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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

ALASKA COMMUNITY ACTION ON TOXICS, et al.,

Plaintiffs,

v.

COUNCIL ON ENVIRONMENTAL QUALITY, and BRENDA MALLORY, in her official capacity as Chair of the Council on Environmental Quality,

Defendants.

Case No. 3:20-cv-05199-RS

JOINT STATUS REPORT

29 Pursuant to this Court’s June 7, 2021 Order Extending Stay of Case by 60 Days and
 30 Scheduling Status Conference (ECF No. 55), the Parties hereby submit this joint status report.
 31 The Parties to the related case before this Court, *California v. CEQ*, No. 3:20-cv-06057-RS
 32 (N.D. Cal.), are submitting a similar joint status report in that case.

1 Because the Parties are unable to reach agreement as to how to proceed in this case,
2 they submit the following separate statements.

3 **Federal Defendants' Position**

4 For the reasons discussed below, Federal Defendants respectfully seek an extension of
5 the stay of this case by an additional 90 days.¹ Plaintiffs challenge the Council on
6 Environmental Quality's ("CEQ") July 16, 2020 rulemaking entitled "Update to the
7 Regulations Implementing the Procedural Provisions of the National Environmental Policy
8 Act," 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Rule"). As Federal Defendants have
9 explained in past status reports, in Executive Order 13990 President Biden directed federal
10 agencies to "immediately review and, as appropriate and consistent with applicable law, take
11 action to address the promulgation of Federal regulations and other actions during the last 4
12 years that conflict" with "important national objectives," such as "listen[ing] to the science";
13 "improv[ing] public health and protect[ing] our environment"; "reduc[ing] greenhouse gas
14 emissions"; and "prioritiz[ing] . . . environmental justice." Protecting Public Health & the
15 Env't & Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021);
16 *see, e.g.*, Joint Status Report & Stipulation to Extend Stay of Case by 45 Days, ECF No. 50 ¶
17 2. CEQ's ongoing review of the 2020 Rule merits a continuation of the stay in this case.

18 By way of background, in the Parties' most recent joint status report, filed on June 3,
19 2021, CEQ stated that it intended to "initiate rulemaking to propose amendments to the 2020
20 Rule to revise the NEPA implementing regulations to comply with the statute's text and goals;
21 provide regulatory certainty to stakeholders; promote better decision making consistent with
22 NEPA's statutory requirements; ensure appropriate coordination among Federal agencies, and
23 State, Tribal, and local governments during the environmental review process; and meet
24 environmental, climate change, and environmental justice objectives." ECF No. 88 at 1-2
25 (citing Decl. of Matthew Lee-Ashley, ECF No. 54-1 ¶ 11). CEQ also explained that the "the
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27 ¹ Counsel for Federal Defendants has conferred with counsel for Defendant-Intervenors
28 regarding the requested extension of the stay. Defendant-Intervenors take no position on that
request.

1 Office of Management and Budget’s [(“OMB”)] Office of Information and Regulatory
2 Affairs’ [(“OIRA”)] forthcoming Spring 2021 Unified Agenda of Regulatory Actions will
3 include additional details regarding CEQ’s planned regulatory actions.” ECF No. 54-1 ¶ 12.

4 Shortly after that status report was filed, OIRA published the Spring 2021 Unified
5 Agenda. The Agenda identified three planned CEQ regulatory actions to address the 2020
6 Rule: (1) a rulemaking to extend the deadline by two years for federal agencies to develop or
7 revise proposed procedures for implementing the 2020 Rule (interim final rule tentatively set
8 for June 2021);² (2) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020
9 Rule (notice of proposed rule tentatively set for July 2021);³ and (3) a “Phase 2” rulemaking
10 proposing broader changes to the 2020 Rule (notice of proposed rule tentatively set for
11 November 2021).⁴

12 CEQ has now completed the first of those three regulatory actions, and has reached a
13 significant milestone in its progress toward completing the second action. In accordance with
14 the plan identified in the Unified Agenda, CEQ published an interim final rule on June 29,
15 2021 that amended 40 C.F.R. § 1507.3(b) to extend the time for agencies to develop or revise
16 procedures implementing the 2020 Rule. Deadline for Agencies to Propose Updates to Nat’l
17 Env’tl Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021); *see* Decl. of Matthew Lee-
18 Ashley ¶ 12 (Exhibit A). The rule “provid[es] Federal agencies an additional two years, until
19 September 14, 2023, to propose revisions to their NEPA procedures” to “allow Federal
20 agencies to avoid wasting resources developing procedures based upon regulations that CEQ
21 may repeal or substantially amend.” 86 Fed. Reg. at 34,155-56. The rule further explains that
22 CEQ “has substantial concerns about the legality of the 2020 Rule, the process that produced
23 it, and whether the 2020 Rule meets the nation’s needs and priorities,” and intends “to address
24 these issues through further rulemaking.” *Id.* at 34,155.

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26 ² <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA08>.

27 ³ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA05>.

28 ⁴ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA07>.

1 Further, on August 2, 2021, CEQ transmitted to OMB for review the proposed “Phase
2 1” rulemaking envisioned in the Regulatory Agenda. Ex. A ¶ 13.⁵ This Phase 1 rule would
3 make “a narrow set of changes to the 2020 [Rule]” to help address CEQ’s goals of
4 “comply[ing] with the law; meet[ing] the environmental, climate change, and environmental
5 justice objectives of E.O.s 13990 and 14008; ensur[ing] full and fair public involvement in the
6 NEPA process; provid[ing] regulatory certainty to stakeholders; and promot[ing] better
7 decision making consistent with NEPA’s statutory requirements.” See Ex. A ¶ 11. CEQ
8 expects to publish notice of the proposed “Phase 1” rulemaking in the Federal Register once
9 OMB completes its interagency review process, likely within the next 90 days. Ex. A ¶ 13-
10 14.⁶

11 Although CEQ did not meet the goal set out in the Spring 2021 Unified Regulatory
12 Agenda for publication of its Phase 1 proposed rule by July 2021, CEQ is nevertheless moving
13 expeditiously. Development of the Phase 1 proposed rule took longer than anticipated due to
14 CEQ’s limited resources as well as the need to confer with a broad range of agencies. Ex. A
15 ¶¶ 15, 18. At present, CEQ is taking steps to develop a “Phase 2” rulemaking and intends to
16 issue a notice of proposed “Phase 2” rulemaking after it finalizes and publishes a final “Phase
17 1” rule in the Federal Register. *Id.* ¶ 16.

18 Given the tangible progress CEQ has made towards revising the 2020 Rule, Federal
19 Defendants believe a continued stay of this matter is proper to permit CEQ additional time to
20 continue its rulemaking progress. The Supreme Court has held that “the power to stay
21 proceedings is incidental to the power inherent in every court to control the disposition of the
22 causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”

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24 ⁵ See also <https://www.reginfo.gov/public/do/eoDetails?rrid=187562>.

25 ⁶ Under Executive Order 12866, agencies must submit “significant” proposed rules to OIRA for
26 advance review. EO 12866 § 6(A), 58 Fed. Reg. 51735 (Sept. 30, 1993). OIRA then has 90
27 days to complete its review (subject to one 30-day extension). *Id.* § 6(b)(2)(B). An agency
28 cannot publish the proposed rule in the Federal Register until OIRA completes its review or the
time for OIRA to complete its review expires. *Id.* § 8. The Phase 1 proposed rule has been
determined to be “significant” for purposes of the EO 12866 review process. Ex. A ¶ 13.

1 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A district court has broad discretion in
2 granting a motion for stay, “particularly in this time of scarce judicial resources and crowded
3 dockets.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). A court weighs
4 three factors in determining whether to grant a stay: (1) “the possible damage which may
5 result from the granting of a stay”; (2) “the hardship or inequity which a party may suffer in
6 being required to go forward”; and (3) “the orderly course of justice measured in terms of the
7 simplifying or complicating of issues, proof, and questions of law which could be expected to
8 result from a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Here, each factor
9 weighs in favor of the Court continuing to stay this litigation.

10 First, a stay is appropriate because CEQ has undertaken administrative actions that will
11 bear significantly upon this case, and moving forward with litigation would interfere with
12 those actions and cause hardship to CEQ. As the Ninth Circuit has explained,

13 A trial court may, with propriety, find it is efficient for its own docket and
14 the fairest course for the parties to enter a stay of an action before it, pending
15 resolution of independent proceedings which bear upon the case. This rule
16 applies whether the separate proceedings are judicial, *administrative*, or
arbitral in character, and does not require that the issues in such proceedings
are necessarily controlling of the action before the court.

17 *Leyva v. Certified Grocers of Cal.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (emphasis added).

18 This is just such a case.

19 Specifically, CEQ is now well underway in its reconsideration of the 2020 Rule and
20 has begun taking the “expeditious action” that Plaintiffs previously complained was absent.
21 ECF 54 at 6. CEQ has issued an interim final rule extending the time for agencies to propose
22 their own implementing regulations; it is currently in the process of proposing an initial
23 “Phase 1” revision to the 2020 Rule; and it anticipates further proposed amendments to follow
24 in a Phase 2 rule. Ex. A ¶ 16. In the interim CEQ is working with agencies to minimize
25 conflicts posed by the 2020 Rule and helping agencies implement NEPA consistent with EOs
26 13990 and EO 14008, steps that minimize any harm to Plaintiffs. Ex. A. ¶ 17. These rules
27 and actions will—and in the case of the interim final rule, have already begun to—affect, and
28 potentially narrow, or even moot, the issues before this Court.

1 Against that progress, continuing to litigate this case would interfere with CEQ’s
2 ongoing rulemaking process and its inherent authority to reconsider and to revise, replace, or
3 repeal the 2020 Rule. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545
4 U.S. 967, 981 (2005); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *ASSE*
5 *Int’l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016). Lifting the stay would force
6 CEQ—a very small agency—to redirect its limited resources from its reconsideration process
7 to litigation defending the very action it is reconsidering, and to consequently structure its
8 proposed rulemakings around the risks posed by pending litigation, rather than the agency’s
9 priorities and expertise. The Court should decline to permit ongoing litigation to interfere
10 with CEQ’s administrative process. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 558
11 (9th Cir. 1989) (“The Supreme Court has warned courts not to intrude on administrative
12 functions.”).

13 Second, a stay will preserve the Court and the Parties’ resources, given Plaintiffs
14 challenge a rule that the agency has already begun to change. *See Gustavson v. Mars, Inc.*,
15 No. 13-4537-LHK, 2014 WL 6986421, at *3 (N.D. Cal. 2014) (“[C]onsiderations of judicial
16 economy are highly relevant” in determining whether to grant a stay. (citation omitted)).
17 When an agency has already begun the process of reconsidering its own action, and has
18 already begun to take steps to amend that action, it is “prudent and efficient” to “giv[e] the
19 relevant agency the opportunity to reconsider and rectify an erroneous decision without further
20 expenditure of judicial resources.” *ASSE Int’l*, 182 F. Supp. 3d at 1063; *see also Ethyl Corp.*
21 *v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (noting that courts generally “prefer[] to allow
22 agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources
23 reviewing a record that both sides acknowledge to be incorrect or incomplete”).

24 Third and finally, a 90-day extension of the stay would not prejudice Plaintiffs. CEQ
25 is in the process of reconsidering the 2020 Rule to ensure that NEPA is implemented in a
26 manner consistent with the policies set forth in EO 13990 and EO 14008, many of which
27 implicate the same concerns that Plaintiffs have raised in this litigation. Ex. A ¶ 8; 86 Fed.
28 Reg. at 7,037; Tackling the Climate Crisis at Home & Abroad, 86 Fed. Reg. at 7,619, 7,629.

1 For example, consistent with those executive orders—and as noted in the prior status
2 reports—CEQ is currently reconsidering the 2020 Rule’s treatment of, and effect on,
3 environmental justice, climate change, and public participation in the NEPA process—all
4 issues raised by Plaintiffs here. Ex. A ¶ 8; Am. Compl. ¶¶ 215 (public participation); 213,
5 265, 274 (environmental justice); 212 (climate change), ECF No. 22. CEQ has also identified
6 that “some of the changes made to the NEPA regulations [in the 2020 Rule] create confusion
7 with respect to NEPA implementation, break from longstanding caselaw interpreting NEPA’s
8 statutory requirements, and may have the purpose or effect of improperly limiting relevant
9 NEPA analysis, with negative repercussions in critical areas such as climate change and
10 environmental justice.” 86 Fed. Reg. at 34,155; *see also* Ex. A ¶ 9; Am. Compl. ¶¶ 211, 311
11 (effects); 218, 227 (departure from longstanding interpretations).

12 In addition, although Plaintiffs claim that restarting the litigation is necessary to
13 expeditiously address the harms they allege are caused by implementation of the 2020 Rule,
14 any such harm could more effectively be addressed by other means. Specifically, Plaintiffs
15 have the option to challenge NEPA processes taken under the 2020 Rule as applied to
16 individual projects if and when such issues arise—including by seeking preliminary injunctive
17 relief—to the extent they believe those processes may threaten imminent, concrete harm. *See*
18 *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (Plaintiff “will have ample
19 opportunity later to bring [their] legal challenge” in the context of a future agency action
20 applying the 2020 Rule “when harm is more imminent and more certain.”). Indeed, another
21 court in a virtually identical case dismissed challenges to the 2020 NEPA Rule on grounds that
22 plaintiffs’ claims were unripe and that “plaintiffs do not have standing under any theory
23 because they have not established that the 2020 Rule has caused or imminently will cause
24 them any concrete injury.” *See Wild Virginia v. Council on Env’t Quality*, — F. Supp. 3d. —,
25 No. 20-45, 2021 WL 2521561, at *8-9 (W.D. Va. June 21, 2021), *appeal docketed*, No. 21-
26 1839 (4th Cir. Aug. 2, 2021). To that end, that court recognized that “[w]hen a particular
27 agency renders a decision on a particular project following a procedure that, in the plaintiffs’
28 view, does not meet the requirements of NEPA, the plaintiffs will then be able to pursue a

1 legal challenge.” *Id.* As in *Wild Virginia*, Plaintiffs here will have ample opportunity to bring
2 a legal challenge if and when harm becomes more imminent and more certain.

3 By contrast, there is no guarantee that continued litigation in this case would resolve
4 Plaintiffs’ concerns any faster than CEQ’s continued rulemaking efforts. If litigation
5 commences, this Court would need to first resolve Federal Defendants’ pending motion to
6 dismiss (after Federal Defendants file their reply in support of that motion), and the Parties
7 would then need to brief the merits.⁷ That process is likely to take, at minimum, the remainder
8 of 2021. It is therefore unlikely this Court would reach the merits substantially before CEQ
9 finalizes its “Phase 1” rulemaking (and possibly even before CEQ issues a “Phase 2” notice of
10 proposed rulemaking).

11 In sum, in the little over six months that have passed since the inauguration, CEQ has
12 identified numerous and substantial concerns with the 2020 Rule, formulated a proposed
13 three-part rulemaking plan to address those concerns, issued the first of those rules as an
14 interim final rule, and stands poised to publish the second proposed rule as soon as OMB
15 completes its review. CEQ is actively working to reconsider the 2020 Rule as quickly as is
16 feasible, and proceeding with the litigation now would interfere with that administrative
17 process and divert the Court’s and the Parties’ resources without any certainty that litigation
18 will relieve Plaintiffs’ concerns sooner than CEQ’s rulemaking process. The Court should
19 therefore continue the stay for 90 days to allow for completion of the OMB review process
20 and publication of the proposed “Phase 1” rule.

21 Alternatively, if the Court denies Federal Defendants’ request to extend the stay,
22 Federal Defendants respectfully request that the Court set a deadline of September 3, 2021 for
23 Federal Defendants’ reply in support of their motion to dismiss to allow Federal Defendants
24 sufficient time to finalize the brief and allow for review both within CEQ and the Department
25 of Justice.

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28 ⁷ Federal Defendants would oppose any efforts to proceed with summary judgment before
resolution of their motion to dismiss for lack of jurisdiction.

1 **Plaintiffs' Position**

2 Plaintiffs Alaska Community Action on Toxics et al. (“ACAT”) oppose a fourth stay in
3 this important case. ACAT acknowledges and appreciates the federal defendants’ recognition
4 that the 2020 Rule is irredeemably flawed, as well as its efforts to resolve those flaws through a
5 multi-step administrative rulemaking process. However, as ACAT has documented repeatedly,
6 the on-the-ground environmental harm of the 2020 Rule requires is serious and ongoing. *See*
7 ECF 54 at 6; ECF 46 at 20 (documenting current use of 2020 Rule for environmentally damaging
8 projects). Because the 2020 Rule is procedurally and substantively unlawful, it cannot remain in
9 place during the multi-year administrative process required to address its deep flaws.

10 CEQ has shared with ACAT that a *proposed* “Phase I” rule is in the interagency review
11 process and could be finalized within 90 days. ACAT has only limited information on the
12 substance of the proposed rule, which is not yet public. However, in conversations with CEQ,
13 and in representations to the public, CEQ has emphasized that the proposed Phase I rule is
14 “narrow” in scope.⁸ ACAT’s complaint, in contrast, is sweeping, identifying numerous
15 procedural irregularities and substantive flaws in the 2020 Rule. These problems will not be
16 solved by a “narrow” Phase I rule. Moreover, the Phase I Rule will not be finalized before the
17 end of this year at best in any event.

18 A Phase II rule, in which CEQ plans to implement “broader” changes to the 2020 Rule,
19 remains at an early phase of development.⁹ There is no schedule for promulgation of a proposed
20 Phase II rule, nor any indication of its content. If the development of the 2020 Rule is any guide,
21 broader changes to NEPA implementing regulations will be controversial and time-consuming.
22 Accordingly, it will likely take many months, or even years, before ACAT’s serious concerns
23 with the 2020 Rule are addressed through CEQ’s anticipated rulemaking process, and there is no
24 guarantee that CEQ’s proposed solutions will be satisfactory. Meanwhile, the environmental
25 harm and procedural havoc created by the 2020 Rule will continue.

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28 ⁸ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA05>

⁹ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA07>

1 Applying the stay factors to this situation reveals that the requested stay should be
2 denied, and the case should proceed expeditiously. First, the damage from granting the stay is
3 significant because it means that a Rule that all parties agree is unlawful will continue to be
4 implemented. As a practical matter, the question before the Court is not whether a stay should
5 be granted for 90 days, since the only thing that will happen in that time frame is promulgation
6 of a proposed rule rather than a final rule. Moreover, a final “narrow” Phase I rule would at best
7 resolve only a handful of ACAT’s claims. CEQ effectively is asking this Court to endorse a
8 multi-year administrative process that leaves an unlawful rule in place while its flaws are
9 resolved. As ACAT has demonstrated and CEQ has not contested, ongoing implementation of
10 the 2020 Rule is resulting in real harm to the environment, to ACAT’s detriment.

11 Nor is there any “hardship or inequity” which CEQ may suffer from being required to
12 proceed with this litigation. Since all parties appear to agree that the rule is procedurally and
13 substantively unlawful, the only question is whether the rules should be vacated—and the
14 previous version of NEPA’s implementing rules restored—while the new rulemaking process
15 proceeds. While CEQ is correct that normally an agency should be given some latitude to cure
16 its own errors before a Court weighs in, that is not the case when the unlawful rules will continue
17 to be implemented across the entire federal government for a period of years, and there is no
18 assurance that ACAT’s concerns will ultimately be resolved in any event.

19 Finally, the “orderly course of justice” supports denial of the stay. CEQ incorrectly
20 argues the ACAT’s claims are unripe, claims that it has raised in its motion to dismiss. These
21 unfounded arguments have no place in a request for a stay. And ACAT may not be able to raise
22 many of the claims it has raised in this case—including CEQ’s failure to follow proper
23 procedures in adopting the 2020 Rule—in site-specific challenges to agency action that relies on
24 such rules. Indeed, such cases would involve different defendants, who would presumably assert
25 that they were merely relying on CEQ’s rule. Moreover, the flaws in the 2020 Rule are
26 cumulative to one another, making piecemeal litigation against component parts both inefficient
27 and potentially ineffective. Given that the parties are in alignment that the 2020 Rule needs to be
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1 abandoned in whole or in part, the “orderly course of justice” supports resolving those issues and
2 vacating the Rule expeditiously in this case.

3 ACAT respectfully requests the following relief:

- 4 a) Deny federal defendants’ request to extend the stay in this matter;
5 b) Set a deadline for any replies in support of the pending motions to dismiss within 14 days
6 of the Court’s order, which is consistent with CEQ’s proposal in the last request for stay;
7 c) Direct the parties to file a status report within 14 days of this Court’s order identifying: i.
8 which claims ACAT intends to move forward with; ii. which claims CEQ expects to contest or
9 concede; iii. a proposed briefing schedule for resolution of such claims and/or any remedy.

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11 Respectfully submitted this 5th day of August, 2021.

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