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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,

Defendants.

Case No. 3:20-cv-06057-RS

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

Pursuant to this Court's February 25, 2022 Order Extending Stay of Case by 120 Days (ECF No. 102), the Parties hereby submit this joint status report. 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.

Federal Defendants and Plaintiffs have conferred regarding future proceedings in this case, and Plaintiffs do not oppose Federal Defendants' request to extend the stay by an

1 additional 120 days to accommodate the Council on Environmental Quality’s (“CEQ”)
 2 rulemaking process, including its goal of issuing a Notice of Proposed Rulemaking for its
 3 Phase 2 rule in the coming months. Counsel for Federal Defendants has conferred with
 4 Intervenor-Defendants, who advise that they take no position on the extension of the stay.

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

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

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

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

23 4. On the basis of CEQ’s ongoing reconsideration of the 2020 Rule, Federal
 24 Defendants have sought to stay this case in periodic status reports, and the Court has granted
 25 those requests. *See* ECF Nos. 83-84, 88-89, 91-92, 95-96, 101-102.

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 27
 28 ¹ 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/>.

5. As explained in prior status reports, in the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions published by the Office of Management and Budget’s Office of Information and Regulatory Affairs (“OIRA”), CEQ identified three planned regulatory actions to address the 2020 Rule: (1) a rulemaking to extend the deadline by two years for federal agencies to develop or revise proposed procedures for implementing the 2020 Rule;² (2) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020 Rule;³ and (3) a “Phase 2” rulemaking proposing broader changes to the 2020 Rule.⁴ *See also* Ex. A ¶¶ 10-11.

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

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

- a. It revises 40 C.F.R. § 1502.13 to “remov[e] the requirement that an agency base the purpose and need on the goals of an applicant and the agency’s statutory authority” in order to “clarif[y] that agencies have discretion to

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

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

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

consider a variety of factors when assessing an application for an authorization.” It also “makes a conforming edit to the definition of ‘reasonable alternatives’” in 40 C.F.R. § 1508.1(z).

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

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

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

8. CEQ is continuing to work on the Phase 2 rulemaking, the third of the three contemplated regulatory actions to address the 2020 Rule. In the Spring 2022 Regulatory Agenda, CEQ indicated that it hopes to issue a Notice of Proposed Rulemaking for the Phase 2 rule in August 2022.⁵ In furtherance of that goal, CEQ has held approximately 47 meetings with outside stakeholders between September 10, 2021 and June 17, 2022 to discuss the Phase 2 rulemaking. Ex. A ¶ 14.

9. In addition, “[w]hile it proceeds with this phased rulemaking process, CEQ is assisting federal agencies in implementing NEPA in a manner consistent with EOs 13990 and 14008, as well as CEQ’s goals.” *Id.* ¶ 15.

10. CEQ has worked diligently to progress through its phased rulemaking process

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

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

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

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

27 13. Federal Defendants have conferred with Plaintiffs regarding the requested
 28 extension of the stay.

1 14. Plaintiffs do not oppose Federal Defendants' request for a 120-day stay
2 extension based on CEQ's representations that it plans to issue a draft Phase 2 rule in the next
3 few months. Despite Federal Defendants' efforts to date, Plaintiffs continue to suffer harms
4 from the portions of the 2020 Rule still in effect. *See* ECF No. 75. Plaintiffs reserve the right
5 to oppose any future stay until CEQ fully repeals the 2020 Rule or the 2020 Rule is vacated.

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

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

12 A proposed order is attached.

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

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