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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 March 6, 2023 Order Extending Stay of Case by 120 Days (ECF No. 70) and the June 15, 2023 Clerk's Notice (ECF No. 71), 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 near future. 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.¹

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.

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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/>.

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, 66-70.

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.

6. To date, CEQ has completed the first two of these three planned regulatory actions. CEQ has also made significant progress on the third planned regulatory action, the Phase 2 rulemaking, but, as described further below, has had to adjust its process to accommodate amendments to the National Environmental Policy Act (“NEPA”) in the recently enacted Fiscal Responsibility Act of 2023 (“FRA”), Pub. L. No. 118-5 (June 3, 2023).

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

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>.

1 became effective on May 20, 2022. Nat'l Env'tl Policy Act Implementing Regulations
 2 Revisions, 87 Fed. Reg. 23,453 (April 20, 2022). The Phase 1 rule makes three revisions to
 3 CEQ's regulations as set forth in the 2020 Rule:

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

16 87 Fed. Reg. at 23,453; *see also* Ex. A ¶ 12. CEQ explained that it made these revisions "in
 17 order to better align the provisions with CEQ's extensive experience implementing NEPA and
 18 unique perspective on how NEPA can best inform agency decision making, as well as
 19 longstanding Federal agency experience and practice, NEPA's statutory text and purpose to
 20 protect and enhance the quality of the human environment, including making decisions
 21 informed by science, and case law interpreting NEPA's requirements." 87 Fed. Reg. at
 22 23,453.

23 9. As for the third of the three contemplated regulatory actions to address the
 24 2020 Rule, as explained in the last status report, on January 30, 2023, CEQ submitted the draft
 25 Phase 2 proposed rule to OIRA for review before publication as required by Executive Order
 26 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993). Ex. A ¶ 13.
 27 However, the FRA was enacted into law before OIRA concluded review of the Phase 2
 28 proposed rule and before CEQ could publish that rule for public comment. Title III of the

1 FRA contains the “Builder Act,” which amends certain provisions of NEPA. *See* Pub. L. No.
2 118-5, § 321. CEQ has accordingly worked expeditiously to incorporate the revisions to
3 NEPA contained in the FRA into the Phase 2 proposed rule. Ex. A ¶ 14. On July 14, 2023
4 OIRA completed its review of the Phase 2 proposed rule. *Id.* ¶ 13. CEQ intends to publish
5 the Phase 2 proposed rule in the Federal Register for public comment shortly. *Id.*

6 10. While the FRA has required CEQ to adjust its timeline for publication of the
7 Phase 2 proposed rule, the agency is working swiftly to account for the FRA’s amendments to
8 NEPA. It is more efficient and convenient to the public and stakeholders, including the
9 federal agencies that implement NEPA, for CEQ to account for the revisions to NEPA in the
10 FRA in the Phase 2 proposed rule rather than engage in an additional future rulemaking
11 process. Ex. A ¶ 14. Particularly given the Phase 2 rule is intended to propose broader
12 changes to the 2020 Rule, it is appropriate that those changes are consistent with the current
13 statutory text of NEPA as amended by the FRA. In addition, revising the Phase 2 proposed
14 rule to account for the FRA before publication will allow the public and stakeholders to
15 comment on how the proposed rule addresses the FRA’s amendments to NEPA in the public
16 comment process on the Phase 2 rule. *Id.*

17 11. While it proceeds with its phased rulemaking process, CEQ is assisting
18 agencies in implementing NEPA in a manner consistent with the FRA’s amendments as well
19 as Executive Orders 13990 and 14008. Ex. A ¶¶ 16-17. For example, on January 9, 2023,
20 CEQ issued guidance to assist federal agencies in the consideration of greenhouse gas
21 emissions and climate change in NEPA reviews, as required by Executive Order 13990. Ex.
22 A ¶ 17; Nat’l Env’tl Policy Act Guidance on Consideration of Greenhouse Gas Emissions and
23 Climate Change, 88 Fed. Reg. 1,196 (Jan. 9, 2023). That guidance is effective immediately
24 and therefore applies even while CEQ continues to work on the Phase 2 rulemaking. *Id.*

25 12. CEQ has worked diligently to progress through its phased rulemaking process
26 as efficiently as possible. To allow CEQ to continue to make progress on its ongoing efforts to
27 reconsider the 2020 Rule, Federal Defendants seek an extension of the current stay by 120
28 days to allow for the publication of the Phase 2 proposed rule and for the public comment

1 period on that rule.

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

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

28 15. Plaintiffs do not oppose Federal Defendants’ request for a 120-day extension of

1 the stay at this time. While Plaintiffs appreciate CEQ's recognition of the problems of the
 2 2020 Rule, and efforts to date to address those problems, Plaintiffs remain deeply concerned
 3 that major aspects of the Rule remain in place during these rulemakings. Plaintiffs continue to
 4 believe that vacatur of the 2020 Rule is warranted under both governing law and the facts on
 5 the ground. Accordingly, Plaintiffs' non-opposition to this motion should not be interpreted to
 6 mean Plaintiffs will agree to future requests for stays of this litigation if the 2020 Rule
 7 continues to be implemented in a way that harms their interests, and/or if progress towards
 8 finalization of a Phase II rule that addresses the major problems identified in this lawsuit is not
 9 sustained.

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

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

16 A proposed order is attached.

17 Respectfully submitted this 17th day of July, 2023.

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