

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IOWA CITIZENS FOR COMMUNITY)
IMPROVEMENT, ANIMAL LEGAL)
DEFENSE FUND, ASSOCIATION OF)
IRRITATED RESIDENTS, INSTITUTE)
FOR AGRICULTURE AND TRADE)
POLICY, WATERKEEPER ALLIANCE,)
INC., and WATERKEEPERS)
CHESAPEAKE,)

Plaintiffs,)

v.)

COUNCIL ON ENVIRONMENTAL)
QUALITY and BRENDA MALLORY IN)
HER OFFICIAL CAPACITY AS CHAIR)
OF THE COUNCIL ON)
ENVIRONMENTAL QUALITY,)

Defendants.)

Case No. 1:20-cv-2715-TJK

**JOINT STATUS REPORT AND STIPULATION TO STAY CASE FOR AN
ADDITIONAL 120 DAYS**

Pursuant to this Court’s March 8, 2022 Minute Order, Federal Defendants and Plaintiffs submit this joint status report and hereby stipulate to an additional 120-day stay of this case.

In support of the stipulation, Federal Defendants and Plaintiffs state the following:

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

2. On inauguration day, President Biden issued Executive Order 13990 directing 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). The order also requires agencies “to immediately commence work to confront the climate crisis.” *Id.* The White House specifically identified the 2020 Rule as subject to these requirements.¹

3. Pursuant to that direction, CEQ began 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. *See* ECF No. 22 ¶ 3; Decl. of Matthew Lee-Ashley ¶ 8 (attached as Ex. A).

4. In light of Executive Order 13990 and CEQ’s ongoing review of the 2020 Rule, on February 8, 2021, Federal Defendants moved unopposed for a 60-day stay of this case. ECF No. 19. The Court stayed the case the following day. Minute Order (Feb. 9, 2021). The case has remained stayed since that time pursuant to stipulations in which the Parties agreed to extend the stay. ECF No. 21, 22, 23, 24, 26.

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) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020 Rule; and (3) a “Phase 2” rulemaking proposing broader changes to the 2020 Rule. ECF No. 22; *see also* Ex. A ¶¶ 10-11.

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/>.

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 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 2022.² In furtherance of that goal, CEQ has held approximately 48 meetings with outside stakeholders between September 10, 2021 and June 30, 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. In light of CEQ’s ongoing reconsideration of the 2020 Rule, Federal Defendants and Plaintiffs stipulate to an additional 120-day stay of this case, through October 2022. By that time, CEQ is hopeful that it will have either issued the Notice of Proposed Rulemaking for the Phase 2 rule or made additional significant progress toward that step.

² <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=0331-AA07>.

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

12. An additional stay is also in the interest of judicial economy. Allowing CEQ sufficient time to determine its own path forward through the administrative process and complete its new rulemakings to amend or repeal the 2020 Rule, in whole or in part, may narrow or even eliminate some or all of the issues before this Court.

13. Federal Defendants and Plaintiffs propose that the Parties file a joint status report no later than four days prior to the end of the 120-day stay period regarding future proceedings in this case.

For the foregoing reasons, Federal Defendants and Plaintiffs respectfully request the Court enter an order staying the case for an additional 120 days, and requiring the Parties to submit a joint status report no later than four days prior to the end of the stay period.

A proposed order is submitted herewith.

Respectfully submitted this 1st day of July, 2022.

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