



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

August 19, 2022

By ECF

The Honorable Colleen McMahon
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Environmental Justice Health Alliance for Chemical Policy Reform, et al. v. Council on Environmental Quality, et al.*, No. 20-cv-6143 (CM) (S.D.N.Y.)

Dear Judge McMahon:

This Office represents defendants Council on Environmental Quality (“CEQ”) and Brenda Mallory in her official capacity as Chair of the Council on Environmental Quality (together, “Defendants”) in the above-captioned action. In accordance with the Court’s April 8, 2022 Order, Dkt. No. 90, we submit this joint status report regarding the future of proceedings in this matter. For the reasons outlined below and in the declaration of Matthew Lee-Ashley dated August 19, 2022 (the “Lee-Ashley Decl.”), *see* Exhibit A, Defendants and Plaintiffs agree that this matter should be stayed for an additional 120 days to accommodate CEQ’s rulemaking process. Accordingly, with Plaintiffs’ consent, Defendants respectfully request that the Court enter an order extending the stay for an additional 120 days and requiring the parties to submit a further status report by the same date. A proposed order setting forth this relief is attached as Exhibit B. Intervenors take no position on this request.

Plaintiffs challenge CEQ’s 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 has been 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.” Protecting Public Health & the Env’t & Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021). The White House specifically identified the 2020 Rule as subject to these requirements. In response to EO 13990, CEQ began its reconsideration process with the goal of considering the “full array of questions and substantial concerns connected to the 2020 Rule,” including issues “directly relevant to this litigation.” Lee-Ashley Decl. ¶ 8. Based on CEQ’s ongoing reconsideration of the 2020 Rule, Defendants, with Plaintiffs’ consent, have sought to stay this case in periodic status reports, and the Court has granted those requests. *See* Dkt. Nos. 64-65, 68-69, 80-81, 83-84, 87-90.

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.

CEQ completed the first of those three regulatory actions on June 29, 2021, 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 also* Lee-Ashley Decl. ¶ 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.

Since our last status report, CEQ also completed the second of those three regulatory actions by publishing the final Phase 1 rule on April 20, 2022. *See Nat'l Env'tl Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453 (Apr. 20, 2022). That rule makes three changes to CEQ's regulations:

1. It revises 40 C.F.R. § 1502.13. CEQ characterizes this revision as "removing the requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority" to "clarif[y] that agencies have discretion to consider a variety of factors when assessing an application for an authorization." It also made a conforming edit to the definition of "reasonable alternatives" in 40 C.F.R. § 1508.1(z).
2. It revises 40 C.F.R. § 1507.3. CEQ characterizes this revision as "remov[ing] 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."
3. It revises the definition of "effects" in 40 C.F.R. § 1508.1(g). CEQ characterizes this revision as intended "to include direct, indirect, and cumulative effects."

87 Fed. Reg. at 24,453; *see also* Lee-Ashley Decl. ¶ 12. CEQ's revisions were intended "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.

In addition, CEQ is also currently working on its Phase 2 rulemaking. CEQ held approximately forty-eight meetings with outside stakeholders between September 10, 2021, and June 30, 2022, to discuss the planned Phase 2 rulemaking. Lee-Ashley Decl. ¶ 14. In the Spring 2022 Unified Regulatory Agenda, CEQ indicated that it hoped to publish the "Phase 2" Notice of

Proposed Rulemaking (NPRM) in August 2022. But before CEQ can publish the Phase 2 NPRM, it will likely need to submit it to the Office of Management and Budget's Office of Information and Regulatory Affairs which then has up to 90 days to complete its review process. 58 Fed. Reg. 51,735 (Oct. 4, 1993).

To allow CEQ time to continue to make progress on a Phase 2 proposed rule, Defendants seek a further extension of the stay by 120 days. The requested 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 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). Further, an extension of the stay may serve the interest of judicial economy if CEQ modifies the 2020 Rule in a way that narrows the scope of the parties' dispute.

For the foregoing reasons, Defendants respectfully request that the Court enter an order staying the case for an additional 120 days and requiring the parties to submit a further status report on or before that date.

We thank the Court for its consideration.

Respectfully submitted,

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York

By: /s/ Zachary Bannon
DANIELLE J. LEVINE
ZACHARY BANNON
Assistant United States Attorneys
Tel.: 212-637-2689/2728
E-mail: danielle.levine@usdoj.gov
zachary.bannon@usdoj.gov