. Furthermore, Defendant-Intervenor has
10 already filed notices of appeal, and an expedited decision is not necessary to allow them to “fully
11 exercise their appellate rights to seek judicial review” of the Order. Furthermore, when Federal
12 Defendants engage in any new rulemaking process with regard to the 2019 ESA Rules,
13 Defendant-Intervenor will have their full rights under the APA to comment on those proposed
14 rules.

15 Second, Defendant-Intervenor fails to identify any “significant substantive harm” that
16 would result from the Court deciding the stay motion in the normal course, citing only
17 unspecified “uncertainty” in and “costly adaptation” to the prior regulatory process. ECF 173 at
18 3–4. This argument is not well taken. The regulatory framework prior to the 2019 ESA Rules
19 was in effect for more than 35 years. The parties to this action, including Federal Defendants
20 and State Plaintiffs, have decades of experience implementing these pre-2019 regulations, and
21 there is extensive federal court analysis and precedent governing those rules, including multiple
22 U.S. Supreme Court decisions. The Court’s Order returning the regulatory framework to that
23 status quo is the least disruptive and uncertain for the parties, the public, and the courts, while (as
24 discussed below) mitigating the environmental harms caused by implementation and application
25 of the 2019 ESA Rules. *See Cal. by & Through Becerra v. Azar*, 501 F. Supp. 3d 830, 843 (N.D.
26 Cal. 2020) (“[V]acating the agency’s action simply preserves a status quo that has existed since
27

1 at least the early 1990's while the agency takes the time it needs to give proper consideration to
2 the matter").

3 Third, and contrary to the Defendant-Intervenors' contention, there is the potential for
4 significant harm and prejudice to Plaintiffs from curtailing their ability to fully oppose the stay
5 motion. Plaintiffs have already addressed their substantial concerns with any course of action
6 that leaves the 2019 ESA Rules in place for any significant length of time, *see* ECF 135 at 6–11;
7 ECF 145 at 6–7, and the Court previously found that harm from the application of the 2019 ESA
8 Rules warranted denial of Federal Defendants' prior attempt to stay the litigation. ECF 145 at
9 21–23.

10 In their remand motion, Federal Defendants conceded that the 2019 ESA Rules have
11 substantial substantive and procedural flaws, and that their continued implementation would
12 cause confusion and disruption. ECF 146 at 23–25. Furthermore, Plaintiffs' "prior position"
13 that Federal Defendants' remand motion be decided on the papers is entirely consistent with their
14 position here. *See* ECF 173 at 4. Not only did all parties to this action consent to that request,
15 but that consensus was reached to address *Defendant-Intervenors'* concern about continuing to
16 brief Plaintiffs' summary judgment motions while the Court considered Federal Defendants'
17 remand motion, *see* ECF 147, as well as to prevent the invalid 2019 ESA Rules from remaining
18 in force and continuing to cause substantial harm to listed species and their habitat any longer
19 than was necessary to decide the remand motion.

20 Finally, Plaintiffs are seriously considering filing a motion to alter or amend the judgment
21 pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, in light of the significant legal
22 violations in the 2019 ESA Rules, and the Supreme Court's procedural ruling in *Louisiana v.*
23 *Am. Rivers*, -- S.Ct. --, No. 21A539, 2022 WL 1019417 (Apr. 6, 2022), which is central to
24 Defendant-Intervenors' stay motion. Therefore, Plaintiffs believe that this Rule 59(e) motion
25 should be heard by the Court concurrently with Defendant-Intervenors' stay motion on October
26 20.

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant-Intervenors' request to expedite consideration without oral argument of their motion for a stay pending appeal, and allow Plaintiffs to fully respond to this stay motion.

Respectfully submitted this 25th day of July, 2022.

s/ Kristen L. Boyles

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** In compliance with Civil Local Rule 5-1(h)(3), the filer of this document attests that all signatories listed have concurred in the filing of this document.

CERTIFICATE OF SERVICE

I hereby certify that on today's date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated: July 25, 2022.

s/ Kristen L. Boyles
KRISTEN L. BOYLES (CSBA # 158450)