

LISA L. RUSSELL  
Deputy Assistant Attorney General  
U.S. Department of Justice  
Environment and Natural Resources Division  
CLARE BORONOW, admitted to MD Bar  
999 18th Street, South Terrace, Suite 370  
Denver, CO 80202  
Tel: (303) 844-1362 / Fax: (303) 844-1350  
[clare.boronow@usdoj.gov](mailto:clare.boronow@usdoj.gov)  
GREGORY M. CUMMING, admitted to DC Bar  
150 M Street, N.E.  
Washington, D.C. 20002  
Tel: (202) 598-0414 / Fax: (202) 305-0506  
[gregory.cumming@usdoj.gov](mailto:gregory.cumming@usdoj.gov)

*Counsel for Defendants*

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

ALASKA COMMUNITY ACTION ON  
TOXICS, 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-05199-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. 65), the Parties hereby submit this joint status report. The Parties to the related case before this Court, *California v. CEQ*, No. 3:20-cv-06057-RS (N.D. Cal.), are submitting a similar joint status report in that case.

1 Federal Defendants and Plaintiffs have conferred regarding future proceedings in this  
 2 case, and Plaintiffs do not oppose Federal Defendants' request to extend the stay by an  
 3 additional 120 days to accommodate the Council on Environmental Quality's ("CEQ")  
 4 rulemaking process, including its goal of issuing a proposed Phase 2 rule and associated  
 5 Notice of Proposed Rulemaking in the coming months. Counsel for Federal Defendants has  
 6 conferred with Intervenor-Defendants, who advise that they take no position on the extension  
 7 of the stay.

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

10 1. Plaintiffs challenge CEQ's July 16, 2020 rulemaking entitled "Update to the  
 11 Regulations Implementing the Procedural Provisions of the National Environmental Policy  
 12 Act," 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Rule").

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

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

---

26  
 27  
 28 <sup>1</sup> 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/>.

4. On the basis of CEQ’s ongoing reconsideration of the 2020 Rule, Federal Defendants have sought to stay this case in periodic status reports, and the Court has granted those requests. *See* ECF Nos. 50-51, 54-55, 56-57, 59-60, 62-65.

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;<sup>2</sup> (2) a “Phase 1” rulemaking to propose a narrow set of changes to the 2020 Rule;<sup>3</sup> and (3) a “Phase 2” rulemaking proposing broader changes to the 2020 Rule.<sup>4</sup> *See also* Ex. A ¶¶ 10-11.

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

7. First, on June 29, 2021, CEQ 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.

8. Second, on April 20, 2022, CEQ published the final Phase 1 rule, which became effective on May 20, 2022. *National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453 (April 20, 2022). The Phase 1 rule makes three

---

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

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

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

1 revisions to CEQ’s regulations as set forth in the 2020 Rule:

- 2 a. It revises 40 C.F.R. § 1502.13 to “remov[e] the requirement that an agency
- 3 base the purpose and need on the goals of an applicant and the agency’s
- 4 statutory authority” in order to “clarif[y] that agencies have discretion to
- 5 consider a variety of factors when assessing an application for an
- 6 authorization.” It also “makes a conforming edit to the definition of
- 7 ‘reasonable alternatives’” in 40 C.F.R. § 1508.1(z).
- 8 b. It revises 40 C.F.R. § 1507.3 “to remove language that could be construed
- 9 to limit agencies’ flexibility to develop or revise procedures to implement
- 10 NEPA specific to their programs and functions that may go beyond the
- 11 CEQ regulatory requirements.”
- 12 c. It revises the definition of “effects” in 40 C.F.R. § 1508.1 “to include
- 13 direct, indirect, and cumulative effects.”

14 87 Fed. Reg. at 23,453; *see also* Ex. A ¶ 12. CEQ explained that it made these revisions “in  
 15 order to better align the provisions with CEQ’s extensive experience implementing NEPA and  
 16 unique perspective on how NEPA can best inform agency decision making, as well as  
 17 longstanding Federal agency experience and practice, NEPA’s statutory text and purpose to  
 18 protect and enhance the quality of the human environment, including making decisions  
 19 informed by science, and case law interpreting NEPA’s requirements.” 87 Fed. Reg. at  
 20 23,453.

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

27 10. While CEQ indicated in the Spring 2022 Regulatory Agenda that it hoped to  
 28 issue the proposed Phase 2 rule in August 2022, publication of the proposed Phase 2 rule has

1 taken longer than anticipated, in part because of interim developments. Ex. A ¶ 13. For  
 2 example, CEQ has had to review and consider the impact on its Phase 2 rulemaking process of  
 3 the Inflation Reduction Act of 2022, P.L. No. 117-169 (2022), which was enacted on August  
 4 16, 2022. *Id.* In addition, because the Phase 2 rule will likely be deemed a significant  
 5 regulatory action for purposes of Executive Order 12866, Regulatory Planning and Review, 58  
 6 Fed. Reg. 51,735 (Oct. 4, 1993), CEQ expects to need to submit the Phase 2 NPRM to OIRA  
 7 for review before publication in the Federal Register. Ex. A ¶ 13. Pursuant to Executive  
 8 Order 12866, OIRA has up to 90 days to complete its review process. 58 Fed. Reg. 51,735, at  
 9 § 6(b)(2)(B). In light of those developments, CEQ’s present goal is to publish the Phase 2  
 10 NPRM and proposed rule in the Federal Register for public review and comment in January  
 11 2023. Ex. A ¶ 13.

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

18 12. CEQ has worked diligently to progress through its phased rulemaking process  
 19 as efficiently as possible. To allow CEQ to continue to make progress on its ongoing efforts to  
 20 reconsider the 2020 Rule, Federal Defendants seek an extension of the current stay by 120  
 21 days, until late February. By that time, CEQ is hopeful that it will have either issued the Phase  
 22 2 proposed rule and associated NPRM or made additional significant progress toward that  
 23 step.

24 13. The requested stay is consistent with the Court’s broad discretion to stay  
 25 proceedings and defer judicial review. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)  
 26 (“[T]he power to stay proceedings is incidental to the power inherent in every court to control  
 27 the disposition of the causes on its docket with economy of time and effort for itself, for  
 28 counsel, and for litigants.”). It is also consistent with CEQ’s inherent authority to reconsider

1 and to revise, replace, or repeal a prior decision to the extent permitted by law and supported  
 2 by a reasoned explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515  
 3 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

4 14. An extension of the stay is also in the interest of judicial economy and avoids  
 5 any interference in the administrative process. CEQ has made substantial progress in its  
 6 reconsideration of the 2020 Rule, having completed two final rulemakings that substantively  
 7 amend key provisions of the 2020 Rule, and is nearing issuance of a proposed rule that will  
 8 propose even broader changes to the 2020 Rule. Allowing CEQ sufficient time to complete its  
 9 phased rulemaking process to amend or repeal the 2020 Rule, in whole or in part, may narrow,  
 10 or potentially even eliminate, some or all of the issues before this Court. *See ASSE Int’l, Inc.*  
 11 *v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (When an agency has already begun  
 12 the process of reconsidering its own action, and has already begun to take steps to amend that  
 13 action, it is “prudent and efficient” to “giv[e] the relevant agency the opportunity to reconsider  
 14 and rectify an erroneous decision without further expenditure of judicial resources.”). In  
 15 contrast, lifting the stay would force CEQ—a very small agency currently engaged in a  
 16 substantial rulemaking process—to redirect its limited resources from rulemaking to litigation  
 17 defending the very action it is reconsidering. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d  
 18 551, 558 (9th Cir. 1989) (“The Supreme Court has warned courts not to intrude on  
 19 administrative functions.”).

20 15. Plaintiffs do not oppose Federal Defendants’ request for a 120-day extension of  
 21 the stay at this time. While Plaintiffs appreciate CEQ’s recognition of the problems of the  
 22 2020 Rule, and efforts to date to address those problems, Plaintiffs remain deeply concerned  
 23 that major aspects of the Rule remain in place during these rulemakings. Plaintiffs continue to  
 24 believe that vacatur of the 2020 Rule is warranted under both governing law and the facts on  
 25 the ground. Accordingly, Plaintiffs’ non-opposition to this motion should not be interpreted to  
 26 mean Plaintiffs will agree to future requests for stays of this litigation if the 2020 Rule  
 27 continues to be implemented in a way that harms their interests, and/or if progress towards  
 28 finalization of a Phase II rule that addresses the major problems identified in this lawsuit is not

1 sustained.

2 16. Plaintiffs and Federal Defendants propose that the Parties file a further joint  
3 status report at the end of the 120-day extension period regarding future proceedings in this  
4 case.

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

8 A proposed order is attached.

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

10 LISA L. RUSSELL  
11 Deputy Assistant Attorney General

12 /s/ Clare Boronow  
13 CLARE BORONOW, admitted to MD Bar  
14 Senior Attorney  
15 U.S. Department of Justice  
16 Environment and Natural Resources Division  
17 Natural Resources Section  
18 999 18th Street, South Terrace, Suite 370  
19 Denver, CO 80202  
20 Tel: (303) 844-1362  
21 E-mail: clare.boronow@usdoj.gov

22 GREGORY M. CUMMING (D.C. Bar No. 1018173)  
23 Trial Attorney  
24 Environment & Natural Resources Division  
25 Natural Resources Section  
26 150 M St., N.E.  
27 Washington, D.C. 20002  
28 (202) 598-0414 (phone)  
gregory.cumming@usdoj.gov

MATTHEW R. OAKES  
Senior Counsel  
Environment and Natural Resources Division  
Law and Policy Section  
U.S. Department of Justice  
Post Office Box 7415  
Washington, D.C. 20044  
Tel: (202) 514-2686

1 E-mail: matthew.oakes@usdoj.gov

2 STEVEN BARNETT

3 Attorney

4 U.S. Department of Justice

5 Environment and Natural Resources Division

6 Law and Policy Section

7 950 Pennsylvania Ave., NW

8 Washington, DC 20530

9 Tel.: (202) 305-0472

10 E-mail: steven.barnett@usdoj.gov

11 ALLEN BRABENDER

12 Attorney

13 U.S. Department of Justice

14 Environment and Natural Resources Division

15 Appellate Section

16 950 Pennsylvania Ave., NW

17 Washington, DC 20530

18 Tel.: (202) 514-5316

19 E-mail: allen.brabender@usdoj.gov

20 *Counsel for Federal Defendants*

*s/ Kristen Boyles*

JAN E. HASSELMAN (WSBA # 29017)

KRISTEN L. BOYLES (CSBA # 158450)

[Admitted Pro Hac Vice]

EARTHJUSTICE

810 Third Avenue, Suite 610

Seattle, WA 98104

(206) 343-7340

kboyles@earthjustice.org

[jhasselman@earthjustice.org](mailto:jhasselman@earthjustice.org)

SUSAN JANE M. BROWN (OSBA # 054607)

[Admitted Pro Hac Vice]

WESTERN ENVIRONMENTAL LAW CENTER

4107 N.E. Couch St.

Portland, OR 97232

(503) 914-1323

[brown@westernlaw.org](mailto:brown@westernlaw.org)

*Attorneys for Plaintiffs*

GREGORY C. LOARIE (CSBA # 215859)

EARTHJUSTICE

50 California Street, Suite 500

San Francisco, CA 94111

(415) 217-2000

[gloarie@earthjustice.org](mailto:gloarie@earthjustice.org)

*Local Counsel for Plaintiffs*

\* 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.