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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 June 24, 2022 Order Extending Stay of Case by 120 Days (ECF No. 104), 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 proposed Phase 2 rule and associated
 3 Notice of Proposed Rulemaking in the coming months. Counsel for Federal Defendants has
 4 conferred with Intervenor-Defendants, who advise that they take no position on the extension
 5 of the stay.

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

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

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

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

24 4. On the basis of CEQ’s ongoing reconsideration of the 2020 Rule, Federal
 25 Defendants have sought to stay this case in periodic status reports, and the Court has granted
 26

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/>.

1 those requests. *See* ECF Nos. 83-84, 88-89, 91-92, 95-96, 101-104.

2 5. As explained in prior status reports, in the Spring 2021 Unified Agenda of
3 Regulatory and Deregulatory Actions published by the Office of Management and Budget’s
4 Office of Information and Regulatory Affairs (“OIRA”), CEQ identified three planned
5 regulatory actions to address the 2020 Rule: (1) a rulemaking to extend the deadline by two
6 years for federal agencies to develop or revise proposed procedures for implementing the 2020
7 Rule;² (2) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020 Rule;³ and
8 (3) a “Phase 2” rulemaking proposing broader changes to the 2020 Rule.⁴ *See also* Ex. A ¶¶
9 10-11.

10 6. To date, CEQ has completed the first two of these three planned regulatory
11 actions and is actively working on the third.

12 7. First, on June 29, 2021, CEQ published an interim final rule that amended 40
13 C.F.R. § 1507.3(b) to extend the time for agencies to develop or revise procedures
14 implementing the 2020 Rule. Deadline for Agencies to Propose Updates to Nat’l Env’tl
15 Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021); *see* Ex. A ¶ 11. The rule
16 “provid[es] Federal agencies an additional two years, until September 14, 2023, to propose
17 revisions to their NEPA procedures” to “allow Federal agencies to avoid wasting resources
18 developing procedures based upon regulations that CEQ may repeal or substantially amend.”
19 86 Fed. Reg. at 34,155-56.

20 8. Second, on April 20, 2022, CEQ published the final Phase 1 rule, which
21 became effective on May 20, 2022. National Environmental Policy Act Implementing
22 Regulations Revisions, 87 Fed. Reg. 23,453 (April 20, 2022). The Phase 1 rule makes three
23 revisions to CEQ’s regulations as set forth in the 2020 Rule:

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

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

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

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

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.

9. CEQ is actively working on the Phase 2 rulemaking, the third of the three contemplated regulatory actions to address the 2020 Rule. Since the last status report, CEQ has made substantial progress on the proposed Phase 2 rule and associated Notice of Proposed Rulemaking (“NPRM”). Ex. A ¶ 13. CEQ has held approximately 49 meetings with stakeholders to discuss the Phase 2 rulemaking as it has worked to draft the proposed Phase 2 rule. *Id.* ¶ 14.

10. While CEQ indicated in the Spring 2022 Regulatory Agenda that it hoped to issue the proposed Phase 2 rule in August 2022, publication of the proposed Phase 2 rule has taken longer than anticipated, in part because of interim developments. Ex. A ¶ 13. For example, CEQ has had to review and consider the impact on its Phase 2 rulemaking process of

1 the Inflation Reduction Act of 2022, P.L. No. 117-169 (2022), which was enacted on August
 2 16, 2022. *Id.* In addition, because the Phase 2 rule will likely be deemed a significant
 3 regulatory action for purposes of Executive Order 12866, Regulatory Planning and Review, 58
 4 Fed. Reg. 51,735 (Oct. 4, 1993), CEQ expects to need to submit the Phase 2 NPRM to OIRA
 5 for review before publication in the Federal Register. Ex. A ¶ 13. Pursuant to Executive
 6 Order 12866, OIRA has up to 90 days to complete its review process. 58 Fed. Reg. 51,735, at
 7 § 6(b)(2)(B). In light of those developments, CEQ’s present goal is to publish the Phase 2
 8 NPRM and proposed rule in the Federal Register for public review and comment in January
 9 2023. Ex. A ¶ 13.

10 11. While it proceeds with its phased rulemaking process, CEQ is assisting
 11 agencies in implementing NEPA in a manner consistent with Executive Orders 13990 and
 12 14008. Ex. A ¶ 15. In addition, at the same time as it is reconsidering the 2020 Rule, CEQ is
 13 also developing revised guidance to assist federal agencies in the consideration of greenhouse
 14 gas emissions and climate change in NEPA reviews, as required by Executive Order 13990.
 15 Ex. A ¶ 16; 86 Fed. Reg. 7,037, 7,042 (Jan. 25, 2021).

16 12. CEQ has worked diligently to progress through its phased rulemaking process
 17 as efficiently as possible. To allow CEQ to continue to make progress on its ongoing efforts to
 18 reconsider the 2020 Rule, Federal Defendants seek an extension of the current stay by 120
 19 days, until late February. By that time, CEQ is hopeful that it will have either issued the Phase
 20 2 proposed rule and associated NPRM or made additional significant progress toward that
 21 step.

22 13. The requested stay is consistent with the Court’s broad discretion to stay
 23 proceedings and defer judicial review. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)
 24 (“[T]he power to stay proceedings is incidental to the power inherent in every court to control
 25 the disposition of the causes on its docket with economy of time and effort for itself, for
 26 counsel, and for litigants.”). It is also consistent with CEQ’s inherent authority to reconsider
 27 and to revise, replace, or repeal a prior decision to the extent permitted by law and supported
 28 by a reasoned explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515

1 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

2 14. An extension of the stay is also in the interest of judicial economy and avoids
 3 any interference in the administrative process. CEQ has made substantial progress in its
 4 reconsideration of the 2020 Rule, having completed two final rulemakings that substantively
 5 amend key provisions of the 2020 Rule, and is nearing issuance of a proposed rule that will
 6 propose even broader changes to the 2020 Rule. Allowing CEQ sufficient time to complete its
 7 phased rulemaking process to amend or repeal the 2020 Rule, in whole or in part, may narrow,
 8 or potentially even eliminate, some or all of the issues before this Court. *See ASSE Int’l, Inc.*
 9 *v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (When an agency has already begun
 10 the process of reconsidering its own action, and has already begun to take steps to amend that
 11 action, it is “prudent and efficient” to “giv[e] the relevant agency the opportunity to reconsider
 12 and rectify an erroneous decision without further expenditure of judicial resources.”). In
 13 contrast, lifting the stay would force CEQ—a very small agency currently engaged in a
 14 substantial rulemaking process—to redirect its limited resources from rulemaking to litigation
 15 defending the very action it is reconsidering. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d
 16 551, 558 (9th Cir. 1989) (“The Supreme Court has warned courts not to intrude on
 17 administrative functions.”).

18 15. Federal Defendants have conferred with Plaintiffs regarding the requested
 19 extension of the stay.

20 16. Plaintiffs do not oppose Federal Defendants’ request for a 120-day stay
 21 extension based on CEQ’s representations that it has made substantial progress on its Phase 2
 22 NPRM and proposed rule and its plan to publish the Phase 2 NPRM and proposed rule in the
 23 Federal Register for public review and comment in January 2023. Despite Federal Defendants’
 24 efforts to date, Plaintiffs continue to suffer harms from the portions of the 2020 Rule still in
 25 effect. *See* ECF No. 75. Plaintiffs reserve the right to oppose any future stay until CEQ fully
 26 repeals the 2020 Rule or the 2020 Rule is vacated.

27 17. Plaintiffs and Federal Defendants propose that the Parties file a further joint
 28 status report at the end of the 120-day extension period regarding future proceedings in this

1 case.

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

5 A proposed order is attached.

6 Respectfully submitted this 3rd day of November, 2022.

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* 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.