

1 LISA L. RUSSELL  
 2 Deputy Assistant Attorney General  
 3 U.S. Department of Justice  
 4 Environment and Natural Resources Division  
 CLARE BORONOW, admitted to MD Bar  
 5 999 18th Street, South Terrace, Suite 370  
 Denver, CO 80202  
 6 Tel: (303) 844-1362 / Fax: (303) 844-1350  
[clare.boronow@usdoj.gov](mailto:clare.boronow@usdoj.gov)  
 7 GREGORY M. CUMMING, admitted to DC Bar  
 150 M Street, N.E.  
 8 Washington, D.C. 20002  
 Tel: (202) 598-0414 / Fax: (202) 305-0506  
 9 [gregory.cumming@usdoj.gov](mailto:gregory.cumming@usdoj.gov)

10 *Counsel for Defendants*

11  
 12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN FRANCISCO DIVISION

15  
 16 ALASKA COMMUNITY ACTION ON  
 TOXICS, et al.,

17 Plaintiffs,

18  
 19 v.

20 COUNCIL ON ENVIRONMENTAL  
 QUALITY and BRENDA MALLORY,  
 21 in her official capacity as Chair of the  
 Council on Environmental Quality,  
 22

23 Defendants.

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

**JOINT STATUS REPORT AND  
 UNOPPOSED MOTION TO EXTEND  
 STAY OF CASE BY 120 DAYS**

24  
 25 Pursuant to this Court’s February 25, 2022 Order Extending Stay of Case by 120  
 26 Days (ECF No. 63), the Parties hereby submit this joint status report. The Parties to the  
 27 related case before this Court, *California v. CEQ*, No. 3:20-cv-06057-RS (N.D. Cal.), are  
 28 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 Notice of Proposed Rulemaking for its  
5 Phase 2 rule in the coming months. Counsel for Federal Defendants has conferred with  
6 Intervenor-Defendants, who advise that 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.<sup>1</sup>

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  
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27  
28 <sup>1</sup> 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/>.

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, 59-60, 62-63.

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;<sup>2</sup> (2) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020 Rule;<sup>3</sup> and  
9 (3) a “Phase 2” rulemaking proposing broader changes to the 2020 Rule.<sup>4</sup> *See also* Ex. A ¶¶  
10 10-11.

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

19 7. Since the last status report, on April 20, 2022, CEQ published the final Phase 1  
20 rule, completing the second of the three contemplated regulatory actions. The final Phase 1  
21 rule, titled National Environmental Policy Act Implementing Regulations Revisions, 87 Fed.  
22 Reg. 23,453 (April 20, 2022), became effective on May 20, 2022. The rule makes three  
23 revisions to CEQ’s regulations:

24 a. It revises 40 C.F.R. § 1502.13 to “remov[e] the requirement that an agency  
25

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

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

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

1 base the purpose and need on the goals of an applicant and the agency’s  
 2 statutory authority” in order to “clarif[y] that agencies have discretion to  
 3 consider a variety of factors when assessing an application for an  
 4 authorization.” It also “makes a conforming edit to the definition of  
 5 ‘reasonable alternatives’” in 40 C.F.R. § 1508.1(z).

6 b. It revises 40 C.F.R. § 1507.3 “to remove language that could be construed  
 7 to limit agencies’ flexibility to develop or revise procedures to implement  
 8 NEPA specific to their programs and functions that may go beyond the  
 9 CEQ regulatory requirements.”

10 c. It revises the definition of “effects” in 40 C.F.R. § 1508.1 “to include  
 11 direct, indirect, and cumulative effects.”

12 87 Fed. Reg. at 23,453; *see also* Ex. A ¶ 12. CEQ explained that it made these revisions “in  
 13 order to better align the provisions with CEQ’s extensive experience implementing NEPA and  
 14 unique perspective on how NEPA can best inform agency decision making, as well as  
 15 longstanding Federal agency experience and practice, NEPA’s statutory text and purpose to  
 16 protect and enhance the quality of the human environment, including making decisions  
 17 informed by science, and case law interpreting NEPA’s requirements.” 87 Fed. Reg. at  
 18 23,453.

19 8. CEQ is continuing to work on the Phase 2 rulemaking, the third of the three  
 20 contemplated regulatory actions to address the 2020 Rule. In the Spring 2022 Regulatory  
 21 Agenda, CEQ indicated that it hopes to issue a Notice of Proposed Rulemaking for the Phase 2  
 22 rule in August 2022.<sup>5</sup> In furtherance of that goal, CEQ has held approximately 47 meetings  
 23 with outside stakeholders between September 10, 2021 and June 17, 2022 to discuss the Phase  
 24 2 rulemaking. Ex. A ¶ 14.

25 9. In addition, “[w]hile it proceeds with this phased rulemaking process, CEQ is  
 26 assisting federal agencies in implementing NEPA in a manner consistent with EOs 13990 and  
 27

28 <sup>5</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=0331-AA07>.

1 14008, as well as CEQ’s goals.” *Id.* ¶ 15.

2 10. CEQ has worked diligently to progress through its phased rulemaking process  
3 as efficiently as possible. To allow CEQ to continue to make progress on its ongoing efforts to  
4 reconsider the 2020 Rule, Federal Defendants seek an extension of the current stay by 120  
5 days, until late October. By that time, CEQ is hopeful that it will have either issued the Notice  
6 of Proposed Rulemaking for the Phase 2 rule or made additional significant progress toward  
7 that step.

8 11. The requested stay is consistent with the Court’s broad discretion to stay  
9 proceedings and defer judicial review. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)  
10 (“[T]he power to stay proceedings is incidental to the power inherent in every court to control  
11 the disposition of the causes on its docket with economy of time and effort for itself, for  
12 counsel, and for litigants.”). It is also consistent with CEQ’s inherent authority to reconsider  
13 and to revise, replace, or repeal a prior decision to the extent permitted by law and supported  
14 by a reasoned explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515  
15 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

16 12. An extension of the stay is also in the interest of judicial economy and avoids  
17 any interference in the administrative process. Specifically, allowing CEQ sufficient time to  
18 complete its reconsideration process and develop and issue its new rulemakings may narrow,  
19 or potentially even eliminate, some or all of the issues before this Court. *See ASSE Int’l, Inc.*  
20 *v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (When an agency has already begun  
21 the process of reconsidering its own action, and has already begun to take steps to amend that  
22 action, it is “prudent and efficient” to “giv[e] the relevant agency the opportunity to reconsider  
23 and rectify an erroneous decision without further expenditure of judicial resources.”). In  
24 contrast, lifting the stay would force CEQ—a very small agency currently engaged in a  
25 substantial rulemaking process—to redirect its limited resources from rulemaking to litigation  
26 defending the very action it is reconsidering. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d  
27 551, 558 (9th Cir. 1989) (“The Supreme Court has warned courts not to intrude on  
28 administrative functions.”).

1           13. Plaintiffs do not oppose Federal Defendants' request for a 120-day extension of  
2 the stay at this time. While Plaintiffs appreciate CEQ's recognition of the problems of the  
3 2020 Rule, and efforts to date to address those problems, Plaintiffs remain deeply concerned  
4 that major aspects of the Rule remain in place during these rulemakings. Plaintiffs continue to  
5 believe that vacatur of the 2020 Rule is warranted under both governing law and the facts on  
6 the ground. Accordingly, Plaintiffs' non-opposition to this motion should not be interpreted to  
7 mean Plaintiffs will agree to future requests for stays of this litigation if the 2020 Rule  
8 continues to be implemented in a way that harms their interests, and/or if progress towards  
9 finalization of a Phase II rule that addresses the major problems identified in this lawsuit is not  
10 sustained.

11           14. Plaintiffs and Federal Defendants propose that the Parties file a further joint  
12 status report at the end of the 120-day extension period regarding future proceedings in this  
13 case.

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

17           A proposed order is attached.

18           Respectfully submitted this 23rd day of June, 2022.

19   LISA L. RUSSELL  
20   Deputy Assistant Attorney General

21   /s/ Clare Boronow  
22   CLARE BORONOW, admitted to MD Bar  
23   Senior Attorney  
24   U.S. Department of Justice  
25   Environment and Natural Resources Division  
26   Natural Resources Section  
27   999 18th Street, South Terrace, Suite 370  
28   Denver, CO 80202  
   Tel: (303) 844-1362  
   E-mail: [clare.boronow@usdoj.gov](mailto:clare.boronow@usdoj.gov)

   GREGORY M. CUMMING (D.C. Bar No. 1018173)  
   Trial Attorney

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Environment & Natural Resources Division  
Natural Resources Section  
150 M St., N.E.  
Washington, D.C. 20002  
(202) 598-0414 (phone)  
gregory.cumming@usdoj.gov

MATTHEW R. OAKES  
Senior Counsel  
Environment and Natural Resources Division  
Law and Policy Section  
U.S. Department of Justice  
Post Office Box 7415  
Washington, D.C. 20044  
Tel: (202) 514-2686  
E-mail: matthew.oakes@usdoj.gov

STEVEN BARNETT  
Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Law and Policy Section  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
Tel.: (202) 305-0472  
E-mail: steven.barnett@usdoj.gov

ALLEN BRABENDER  
Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Appellate Section  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
Tel.: (202) 514-5316  
E-mail: allen.brabender@usdoj.gov

*Counsel for Federal Defendants*

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*s/ Kristen Boyles*  
JAN E. HASSELMAN (WSBA # 29017)  
KRISTEN L. BOYLES (CSBA # 158450)  
[Admitted Pro Hac Vice]  
EARTHJUSTICE  
810 Third Avenue, Suite 610  
Seattle, WA 98104  
(206) 343-7340  
kboyles@earthjustice.org  
[jhasselman@earthjustice.org](mailto:jhasselman@earthjustice.org)

SUSAN JANE M. BROWN (OSBA # 054607)  
[Admitted Pro Hac Vice]  
WESTERN ENVIRONMENTAL LAW CENTER  
4107 N.E. Couch St.  
Portland, OR 97232  
(503) 914-1323  
[brown@westernlaw.org](mailto:brown@westernlaw.org)

*Attorneys for Plaintiffs*

GREGORY C. LOARIE (CSBA # 215859)  
EARTHJUSTICE  
50 California Street, Suite 500  
San Francisco, CA 94111  
(415) 217-2000  
[gloarie@earthjustice.org](mailto:gloarie@earthjustice.org)

*Local Counsel for Plaintiffs*

\* 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.



# Exhibit A

Declaration of Matthew Lee-Ashley

1 LISA L. RUSSELL Deputy Assistant Attorney General  
2 U.S. Department of Justice  
3 Environment and Natural Resources Division  
4 CLARE BORONOW, admitted to MD Bar  
5 999 18th Street, South Terrace, Suite 370  
6 Denver, CO 80202  
7 Tel: (303) 844-1362 / Fax: (303) 844-1350  
8 [clare.boronow@usdoj.gov](mailto:clare.boronow@usdoj.gov)

9 GREGORY M. CUMMING, admitted to DC Bar  
10 150 M Street, N.E.  
11 Washington, D.C. 20002  
12 Tel: (202) 598-0414 / Fax: (202) 305-0506  
13 [gregory.cumming@usdoj.gov](mailto:gregory.cumming@usdoj.gov)

14 *Counsel for Defendants*

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

ALASKA COMMUNITY ACTION ON  
TOXICS, et al.,

Plaintiffs,

v.

COUNCIL ON ENVIRONMENTAL  
QUALITY, et. al.,

Defendants.

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

**DECLARATION OF  
MATTHEW LEE-ASHLEY**

I, Matthew Lee-Ashley, declare as follows:

1. I serve as the Chief of Staff at the Council on Environmental Quality (CEQ). I was appointed to this position on April 11, 2021.

2. I submit this declaration in support of Federal Defendants' request for a stay in the June 23, 2022 joint status report in the above-captioned case.

1           3.       On July 16, 2020, under the Trump Administration, CEQ issued the rulemaking  
2 entitled Update to the Regulations Implementing the Procedural Provisions of the National  
3 Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (2020 Rule), to undertake whole-  
4 sale amendments to longstanding regulations implementing the National Environmental Policy  
5 Act (NEPA). As described below, the Biden Administration’s CEQ has substantial concerns  
6 about the effects of the 2020 Rule on public health; the nation’s land, water, and air quality;  
7 communities that have been historically marginalized and overburdened by pollution; the ability  
8 of citizens to have their voices heard in federal decision-making processes; and other issues,  
9 including the process by which the 2020 Rule was promulgated and the lawfulness of aspects of  
10 the 2020 Rule. CEQ is in the process of reconsidering the 2020 Rule and will take appropriate  
11 steps to engage stakeholders and the public in that process.  
12

13  
14           4.       CEQ’s reconsideration of the 2020 Rule responds to direction from President  
15 Biden.  
16

17           5.       On January 20, 2021, President Biden signed Executive Order 13990, Protecting  
18 Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO  
19 13990), to declare the Administration’s policy “to listen to the science; to improve public health  
20 and protect our environment; to ensure access to clean air and water; to limit exposure to  
21 dangerous chemicals and pesticides; to hold polluters accountable, including those who  
22 disproportionately harm communities of color and low-income communities; to reduce  
23 greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and  
24 expand our national treasures and monuments; and to prioritize both environmental justice and  
25 the creation of the well-paying union jobs necessary to deliver on these goals.” EO 13990 directs  
26 federal agencies to “immediately review and, as appropriate and consistent with applicable law,  
27  
28

1 take action to address the promulgation of Federal regulations and other actions during the last 4  
2 years that conflict with these important national objectives, and to immediately commence work  
3 to confront the climate crisis.” A White House fact sheet published on January 20, 2021 to  
4 accompany EO 13990 directs CEQ to review the 2020 Rule. EO 13990 further directs CEQ to  
5 rescind its 2019 draft guidance “Draft National Environmental Policy Act Guidance on  
6 Consideration of Greenhouse Gas Emissions.”  
7

8           6.       On January 27, 2021, President Biden signed Executive Order 14008, Tackling  
9 the Climate Crisis at Home and Abroad (EO 14008), to declare the Administration’s policy “that  
10 climate considerations shall be an essential element of United States foreign policy and national  
11 security,” and to “move quickly to build resilience, both at home and abroad, against the impacts  
12 of climate change that are already manifest and will continue to intensify according to current  
13 trajectories.”  
14

15           7.       On February 19, 2021, CEQ took its first formal step to implement EOs 13900  
16 and 14008 and revoked its “Draft National Environmental Policy Act Guidance on Consideration  
17 of Greenhouse Gas Emissions.” 86 Fed. Reg. 10,252.  
18

19           8.       CEQ has commenced a comprehensive reconsideration of the 2020 Rule to  
20 evaluate its legal basis, policy orientation, and conformance with Administration priorities,  
21 including the Administration’s commitment to addressing climate change and environmental  
22 justice. During this process, CEQ is considering the full array of questions and substantial  
23 concerns connected to the 2020 Rule. Some of the questions that CEQ is considering that are  
24 directly relevant to this litigation include:  
25

- 26           a.       Whether the 2020 Rule may adversely affect environmental justice or impair  
27 participation by environmental justice communities in the NEPA process;  
28

- 1           b. Whether the 2020 Rule may adversely affect climate change, climate resilience,  
2           or environmental quality generally;
- 3           c. Whether the 2020 Rule is consistent with administrative law principles or unduly  
4           restricts public and community participation, including participation by  
5           environmental justice communities and their members, or has the foreseeable  
6           effect of unduly restricting such participation;
- 7           d. Whether the 2020 Rule improperly or unlawfully circumscribes the range of  
8           alternatives, long recognized by regulation and caselaw to be the heart of an  
9           Environmental Impact Statement, or has the foreseeable effect of leading agencies  
10          to consider an improperly narrow range of alternatives;
- 11          e. Whether the 2020 Rule improperly or unlawfully circumscribes the environmental  
12          effects, including climate change effects, to be evaluated by federal agencies, or  
13          has the foreseeable effect of leading agencies to improperly circumscribe the  
14          environmental effects considered;
- 15          f. Whether the 2020 Rule improperly or unlawfully excludes certain actions from  
16          the definition of “major federal action” for purposes of NEPA’s applicability, or  
17          has the foreseeable effect of improperly excluding certain federal actions from  
18          review under NEPA.

19           9. CEQ is committed to ensuring that its regulations enable agencies to respond  
20          effectively to the climate crisis and the need to transition to a clean energy economy; identify and  
21          elevate the pressing and critical considerations of environmental justice; provide the public, and  
22          particularly environmental justice communities, with full and fair opportunities to inform federal  
23          decision making; and provide for sustainable economic development and job creation, including  
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1 by facilitating the development and restoration of critical infrastructure and climate resilient  
2 projects. CEQ is also committed to ensuring that its regulations conform to all legal requirements  
3 and are consistent with NEPA's purposes set forth by Congress.

4  
5 10. CEQ is conducting a phased rulemaking to identify necessary revisions to the  
6 2020 NEPA regulations in order to comply with the law; meet the environmental, climate  
7 change, and environmental justice objectives of EOs 13990 and 14008; ensure full and fair  
8 public involvement in the NEPA process; provide regulatory certainty to stakeholders; and  
9 promote better decision making consistent with NEPA's statutory requirements. A "Phase 1"  
10 rulemaking makes a narrow set of changes to the 2020 Rule to address these goals. (RIN 0331-  
11 AA05). A "Phase 2" rulemaking will propose broader changes to the 2020 Rule to address these  
12 goals. (RIN 0331-AA07).

13  
14 11. To allow agencies to avoid wasting resources developing procedures based upon  
15 regulations that CEQ may repeal or amend during the phased rulemakings, on June 29, 2021,  
16 CEQ published an interim final rule in the Federal Register amending 40 CFR 1507.3(b) to  
17 extend the deadline by two years (to September 14, 2023) for Federal agencies to develop new,  
18 or update existing, agency NEPA procedures. 86 Fed. Reg. 34,154 (June 29, 2021).

19  
20 12. CEQ issued the Phase 1 final rule on April 20, 2022. *See* National Environmental  
21 Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022); 40 C.F.R.  
22 §§ 1502, 1507, 1508 (2022). The final rule amended three regulatory provisions. First, CEQ  
23 revised 40 C.F.R. 1502.13 to remove the requirement that an agency base the purpose and need  
24 on the goals of an applicant and the agency's statutory authority in order to clarify that agencies  
25 have discretion to consider a variety of factors when assessing an application for an  
26 authorization, and made a conforming edit to the definition of "reasonable alternatives" in 40  
27  
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1 C.F.R. § 1508.1(z). Second, CEQ revised 40 C.F.R. 1507.3 to remove language that could be  
2 construed to limit agencies’ flexibility to develop or revise procedures to implement NEPA  
3 within their programs in a manner that may go beyond the CEQ regulatory requirements. And  
4 third, CEQ revised 40 C.F.R. 1508.1(g) to change the definition of “effects” to include direct,  
5 indirect, and cumulative effects. The final rule became effective on May 20, 2022.  
6

7 13. CEQ is also actively working to develop a “Phase 2” rulemaking. As stated in the  
8 Spring 2022 Unified Regulatory Agenda, CEQ’s present goal is to publish the “Phase 2” Notice  
9 of Proposed Rulemaking (NPRM) in August 2022. Before CEQ can publish the Phase 2  
10 NPRM, it will likely need to submit it to the Office of Management and Budget’s Office of  
11 Information and Regulatory Affairs’ (OIRA) which then has up to 90 days to complete its review  
12 process.  
13

14 14. CEQ is continuing to conduct outreach for the “Phase 2” NPRM to Federal  
15 agencies and outside stakeholders. CEQ has held approximately 47 meetings with outside  
16 stakeholders between September 10, 2021 and June 17, 2022 to discuss the “Phase 2”  
17 rulemaking.  
18

19 15. While it proceeds with this phased rulemaking process, CEQ is assisting federal  
20 agencies in implementing NEPA in a manner consistent with EOs 13990 and 14008, as well as  
21 CEQ’s goals outlined in Paragraph 9 above.  
22

23 16. CEQ is committed to completing this important work on the schedule described  
24 above, but is also mindful of its resources. CEQ has a small team of four attorneys and three  
25 NEPA staff. The agency has also brought on new temporary staff to assist with its numerous  
26 responsibilities. CEQ also confers with multiple federal agencies in connection with its  
27  
28

1 administrative activities so that the broad array of inter-agency perspectives is evaluated and  
2 considered before CEQ makes any final decisions.

3  
4  
5 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true  
6 and correct. Executed this 22nd day of June, 2022.

7 **MATTHEW** Digitally signed by  
8 **LEE-ASHLEY** MATTHEW LEE-ASHLEY  
Date: 2022.06.22  
16:03:05 -04'00'

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9 Matthew Lee-Ashley

10 Chief of Staff

11 Council on Environmental Quality



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

**[PROPOSED] ORDER EXTENDING STAY  
OF CASE BY 120 DAYS**

Having carefully considered Defendants' unopposed request to extend the stay of this case, and having found good cause to do so, this case is hereby stayed for an additional 120 days from the date the stay was previously set to expire, July 2, 2022, to October 31, 2022. A status conference in this case and the related case, *California v. CEQ*, No. 20-cv-06057-RS (N.D. Cal.), was also set for June 30, 2022, and is continued to \_\_\_\_\_. The parties must submit a joint status report regarding future proceedings on or before \_\_\_\_\_.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
RICHARD SEEBORG  
Chief United States District Judge