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

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

COUNCIL ON ENVIRONMENTAL
QUALITY, and BRENDA MALLORY,
in her official capacity as Chair of the
Council on Environmental Quality,¹

Defendants.

Case No. 3:20-cv-6057-RS

JOINT STATUS REPORT

Pursuant to this Court's April 9, 2021 Order Extending Stay of Case by 45 Days and
Scheduling Status Conference (ECF No. 84), the Parties hereby submit this joint status report.

¹ Pursuant to Fed. R. Civ. P. 25(d), Brenda Mallory is automatically substituted for Mary Neumayr as Chair of the Council on Environmental Quality.

The Parties to the related case before this Court, *Alaska Community Action on Toxics v. CEQ*, No. 3:20-cv-05199-RS (N.D. Cal.), are submitting a similar joint status report in that case.

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

Federal Defendants' Position

Federal Defendants respectfully seek an extension of the stay of this case by an additional 60 days.² Plaintiffs challenge the Council on Environmental Quality's ("CEQ") July 16, 2020 rulemaking entitled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Rule"). As Federal Defendants have explained in past status reports, in Executive Order 13990 President Biden directed federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict" with "important national objectives," such as "listen[ing] to the science"; "improv[ing] public health and protect[ing] our environment"; "reduc[ing] greenhouse gas emissions"; and "prioritiz[ing] . . . environmental justice." 86 Fed. Reg. 7,037, 7,037 (Jan. 25, 2021); *see* ECF No. 81 ¶ 2; ECF No. 83 ¶ 2. Pursuant to that direction, CEQ has begun reconsidering the 2020 Rule and, as part of that process, is considering whether to propose to amend or repeal the Rule in whole or in part. ECF No. 83 ¶ 4.

Federal Defendants seek a 60-day extension of the current stay to allow CEQ time to move forward with a rulemaking process to revise the 2020 Rule. As noted in the attached declaration, "CEQ will initiate rulemaking to propose amendments to the 2020 Rule to revise the NEPA implementing regulations to comply with the statute's text and goals; provide regulatory certainty to stakeholders; promote better decision making consistent with NEPA's statutory requirements; ensure appropriate coordination among Federal agencies, and State,

² Counsel for Federal Defendants has conferred with counsel for Defendant-Intervenors regarding the requested extension of the stay. Defendant-Intervenors take no position on that request.

1 Tribal, and local governments during the environmental review process; and meet
 2 environmental, climate change, and environmental justice objectives.” Decl. of Matthew Lee-
 3 Ashley ¶ 11, attached as Exhibit A. “The Office of Management and Budget’s Office of
 4 Information and Regulatory Affairs’ forthcoming Spring 2021 Unified Agenda of Regulatory
 5 Actions will include additional details regarding CEQ’s planned regulatory actions.” *Id.* ¶ 12.

6 Rather than returning to active litigation as Plaintiffs propose, Federal Defendants
 7 believe a further extension of the stay is the better course. CEQ has inherent authority to
 8 reconsider and to revise, replace, or repeal the 2020 Rule. *See Nat’l Cable &*
 9 *Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (noting an
 10 agency may assess “the wisdom of its policy on a continuing basis, . . . for example, in
 11 response to changed factual circumstances, or a change in administrations” (citations and
 12 quotations omitted); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)
 13 (discussing agency’s inherent ability to change position); *ASSE Int’l, Inc. v. Kerry*, 182 F.
 14 Supp. 3d 1059, 1063 (C.D. Cal. 2016) (“[A]dministrative agencies have an inherent authority
 15 to reconsider their own decisions, since the power to decide in the first instance carries with it
 16 the power to reconsider.” (quotation omitted)). Where, as here, an agency has already begun
 17 the process of reconsidering its own action and is likely to take steps to amend or repeal that
 18 action, proceeding with litigation is a waste of agency and court resources. *See ASSE Int’l*,
 19 182 F. Supp. 3d at 1063 (finding it “prudent and efficient” to “giv[e] the relevant agency the
 20 opportunity to reconsider and rectify an erroneous decision without further expenditure of
 21 judicial resources”); *see also Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)
 22 (noting that courts generally “prefer[] to allow agencies to cure their own mistakes rather than
 23 wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge
 24 to be incorrect or incomplete”).

25 In addition, continuing to litigate this case would interfere with CEQ’s ongoing
 26 administrative process by forcing the agency to redirect resources from its reconsideration
 27 process to litigation and to structure its administrative process around pending litigation, rather
 28 than the agency’s priorities and expertise. *See Thompson v. U.S. Dep’t of Lab.*, 885 F.2d 551,

1 558 (9th Cir. 1989) (“The Supreme Court has warned courts not to intrude on administrative
2 functions.”).

3 Against that administrative disruption, a 60-day extension of the stay would not
4 prejudice Plaintiffs. CEQ has committed to reconsidering the 2020 Rule precisely to ensure
5 that NEPA is implemented in a manner consistent with the policies set forth in EO 13990 and
6 EO 14008, many of which implicate the concerns that Plaintiffs have raised in this litigation.
7 Ex. A ¶ 8; 86 Fed. Reg. at 7,037; 86 Fed. Reg. at 7,619, 7,629. For example, consistent with
8 those executive orders, CEQ is currently reconsidering the 2020 Rule’s treatment of, and
9 effect on, environmental justice, climate change, and public participation in the NEPA
10 process—all issues raised in this case. Ex. A ¶ 8. CEQ intends to initiate rulemaking to
11 propose amendments to the 2020 Rule. Ex. A ¶ 11. A stay will allow CEQ to focus on taking
12 that step as expeditiously as possible rather than having to turn its attention to litigation.
13 Further, Plaintiffs continue to have the option to challenge individual NEPA processes taken
14 under the 2020 Rule as they arise, to the extent they may threaten imminent, concrete harm to
15 a party or its members in the future. *See Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S.
16 726, 734 (1998) (Plaintiff “will have ample opportunity later to bring [their] legal challenge”
17 in the context of a future agency action applying the 2020 Rule “when harm is more imminent
18 and more certain.”).

19 If the Court denies Federal Defendants’ request to extend the stay, Federal
20 Defendants respectfully request that the Court set a deadline of June 18, 2021 for Federal
21 Defendants’ reply in support of their motion to dismiss. Under the Court’s current scheduling
22 order (ECF No. 84), that reply brief is currently due on June 11, 2021. Federal Defendants
23 request an additional week to allow Federal Defendants sufficient time to finalize the brief and
24 allow for review both within CEQ and the Department of Justice.

25 **State Plaintiffs’ Position**

26 State Plaintiffs respectfully oppose Federal Defendants’ third request for a stay in this
27 case because delay in this proceeding risks further harm to State Plaintiffs from the 2020 Rule
28 with no likely benefit for judicial economy or avoided hardship for Federal Defendants. This

1 case has already been stayed nearly four months in response to the change in federal
2 administration and to allow for confirmation of the Chair of CEQ. *See* ECF 81 ¶4; ECF 82; ECF
3 83 ¶6; ECF 84. These stays have elapsed without any concrete action by Federal Defendants
4 while the 2020 Rule remains in effect and applies to federal actions across the country.
5 NEPA_69–70 (40 C.F.R. § 1506.13) (stating the effective date of the 2020 Rule is September 14,
6 2020). Federal Defendants have yet to provide any indication that their rule review will conclude
7 in a timeframe that could reasonably address Plaintiffs’ injuries from ongoing implementation of
8 the 2020 Rule or obviate the need for merits briefing and resolution of this case. While State
9 Plaintiffs encourage Federal Defendants to engage in detailed review of the 2020 Rule, the
10 reconsideration process described in Federal Defendants’ supporting declaration does not specify
11 changes to the 2020 Rule that would resolve State Plaintiffs’ claims and provides no firm
12 timeline for any action that would.

13 Federal Defendants do not provide the standard for granting a stay in the Ninth Circuit
14 and they do not meet it. When a party requests to stay judicial proceedings, “the competing
15 interests which will be affected by the granting or refusal to grant a stay must be weighed.”
16 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300
17 F.2d 265, 268 (9th Cir. 1962)). The Ninth Circuit has identified three such competing interests:
18 “[(1)] the possible damage which may result from the granting of a stay, [(2)] the hardship or
19 inequity which a party may suffer in being required to go forward, and [(3)] the orderly course of
20 justice measured in terms of the simplifying or complicating of issues, proof, and questions of
21 law which could be expected to result from a stay.” *Id.* (quoting *CMAX, Inc.*, 300 F.2d at 268).
22 As for the first two considerations, “‘if there is even a fair possibility that the stay ... will work
23 damage to someone else,’ the party seeking the stay ‘must make out a clear case of hardship or
24 inequity.’” *Id.* at 1112 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). As for the third
25 consideration, “case management standing alone is not necessarily a sufficient ground to stay
26 proceedings.” *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066
27 (9th Cir. 2007) (*citing Lockyer*, 398 F.3d at 1112). At this time, Federal Defendants have not
28 demonstrated circumstances warranting a stay under the governing standard.

1 First, Federal Defendants’ request should be denied because there is at least a “fair
2 possibility” that delaying this case will “work damage” to State Plaintiffs. *Lockyer*, 398 F.3d at
3 1109 (quoting *Landis*, 299 U.S. at 255). As explained in State Plaintiffs’ Consolidated
4 Opposition to Defendants’ Motion to Dismiss, State Plaintiffs have multiple unique, concrete and
5 particularized interests that are being harmed by the 2020 Rule. *See* ECF 79, at 14–18. These
6 include harms to State Plaintiffs’ natural resources from decreased environmental protection due
7 to the 2020 Rule’s reduced environmental review process of major federal actions affecting
8 federal lands, facilities, and infrastructure in the undersigned states. *Id.* Because the 2020 Rule is
9 in effect and, without action from this Court, will continue to be in effect, the State Plaintiffs
10 continue to face harms from implementation of the 2020 Rule.

11 This litigation is essential to State Plaintiffs’ ability to prevent those harms. CEQ’s
12 reconsideration of the 2020 Rule, as described in this Joint Status Report and accompanying
13 Declaration, includes no deadlines for action or publication of a proposed rule. The 2020 Rule
14 was the culmination of a nearly two-year process to revise the previous regulations. NEPA_9–
15 10. Should this reconsideration take that long, the 2020 Rule could remain in effect until 2023.
16 CEQ points to the possibility of ad hoc litigation to challenge individual federal actions as an
17 alternative to this lawsuit, but as State Plaintiffs explain in their opposition to Federal
18 Defendants’ Motion to Dismiss, such ad hoc litigation is insufficient to address the programmatic
19 and procedural harms to State Plaintiffs from the 2020 Rule. *See* ECF 79, at 28–33.

20 Additionally, a stay of proceedings still presents more than a “fair possibility” of harming
21 State Plaintiffs because the delayed briefing would foreclose State Plaintiffs’ opportunity to
22 obtain a ruling on the merits of their claims and associated remedies that could prevent the harms
23 threatened by the 2020 Rule. *Lockyer*, 398 F.3d at 1109. As this Court has previously explained,
24 even with an agency’s “complete diligence in passing the proposed regulation, that diligence
25 does not eliminate the ordinary uncertainty in the rulemaking process which creates at least a
26 ‘fair possibility’ of harm.” *California v. EPA*, 360 F. Supp. 3d 984, 993 (N.D. Cal. 2018)
27 (quoting *Landis*, 299 U.S. at 254–55) (denying motion to stay proceedings). But “complete
28 diligence” here is uncertain as Federal Defendants have not presented a timeline for the

1 rulemaking process. Without more, Federal Defendants have failed to show that the stay presents
2 no reasonable possibility of harm to the State Plaintiffs' interests.

3 Because there is more than a "fair possibility" of harm to the State Plaintiffs if a ruling in
4 this matter is delayed, Federal Defendants must "make out a clear case of hardship or inequity in
5 being required to go forward." *Landis*, 299 U.S. at 255. Federal Defendants do not make out a
6 clear case of hardship, but rather suggest that a stay is the better course in the interest of judicial
7 economy. However, an agency preferring a course of action that provides an opportunity to
8 review a regulation without any specified timeline is not a "clear case of hardship." *Id.*
9 Additionally, Federal Defendants point to cases supporting remand to an agency for
10 reconsideration that involve "an erroneous decision" and agencies looking to "cure their own
11 mistakes." *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016); *Ethyl Corp. v.*
12 *Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). But those cases are inapposite because Federal
13 Defendants have not confessed error or identified mistakes here and no court has yet ruled on the
14 merits of the 2020 Rule.³ To the extent Federal Defendants claim hardship simply from having to
15 defend a challenged action, this is insufficient. Being required to defend a suit, without more,
16 does not constitute a "'clear case of hardship or inequity' within the meaning of *Landis*."
17 *Lockyer*, 398 F.3d at 1112. In sum, Federal Defendants have not established any hardship absent
18 a stay.

19 In addition, Federal Defendants' motion should be denied because they do not
20 demonstrate that a stay would promote the "orderly course of justice," *Lockyer*, 398 F.3d at
21 1110, or "economy of time and effort for [the Court], for counsel, and for litigants," *Landis*, 299
22 U.S. at 254. Federal Defendants point to judicial economy as a reason for allowing CEQ to
23 proceed with the reconsideration process which may result in the repeal of part of the 2020 Rule.
24 However, Federal Defendants have not made any claim that such action may happen on a

25
26 ³ If the 2020 Rule is found to be unlawful, the standard remedy would be remand with vacatur,
27 not a stay. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018)
28 ("vacatur of an unlawful agency action normally accompanies a remand").

1 timeframe that could avert harm to State Plaintiffs. The inherent uncertainty regarding the length
2 of a rulemaking process can create a “fair possibility” of harm. *See California v. EPA*, 360 F.
3 Supp. 3d at 993. For similar reasons, this Court should also deny Federal Defendants’ stay
4 request.

5 If the Court denies Federal Defendants’ request for an extension of the stay, State
6 Plaintiffs do not oppose Federal Defendants’ request to set a deadline of June 18, 2021 for
7 Federal Defendants’ reply in support of their Motion to Dismiss.

8 Respectfully submitted this 3rd day of June, 2021.

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