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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 AND UNOPPOSED MOTION TO EXTEND STAY OF CASE BY 120 DAYS

Pursuant to this Court’s August 6, 2021 Order Extending Stay of Case by 90 Days and Scheduling Status Conference (ECF No. 57), the Parties hereby submit this joint status report. The Parties to the related case before this Court, *California v. CEQ*, No. 3:20-cv-06057-RS (N.D. Cal.), are submitting a similar joint status report in that case.

1 Federal Defendants and Plaintiffs have conferred regarding future proceedings in this
2 case, and Plaintiffs do not oppose Federal Defendants’ request to extend the stay by an
3 additional 120 days to accommodate the Council on Environmental Quality’s (“CEQ”)
4 rulemaking process, including its goal of issuing a final Phase 1 rule in February 2022.
5 Counsel for Federal Defendants has conferred with Intervenor-Defendants who advise that
6 they take no position on the extension of the stay.

7 In support of their request to extend the stay by 120 days, Federal Defendants state the
8 following:

9 1. Plaintiffs challenge CEQ’s July 16, 2020 rulemaking entitled “Update to the
10 Regulations Implementing the Procedural Provisions of the National Environmental Policy
11 Act,” 85 Fed. Reg. 43,304 (July 16, 2020) (“2020 Rule”).

12 2. As has been explained in past status reports, in Executive Order 13990
13 President Biden directed federal agencies to “immediately review and, as appropriate and
14 consistent with applicable law, take action to address the promulgation of Federal regulations
15 and other actions during the last 4 years that conflict” with “important national objectives,”
16 such as “listen[ing] to the science”; “improv[ing] public health and protect[ing] our
17 environment”; “reduc[ing] greenhouse gas emissions”; and “prioritiz[ing] . . . environmental
18 justice.” Protecting Public Health & the Env’t & Restoring Science To Tackle the Climate
19 Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021). The White House specifically identified the 2020
20 Rule as subject to these requirements.¹

21 3. In response to EO 13990, CEQ began its reconsideration process with the goal
22 of considering the “full array of questions and substantial concerns connected to the 2020
23 Rule,” including issues “directly relevant to this litigation.” Decl. of Matthew Lee-Ashley ¶ 8,
24 attached as Exhibit A.

25 4. On the basis of CEQ’s ongoing reconsideration of the 2020 Rule, Federal
26

27 ¹ Fact Sheet: List of Agency Actions for Review,
28 <https://www.whitehouse.gov/briefingroom/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

1 Defendants have sought to stay this case in periodic status reports, and the Court has granted
2 those requests. *See* ECF Nos. 50-51, 54-55, 56-57.

3 5. As explained in prior status reports, in the Spring 2021 Unified Agenda of
4 Regulatory and Deregulatory Actions published by the Office of Management and Budget’s
5 Office of Information and Regulatory Affairs (“OIRA”), CEQ identified three planned
6 regulatory actions to address the 2020 Rule: (1) a rulemaking to extend the deadline by two
7 years for federal agencies to develop or revise proposed procedures for implementing the 2020
8 Rule;² (2) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020 Rule;³ and
9 (3) a “Phase 2” rulemaking proposing broader changes to the 2020 Rule.⁴ *See also* Ex. A ¶ 11.

10 6. On June 29, 2021, CEQ completed the first of those three regulatory actions
11 when it published an interim final rule that amended 40 C.F.R. § 1507.3(b) to extend the time
12 for agencies to develop or revise procedures implementing the 2020 Rule. Deadline for
13 Agencies to Propose Updates to Nat’l Env’tl Policy Act Procedures, 86 Fed. Reg. 34,154
14 (June 29, 2021); *see* Ex. A ¶ 12. The rule “provid[es] Federal agencies an additional two
15 years, until September 14, 2023, to propose revisions to their NEPA procedures” to “allow
16 Federal agencies to avoid wasting resources developing procedures based upon regulations
17 that CEQ may repeal or substantially amend.” 86 Fed. Reg. at 34,155-56.

18 7. On October 7, 2021, CEQ published a Notice of Proposed Rulemaking for the
19 Phase 1 rule identified in the Regulatory Agenda. Nat’l Env’tl Policy Act Implementing
20 Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021); *see also* Ex. A ¶ 13. The Notice of
21 Proposed Rulemaking proposes three changes to the 2020 Rule:

- 22 a. Eliminate language in the description of purpose and need for a proposed
23 action when it is an agency’s statutory duty to review applications for
24 authorization (40 CFR 1502.13) and make a conforming edit to the

25 _____
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 definition of “reasonable alternatives” (40 CFR 1508.1(z));

2 b. Remove limitations on agency NEPA procedures for implementing CEQ’s
3 NEPA Regulations (40 CFR 1507.3); and

4 c. Return to the definitions of “effects” in the prior, longstanding 1978 NEPA
5 Regulations (40 CFR 1508.1(g)).

6 86 Fed. Reg. at 55,759; *see also* Ex. A ¶ 13.

7 8. The comment period on the proposed rule is currently set to close November
8 22, 2021. Ex. A ¶ 14. After the comment period closes, CEQ will need to review the
9 comments received, prepare a draft of the final rule, and submit that draft to OIRA for review.
10 Because the proposed Phase 1 rule is a significant regulatory action for purposes of Executive
11 Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993), OIRA has
12 up to 90 days to complete its review of the draft final rule. CEQ’s present goal is to complete
13 the Phase 1 rulemaking process and issue a final Phase 1 rule in February 2022. Ex. A ¶ 15.

14 9. CEQ is also currently working on a Phase 2 rulemaking, the third of the three
15 regulatory actions contemplated in the Spring 2021 Regulatory Agenda. CEQ has held
16 approximately seven meetings with outside stakeholders between September 10, 2021 and
17 October 27, 2021 to discuss the planned Phase 2 rulemaking, and intends to hold several
18 additional meetings with federal agencies and outside stakeholders through the end of
19 December 2021. Ex. A ¶ 17. CEQ’s present goal is to issue a Notice of Proposed Rulemaking
20 for the Phase 2 rule in June 2022. *Id.* ¶ 16.

21 10. In addition, “[w]hile it proceeds with this phased rulemaking process, CEQ is
22 assisting federal agencies in implementing NEPA in a manner consistent with EOs 13990 and
23 14008, as well as CEQ’s goals.” *Id.* ¶ 18.

24 11. To allow CEQ time to complete the Phase 1 rulemaking process and continue
25 to make progress on a Phase 2 proposed rule, Federal Defendants seek an extension of the stay
26 by 120 days, until late February, when CEQ anticipates finalizing the Phase 1 rule. *See id.* ¶
27 15.

28 12. The requested stay is consistent with the Court’s broad discretion to stay

1 proceedings and defer judicial review. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)
2 (“[T]he power to stay proceedings is incidental to the power inherent in every court to control
3 the disposition of the causes on its docket with economy of time and effort for itself, for
4 counsel, and for litigants.”). It is also consistent with CEQ’s inherent authority to reconsider
5 and to revise, replace, or repeal a prior decision to the extent permitted by law and supported
6 by a reasoned explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515
7 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

8 13. An extension of the stay is also in the interest of judicial economy and avoids
9 any interference in the administrative process. Specifically, allowing CEQ sufficient time to
10 complete its reconsideration process and develop and issue its new rulemakings may narrow,
11 or potentially even eliminate, some or all of the issues before this Court. *See ASSE Int’l, Inc.*
12 *v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (When an agency has already begun
13 the process of reconsidering its own action, and has already begun to take steps to amend that
14 action, it is “prudent and efficient” to “giv[e] the relevant agency the opportunity to reconsider
15 and rectify an erroneous decision without further expenditure of judicial resources.”). In
16 contrast, lifting the stay would force CEQ—a very small agency currently engaged in two
17 rulemaking processes—to redirect its limited resources from rulemaking to litigation
18 defending the very action it is reconsidering. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d
19 551, 558 (9th Cir. 1989) (“The Supreme Court has warned courts not to intrude on
20 administrative functions.”).

21 14. Plaintiffs do not oppose Federal Defendants’ request for a 120-day extension of
22 the stay at this time. While Plaintiffs appreciate CEQ’s recognition of the problems of the
23 2020 Rule, and efforts to address those problems, Plaintiffs remain deeply concerned that
24 major aspects of the Rule will remain in place during the extended time period needed to
25 finalize the Phase I and II rulemakings. Plaintiffs continue to believe that vacatur of the 2020
26 Rule is warranted under both governing law and the facts on the ground. Accordingly,
27 Plaintiffs’ non-opposition to this motion should not be interpreted to mean Plaintiffs will agree
28 to future requests for stays of this litigation if the 2020 Rule continues to be implemented in a

1 way that harms their interests, and/or if progress towards finalization of a Phase II rule that
2 addresses the major problems identified in this lawsuit is not sustained.

3 15. Plaintiffs and Federal Defendants propose that the Parties file a further joint
4 status report at the end of the 120-day extension period regarding future proceedings in this
5 case.

6 For the foregoing reasons, Federal Defendants respectfully request the Court enter an
7 order staying the case for an additional 120 days and requiring the Parties to submit a further
8 status report seven days prior to the expiration of the stay.

9 A proposed order is attached.

10 Respectfully submitted this 28th day of October, 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.