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

STATE OF CALIFORNIA, *et al.*

Plaintiff,

v.

ANDREW R. WHEELER, as the
Administrator of the United States
Environmental Protection Agency, *et al.*

Defendant.

Case No. 3:20-cv-03005-RS

**MOTION FOR RECONSIDERATION;
OPPOSITION TO PLAINTIFFS'
MOTION FOR ORDER
SHORTENING TIME; AND CROSS-
MOTION FOR ORDER FOR
ENLARGEMENT OF TIME**

Complaint Filed: May 1, 2020

Defendants ANDREW R. WHEELER, as the Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; R. D. JAMES, as Assistant Secretary of the Army for Civil Works; and UNITED STATES ARMY CORPS OF ENGINEERS (collectively "Defendants") hereby respectfully move for reconsideration of this Court's order (Dkt. No. 33) granting Plaintiffs' motion for order shortening time (Dkt. No. 32) and ask that Defendants' timely opposition to Plaintiffs' motion for order shortening time be considered by this Court. Defendants further cross-move for an order of enlargement of time, providing Defendants 28 days to respond to Plaintiffs' motion for preliminary

1 injunction. As explained in detail below, Defendants have good cause as to why their
 2 motion should be granted and why Plaintiffs' request should be denied.

3 **ARGUMENT**

4 **I. Defendants Respectfully Request that Its Motion for Reconsideration be** 5 **Granted**

6 On May 18, 2020, Plaintiffs filed a motion seeking to expedite the hearing date
 7 with respect to their motion for preliminary injunction either enjoining Defendants from
 8 implementing *The Navigable Waters Protection Rule: Definition of "Waters of the*
 9 *United States"*, 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule") or staying the 2020
 10 Rule's June 22, 2020 effective date (Dkt. No. 32). On May 19, 2020, this Court granted
 11 the motion. Dkt. Nos. 33, 34. Local Rule 6-3(b) provides that "a party who opposes a
 12 motion to enlarge or shorten time must file an opposition not to exceed 5 pages,
 13 accompanied by a declaration setting forth the basis for opposition, no later than 4 days
 14 after receiving the motion." That is, Defendants had until May 22, 2020, to file an
 15 opposition to the motion. Defendants' opposition to Plaintiffs' motion is set forth below
 16 and is timely in accordance with Local Rule 6-3(b). Accordingly, Defendants respectfully
 17 request that the Court reconsider its May 19, 2020 order granting Plaintiffs' motion to
 18 shorten time and take Defendants' opposition/cross motion, set forth below, under
 19 submission. *See also* Fed. R. Civ. P. 60.

20 **II. Plaintiffs' Motion for an Order Shortening Time Should Be Denied**

21 Plaintiffs' request to shorten the hearing date schedule with respect to their
 22 motion for preliminary injunction is, at bottom, an inequitable solution to a problem that
 23 was entirely self-inflicted. Plaintiffs had nearly *four months* to consider and formulate
 24 arguments in advance of their motion for preliminary injunction, as the final 2020 Rule
 25 was publicly available in pre-publication form as early as January 23, 2020. *See*
 26 <https://www.epa.gov/nwpr/navigable-waters-protection-rule-factsheets> (last visited May
 27 19, 2020) (noting that the 2020 Rule was finalized and available publicly on January 23,
 28 2020). Yet, Plaintiffs waited until May 18, 2020, to file their motion for preliminary

1 injunction/stay – nearly a month after the 2020 Rule was published in the Federal
2 Register on April 21. *See* 85 Fed. Reg. 22,250 (April 21, 2020). Plaintiffs are now asking
3 the Court to expedite the hearing date so that their motion can be heard before the 2020
4 Rule’s June 22 effective date. This is not an exercise of due diligence demonstrating
5 “good cause” for Plaintiffs’ request. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d
6 604, 609 (9th Cir. 1992) (in the context of Fed. R. Civ. P. 16(b), defining the “good
7 cause” standard as “primarily consider[ing] the diligence of the party seeking the
8 amendment”).

9 Moreover, Defendants were led to believe that a more accommodating briefing
10 schedule could be agreed upon by the parties—particularly in light of the extended page
11 limits Defendants agreed to. On May 8, 2020, Plaintiffs’ counsel emailed Defendants’
12 counsel asking that the parties stipulate to a 40-page limit with respect to the motion for
13 preliminary injunction. *See* Declaration of Erica Zilioli (“Zilioli Decl.”) ¶ 3. Defendants’
14 counsel expressed uncertainty that they could adequately respond to a longer motion
15 within 14 days and asked if Plaintiffs would be willing to stipulate to an extended
16 briefing schedule in addition to stipulating to longer page limits. *See id.* Plaintiffs’
17 counsel declined to further negotiate on any request to extend the briefing schedule.
18 Instead, Plaintiffs’ counsel insisted that a stipulation on page limits be filed now and a
19 modified briefing schedule be discussed later. *Id.* ¶ 4. The parties’ stipulation solely with
20 respect to page limits was filed on May 8, 2020. *See* Dkt. No. 12.

21 On May 12, 2020, Plaintiffs’ counsel informed Defendants’ counsel that Plaintiffs
22 would not agree to modify the briefing schedule and give Defendants 45 days to respond
23 to the motion for preliminary injunction unless the 2020 Rule’s effective date was stayed.
24 Zilioli Decl. ¶ 5. Defendants subsequently proposed shorter briefing schedules in an
25 attempt to accommodate Plaintiffs’ request to complete briefing and have a hearing
26 before June 22, but Plaintiffs rejected all proposals unless Defendants would agree to stay
27 the June 22, 2020 effective date. *Id.* ¶¶ 5-6. Had Defendants known that Plaintiffs would
28 be steadfast in refusing to provide more than 14 days to respond to Plaintiffs’ motion for

1 preliminary injunction, they would not have agreed to an extended 40-page limit. Given
 2 that the parties agreed to an enlargement in the page limit with respect to briefing the
 3 motion for preliminary injunction, given that Plaintiffs have filed nearly 900 pages worth
 4 of documents in support of their motion for preliminary injunction (*see* Dkt Nos. 30-31),
 5 and given that one of the business days within the 14-day period (May 25) is a federal
 6 holiday, it is prejudicial to Defendants to grant Plaintiffs' motion to shorten the hearing
 7 date and maintain the current briefing schedule.

8 **III. Extending the Current Briefing Schedule Is Warranted**

9 Rather than grant Plaintiffs' request, Defendants hereby respectfully move, in
 10 accordance with Local Rules 6 and 7, for an order to enlarge the briefing schedule with
 11 respect to Plaintiffs' motion for preliminary injunction. Defendants request that they be
 12 given 28 days to file an opposition to Plaintiffs' motion for preliminary injunction and
 13 Plaintiffs be given 14 days to file a reply brief to Defendants' opposition brief.

14 Defendants have good reasons for this request. Fourteen days to respond to
 15 Plaintiffs' motion is simply not enough time to adequately respond to a 40-page motion,
 16 particularly when Plaintiffs had nearly 4 months to evaluate and digest the pending 2020
 17 Rule. Moreover, as discussed above, Plaintiffs have filed nearly 900 pages of
 18 documentation in support of their motion. The 2020 Rule is also the culmination of a
 19 multi-year administrative process and is being litigated in district courts nationwide.¹
 20 Given this scope of litigation, more time should be given to facilitate a more fulsome
 21 briefing of the issues raised by Plaintiffs.

22 As explained above, Defendants would be prejudiced without the requested
 23 extension of time. Plaintiffs had four months to formulate the basis of their motion for
 24

25 ¹ *See, e.g., Chesapeake Bay Foundation, Inc. v. Wheeler*, 1:20-cv-1064 (D. Md.);
 26 *Conservation Law Foundation v. EPA*, 1:20-cv-10280 (D. Mass.); *South Carolina*
 27 *Coastal Conservation League v. Wheeler*, 2:20-cv-1687 (D.S.C.); *New Mexico Cattle*
 28 *Growers' Ass'n v. EPA*, 1:19-cv-988 (D.N.M.); *Murray v. Wheeler*, 1:19-cv-1498
 (N.D.N.Y.); *Oregon Cattlemen's Ass'n v. EPA*, 3:19-cv-00564 (D. Or.); *Washington*
Cattlemen's Ass'n v. EPA, 2:19-cv-00569 (W.D. Wash.).

1 preliminary injunction. Defendants have only 14 days to respond to a 40-page motion
 2 where Plaintiffs have filed, *inter alia*, numerous declarations in support of their claims of
 3 irreparable harm. *See generally* Dkt. No. 30. This asymmetrical briefing schedule
 4 unfairly prejudices Defendants' ability to meaningfully respond to Plaintiffs' motion.
 5 While Plaintiffs claim that they would be prejudiced and irreparably harmed if the motion
 6 was heard after June 22, 2020, Defendants' opposition to Plaintiffs' motion for
 7 preliminary injunction will show that this is not the case.

8 Also as explained above, Defendants have made concerted efforts to reach an
 9 agreement to modify the briefing schedule. Defendants initially flagged the issue on May
 10 8, 2020, requesting that the parties stipulate to allowing Defendants 45 days to respond to
 11 Plaintiffs' motion. Zilioli Decl. at ¶ 3. On May 12, 2020, Plaintiffs' counsel responded by
 12 refusing to extend the briefing schedule unless the June 22 effective date was stayed. *Id.*
 13 at ¶ 5. Defendants proposed a shorter 28 day deadline to respond to Plaintiffs' motion;
 14 again Plaintiffs declined to consider the request unless the effective date was stayed. *Id.*
 15 On May 15, 2020, Defendants' counsel proposed a briefing schedule whereby
 16 Defendants' opposition would be due June 12, Plaintiffs' reply would be due June 16 or
 17 17, and the hearing date would be held on June 18. *Id.* at ¶ 6. Again, this proposal was
 18 rejected by Plaintiffs, who insisted on Defendants staying the effective date of the rule—a
 19 significant undertaking with nationwide implications. *Id.* There have been no other time
 20 modifications in this proceeding. Given the scope of Plaintiffs' motion for preliminary
 21 injunction, Defendants' belief that more time is needed is both reasonable and justified.

22 CONCLUSION

23 For the foregoing reasons, Defendants' motion to reconsider this Court's May 19,
 24 2020 order granting Plaintiffs' motion to shorten time should be granted. Further,
 25 Plaintiffs' motion for an order to expedite the hearing date with respect to their motion
 26 for preliminary injunction should be denied. Instead, Defendants' motion for an order of
 27 enlargement of time, providing Defendants 28 days to respond to Plaintiffs' motion for
 28 preliminary injunction and 14 days for Plaintiffs to file a reply brief, should be granted.

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Respectfully submitted,

Date: May 20, 2020

/s/ Hubert T. Lee

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STATE OF CALIFORNIA, *et al.*

Plaintiff,

v.

ANDREW R. WHEELER, as the
Administrator of the United States
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Defendant.

Case No. 3:20-cv-03005-RS

**DECLARATION OF ERICA ZILIOLI
IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFFS'
MOTION FOR ORDER
SHORTENING TIME/CROSS-
MOTION FOR ORDER FOR
ENLARGEMENT OF TIME**

Complaint Filed: May 1, 2020

I, Erica Zilioli, declare as follows:

1. I am a Senior Attorney with the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section. I am an attorney assigned to represent defendants ANDREW R. WHEELER, as the Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; R. D. JAMES, as Assistant Secretary of the Army for Civil Works; and UNITED STATES ARMY CORPS OF ENGINEERS (collectively "Defendants") in the above-captioned action. I make this declaration based on my own personal knowledge and, if called to testify, could and would testify as stated

1 herein. I make this declaration in support of Defendants' opposition to Plaintiffs' Motion
2 for Shortening and Defendants' Cross-Motion for an Enlargement of Time.

3 2. On April 21, 2020, *The Navigable Waters Protection Rule: Definition of*
4 "*Waters of the United States*" 85 Fed. Reg. 22,250 (April 21, 2020) ("2020 Rule"), was
5 published in the Federal Register. The 2020 Rule was made publicly available in pre-
6 publication form on January 23, 2020. *See* [https://www.epa.gov/nwpr/navigable-waters-](https://www.epa.gov/nwpr/navigable-waters-protection-rule-factsheets)
7 [protection-rule-factsheets](https://www.epa.gov/nwpr/navigable-waters-protection-rule-factsheets) (last visited May 19, 2020) (noting that the 2020 Rule was
8 finalized and available publicly on January 23, 2020).

9 3. On May 1, 2020, Plaintiffs initiated this lawsuit. On May 7, 2020, Ms.
10 Tatiana Gaur, counsel for Plaintiffs, informed me by email that Plaintiffs intended to file
11 a motion for preliminary injunction in the next two weeks. Dkt. No. 32-2 at 15. She also
12 requested that we stipulate to a larger page limit with respect to briefing Plaintiffs'
13 motion for preliminary injunction. *Id.* On May 8, 2020, I responded by expressing
14 concern regarding the adequacy of the default briefing schedule; specifically, I noted my
15 concern that 14 days to respond to an expanded motion for preliminary injunction was
16 too short and suggested that the parties stipulate to 45 days. *Id.* at 14.

17 4. Ms. Gaur declined to further negotiate on any request to extend the
18 briefing schedule, instead, requesting that a stipulation on page limits be filed first and a
19 modified briefing schedule be discussed later. *Id.* at 13-14. The parties' stipulation solely
20 with respect to page limits was filed on May 8, 2020. *See* Dkt. No. 12.

21 5. On May 12, 2020, Ms. Gaur informed me that Plaintiffs could not agree to
22 modify the briefing schedule to give Defendants 45 days to respond to the motion for
23 preliminary injunction unless the 2020 Rule's effective date was stayed. Dkt. No. 32-2 at
24 11. On May 14, 2020, I proposed a shorter 28-day deadline to respond to Plaintiffs'
25 motion. *Id.* at 9. Again Plaintiffs declined to consider the proposal unless the effective
26 date was stayed and, for the first time, mentioned seeking expedited hearing of their
27 motion. *Id.*
28

[PROPOSED] ORDER

Before the Court is Defendants' (1) Motion for Reconsideration of this Court's May 19, 2020 order (Dkt. No. 33) granting Plaintiffs' motion for order shortening time (Dkt. No. 32); (2) Defendants' opposition to Plaintiffs' motion for order shortening time; and (3) Defendants' Cross-Motion for an order for enlargement of time, requesting that Defendants have 28 days to respond to Plaintiffs' motion for preliminary injunction/stay and Plaintiffs be given 14 days to reply to Defendants' opposition to Plaintiffs' motion for preliminary injunction/stay. Upon due consideration, IT IS SO ORDERED THAT:

1. Defendants' motion for reconsideration of this Court's May 19, 2020 order (Dkt. No. 33) is GRANTED and said order is hereby vacated;
2. it is FURTHER ORDERED that Defendants' opposition to Plaintiffs' motion for order shortening time shall be taken under submission;
3. it is FURTHER ORDERED Defendants' Cross-Motion for an order for enlargement of time is hereby GRANTED;
 - a. Defendants shall have until June 15, 2020, to file their opposition to Plaintiffs' motion for preliminary injunction/stay (Dkt. No. 30);
 - b. Plaintiffs shall have until June 29, 2020, to file their reply to Defendants' opposition; and
4. Plaintiffs' motion for preliminary injunction/stay shall be heard on _____, 2020, at _____ in Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California.

DATED this ____ day of _____, 2020.

Richard Seeborg
United States District Court Judge