September 29, 2023

ELECTRONIC SUBMISSION

Attn: CEQ-2023-0003

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: National Environmental Policy Act Implementing Regulations Revisions Phase 2: Docket No. CEQ-2023-0003

To Whom It May Concern:

On July 31, 2023, the White House Council on Environmental Quality (CEQ) published proposed "National Environmental Policy Act Implementing Regulations Revisions Phase 2." 88 Fed. Reg. 49,924. (Proposed Rule). In it, CEQ proposes to revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), including the Fiscal Responsibility Act (FRA) amendments to NEPA.

I served as associate director for regulatory reform at CEQ from 2017 to 2019. In that role I was one of the principal drafters of the One Federal Decision policy and the 2020 revision to CEQ's Regulation of NEPA. Because I believe that the Proposed Rule is a significant missed opportunity for permitting reform, to which President Biden is supposedly committed, and does not fully implement the FRA's NEPA amendments, I respectfully submit these comments for CEQ's consideration.

The most remarkable thing about the Proposed Rule is not what it says, but rather what it doesn't. The federal process for permitting and environmental reviews of infrastructure projects is a virtually insurmountable obstacle to the deployment of renewable energy capacity on the scale and at the speed that would be necessary to meet President Biden's commitment to net zero carbon emissions from the power sector by 2035. Prominent studies state that the pace of renewable energy capacity permitting would have to double or triple in order to achieve net zero goals. See, e.g., Energy Innovation Policy & Technology LLC, "Studies Agree 80 Percent Clean Energy by 2030 Would Save Lives and Create Jobs at Minimal Cost," September 7, 2021.

But as explained below, the pace of renewable permitting has actually gone down under President Biden compared with the last year of the Trump administration. With the permitting bottleneck that exists currently, the trillions that Congress has appropriated for renewable subsidies simply cannot be spent. With the pace of permitting at only a small fraction of what would be needed for an orderly clean energy transition it is becoming clearer with every passing year that President Biden's net zero goals are an absolute fantasy. Yet the Biden administration seems remarkably unconcerned.

The Proposed Rule is merely the latest example of this inexplicable insouciance. It continues the pattern of undoing Trump-era reforms that benefited renewable energy projects disproportionately. Indeed, it goes in the other direction, adding considerably to the administrative burdens of the NEPA process for agencies and project proponents alike.

Many factors contribute to the enormous costs, delays, and uncertainties of the federal process for permitting and environment review of infrastructure projects. The root of the problem is a hydra-headed bureaucracy in which separate agencies enforce disparate environmental laws with uncoordinated and inconsistent processes. That is a problem that ultimately only Congress can solve. Real reform may require the consolidation of all federal environmental laws into a single coherent statute with a single permitting agency and a single permit for all federal requirements, as European governments are starting to do.

CEQ has tried to reform the process under presidents of both parties. But just when reform is most urgently needed, President Biden's CEQ appears to have thrown in the towel on permitting reform.

I. The Vital Importance of Efficient Permitting and Environmental Review

The costs, delays, and uncertainties of the federal process for permitting and environmental review of major infrastructure projects are an enormous competitive disadvantage for the United States. Permitting inefficiency deprives Americans of the modern infrastructure they need and deserve. Leaving aside whether the goal of net zero is even desirable, the American people need to understand that the goal of net zero is almost certainly impossible under current law.

The Biden administration seems remarkably unconcerned, which is surprising given that its highest priority is supposed to be climate policy. It's a remarkable contrast with the Trump administration, under which the pace of renewable energy capacity permitting doubled. Incredibly, under President Biden the pace of renewable capacity permitting has actually gone down and was ten percent lower in 2022 than in 2020.

This is remarkable because the Trump administration's attitudes toward renewable energy ranged from agnostic to hostile. Yet simply because of President Trump's commitment to

efficient permitting, the rate of renewable capacity permitting was higher in his last year in office than it is now.

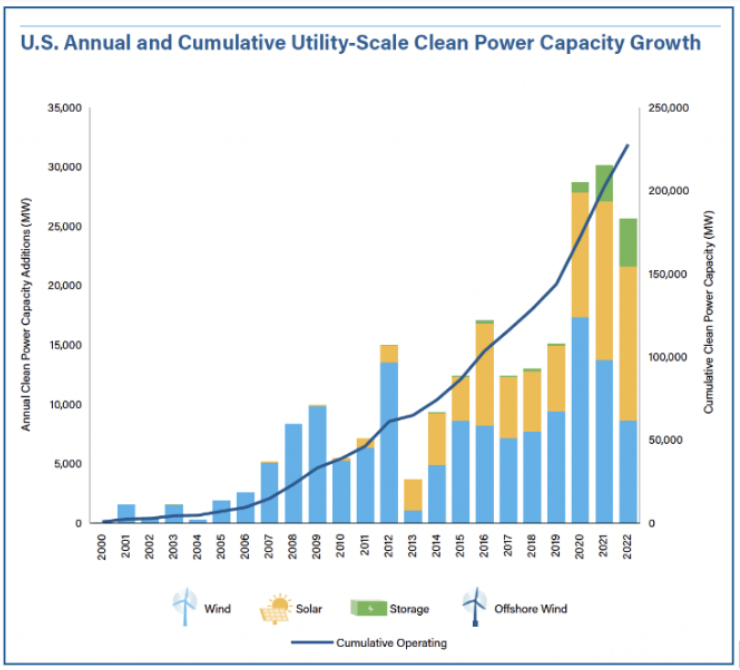

Chart: U.S. Annual and Cumulative Utility-Scale Clean Power Capacity Growth – Clean Power Annual Market Report | 2022

This also highlights the paradox that among the biggest obstacles to a clean energy transition are the far-left environmental advocacy groups that block the very permitting reforms that would be necessary to increase deployment of renewable energy. Indeed, that may explain why CEQ under President Biden has done so little to accelerate renewable energy permitting; its various revisions to its regulation of NEPA may not reflect the national policy priorities of President Biden, but they are uniformly consonant with the policy priorities of the environmental advocacy groups that are as likely to seek to block renewable energy projects as other kinds of infrastructure.

We often hear complaints about the costs, delays, and uncertainties of the permitting process, but of these, the worst by far is uncertainty, which has an enormous impact on access to capital. This is a crucial point for Biden administration officials to grasp. There is more than enough capital in the private economy to build all the infrastructure that America needs. If we could only make the permitting process predictable enough, private capital would flood in, and Congress would not have to borrow trillions from our children and grandchildren to subsidize the infrastructure it thinks we need.

II. CEQ's Revisions to its NEPA Implementing Regulations

A. What is the legal authority for the CEQ Regulation?

CEQ has no statutory rulemaking authority under NEPA. In 1978, under President Jimmy Carter, CEQ published a set of so-called regulations implementing NEPA. The authority cited in the premises of the 1978 Regulation is a Nixon executive order (E.O. 11514, March 5, 1970), as amended by a Carter executive order (E.O. 11991, May 24, 1977). As a White House directive, the CEQ Regulation is mandatory for executive branch agencies, just like any executive order.

But since CEQ has no statutory rulemaking authority, CEQ may not have the legal authority to add to the judicially enforceable rights and obligations created by NEPA. Nowhere in the preamble to the Proposed Rule does CEQ acknowledge this crucial issue. But with the *Chevron* doctrine increasingly in question, CEQ should explain what level of deference it expects federal courts to give the new rule, and how federal courts should treat the rule if the *Chevron* doctrine is overturned. For example, CEQ should not assume that federal courts will enforce its inclusion of "cumulative impacts" in the definition of the statutory term "effects of the proposed agency action," but should explain whether it thinks that any of the Regulation of NEPA is judicially enforceable, and if so, why.

When made pursuant to executive authority and not in the exercise of a congressional delegation of rulemaking authority, presidential directives present the paradigmatic case for *Skidmore* deference, to wit "substantial deference" to agencies' interpretive rules. See, *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). In *Andrus v. Sierra Club*, the Supreme Court noted that "CEQ's interpretation of NEPA is entitled to substantial deference." 442 U.S. 347, 358 (1979). The Court has reiterated that position several times, for example in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) and *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

These cases need to be read with *Vermont Yankee Nuclear Power Corp. v. NRDC*, in which the Supreme Court warned, "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. 519 (1978).

B. Revising the CEQ Regulation of NEPA

On July 16, 2020, CEQ finalized an extensive revision and update of the 1978 regulation. 85 Fed. Reg. 43,304, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," (July 16, 2020). The Trump-era rule revision was measured, and designed to reduce costs, delays, and uncertainties, while making the NEPA process more inclusive for stakeholders and preserving environmental protections.

I was intimately involved in the process that produced that rule revision, and I can attest that we bent over backwards to create an inclusive, broad-based rule that could get bipartisan support and stand the test of time. The worst thing that could happen is for the CEQ rule to become

politicized and for NEPA procedures to change with every new administration. Like uncertainty in the NEPA process, instability in NEPA procedures hurts everybody.

The Biden CEQ has not been sufficiently sensitive to this danger. The Proposed Rule is called "Phase 2," but it is actually the third time CEQ has changed its regulation of NEPA since 2021. It has reversed Trump-era reforms that had broad support, including among renewable energy developers. The one-sided changes of the Proposed Rule guarantee that when a new Republican administration is elected, the CEQ Regulation will have to change yet again.

III. Issues in the Proposed Rule

This section highlights important issues in the Proposed Rule, including CEQ's consistency with the FRA's NEPA amendments. The FRA's amendments to NEPA were an important step forward for permitting reform. But some of the most important provisions are not self-executing and require active implementation by CEQ. This is another way in which the Proposed Rule represents a missed opportunity.

Statement of purpose and need. As amended, NEPA now requires environmental documents to contain a statement of purpose and need for the agency action. It's very important to distinguish between the purpose and need for the agency action, and the purpose and need for the underlying project. In a permitting decision subject to NEPA, the purpose and need for the project is none of the agency's business. What matters in the NEPA process is the purpose and need for the agency action, which in a permitting decision is the statutory authority that requires the agency to act on a permit application. This matters because of the alternatives analysis, which is supposed to be cabined by the purpose and need, and which often takes up a majority of the EIS. The alternatives to a project may be infinitely many. But the alternatives in a permitting decision will normally be just to grant or deny the permit. Agencies routinely conflate the purpose and need for the project with the purpose and need for the action, which leads to an enormous waste of time and resources. The enormous amount of time and money that FERC spends studying design alternatives and routing alternatives is not required by NEPA. This is something that the Proposed Rule gets right. The new Sec. 1502.13 would require that each EIS contain a statement of the purpose and need for the proposed agency action.

Limitation on alternatives that must be considered. NEPA originally required the agency to study "alternatives" to the proposed agency action but gave little guidance on which alternatives the agency should consider. The result has been a huge waste of time both in the NEPA process and the ensuing litigation. The FRA amendments provided much needed clarity and limiting principles here. Under Sec. 102(2)(C), the alternatives that the agency is required to consider now are those that constitute: (1) a "reasonable number"; (2) are technically and economically feasible; (3) are within the jurisdiction of the agency; (4) meet the purpose and need of the proposed agency action; and (5) meet the goals of the applicant.

This is a significant change. One of the biggest contributors to the excessive length of NEPA documents is that agencies spend hundreds of pages studying the impacts of a broad range of alternatives that the developer can readily exclude for business reasons, and that the agency can often readily exclude for policy reasons. But they study them anyway, because of the lack of clarity of what alternatives the law required them to study. A major problem has been the systematic conflation of alternatives to the "agency action" with alternatives to the project itself, alluded to above.

The Proposed Rule contains problematic language in this regard. Sec. 1502.14(a) reintroduces the concept of "alternatives not within the jurisdiction the agency." As long as it is not an enforceable requirement, such procedural add-ons are within the prerogative of the president, but it could lead agencies to consider factors that Congress did not intend them to consider, in violation of the Administrative Procedure Act. An even bigger problem is the new requirement in Sec. 1502.14(f) that the agency identify the environmentally preferable alternative. Does CEQ expect that this new requirement will be judicially enforceable against agencies?

Significance determination. Sec. 1501.3(d) of the Proposed Rule reintroduces the "context and intensity" factors that the 1978 Regulation invented out of thin air to guide agencies in determining when there is a significant impact requiring an EIS under NEPA. The Trump-era CEQ eliminated these factors because we felt because "significantly" is a simple statutory term whose meaning should not require a Homeric odyssey of regulatory exploration. The "context and intensity" factors are an example of how the NEPA process has expanded to consume enormous agency resources, and their reintroduction in the Proposed Rule is a major step in the wrong direction.

Reasonably foreseeable standard for impacts that must be studied. The FRA changed NEPA Sec. 102(2)(C) to create a "reasonably foreseeable" standard for the impacts and alternatives that must be studied. This is a significant change, because the biggest expansion in the scope of NEPA in recent years has been a series of court rulings that require agencies to study impacts far upstream and far downstream from the agency action, including climate-related impacts. "Reasonably foreseeable" is a concept borrowed from the law of torts, in which liability for negligence lies when the defendant's failure in his duty of care was not just the cause-in-fact of the injury but also its proximate cause. Proximate causation is limited to those injuries that are reasonably foreseeable. This is one of several provisions adopted from the 2020 NEPA rule revision and was borrowed from Justice Thomas's majority opinion in *Department of Transportation v. Public Citizen*. Agencies and developers should now be able to avail themselves of proximate causation as developed in the common law of torts to limit the downstream and upstream effects that must be considered in the NEPA process.

The White House can still require agencies to account for greenhouse gas emissions, but greenhouse gas emissions and climate impacts of any particular agency action cannot be considered "significant" impacts within the meaning of Sec. 102(2)(C) of NEPA. Permit

decisions are not the place for agencies to be usurping Congress's role in making national climate policy.

Cumulative Effects. Similarly, Sec. 1508(g) of the Proposed Rule defines effects or impacts to include "cumulative effects," which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency or person undertakes such other action. This also should not be treated as a judicially enforceable requirement. The environmental baseline should always include important trends. But whatever level of deference is given to the CEQ regulation, there is no possible way that "effects of the proposed agency action" in Sec. 102(2)(C) could be read to include effects that are totally unrelated to the proposed agency action. Therefore, CEQ's inclusion of "cumulative effects" within the definition of "effects" should be considered precatory and totally irrelevant to the legal sufficiency of an EIS.

Time limits. Under the FRA's NEPA amendments, the lead agency must now complete the EIS in two years, and an EA in one year. The clock starts ticking on the earlier of (a) the date that the agency determines that an EIS or EA is required for the proposed action, (b) the date on which the agency notifies the applicant that its application is complete, or (c) the date on which the agency publishes a notice of intent to prepare an EIS or EA.

This provision of the FRA creates a tight timetable that if effectively implemented will make the process much faster and more predictable. But it is not entirely self-executing. If left to their own devices agencies will almost certainly game the system, just like they gamed the time limits under One Federal Decision. The issue with time limits in NEPA is always who controls the starting gun. If it is the agency, then a real time limit is almost impossible to achieve. An effective time limit requires putting the project proponent in charge of when the clock starts ticking.

Hence, the time limits codified at Sec. 1501.10 in the Proposed Rule are a missed opportunity. CEQ needs to create an automatic trigger for when the agency "determines that NEPA requires an EIS or EA for the proposed action." That trigger should be in the hands of the project proponent, not the agency. One possibility is for FPISC or another entity outside the action agency to pass on the sufficiency of a permit application.

Page limits. Similarly, agencies proved resourceful in gaming the page limits of One Federal Decision. The FRA's NEPA amendments limit EISs to 150 pages and EAs to 75 pages (350 and 150, respectively for projects of "extraordinary complexity"). These limits do not include appendices. But if the page limits don't include appendices, then there may be no real page limits, and we could start seeing executive summaries 150 pages long presented as a complete EIS, with the other however many hundreds or thousands of pages of EIS presented as appendices. CEQ should establish the principle that the sufficiency of the EIS is reinforced by, but does not require, any of the matter in the appendices.

Applicant preparation of NEPA documents. As amended by the FRA, Sec. 107(f) of NEPA requires agencies to prescribe procedures for project proponents to draft their own EISs, subject to agency verification and adoption. This is a very important change. One of the greatest sources of delay and uncertainty in the NEPA process was the requirement, invented by the 1978 CEQ Regulation, that the agency prepare the EIS. The change brings U.S. environmental review procedures in line with the general practice across developed industrial economies. But once again, the FRA's NEPA amendment is not entirely self-executing and looking at Sec. 1506.5 of the Proposed Rule is another missed opportunity. CEQ should specify the procedures to be adopted by agencies in compliance with Sec. 107(f) and should give agencies a strict timeline to adopt them.

Major federal action. In the years after NEPA was first enacted, there was considerable discussion about whether the word "major" in "major federal action significantly impacting" the environment (under Section 102(2)(C)) created a separate standard that needed to be met apart from "significantly impacting" for NEPA's core EIS requirement to be triggered. The 1978 CEQ Regulation of NEPA tried to settle the debate by providing that if a federal action had a "significant impact" on the environment, it was ipso facto a "major" federal action. This arguably violated an important canon of construction, which is that words in a statute should not be presumed to mean nothing.

In a new definition of "major federal action" the FRA made clear that "major" is a separate standard that must be met independently of "significantly impacting" for NEPA to be triggered: "The term 'major Federal action' means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility." CEQ should clarify that "action" in the statute means an action and its impacts, such that the action is "major" if its *impacts* are subject to substantial Federal control and responsibility. Hence an agency action related to a project whose ultimate outcome or impacts are under the control of a state government should not qualify as a "major federal action."

IV. Recommendations

To address the problems of cost, delay, and uncertainty in the permitting process, CEQ should consider the following reforms:

Make the timing predictable. Agency officials drag their feet every step of the way, leaving developers in limbo and driving up projects' costs. If developers had more control over project timetables, it would save enormous amounts of capital and time. Instead of allowing only officials to assemble environmental documents, developers should be allowed to prepare the materials for agency certification. If agencies take too long issuing a permit or denial, developers should be given provisional permits to start construction subject to monitoring and mitigation.

Prioritize projects of national importance. NEPA has resulted in the systemic subordination of the national interest in major infrastructure projects to small pockets of local opposition. Courts ruling on injunctive relief have often disregarded the national interest in effective agency action.

Create a unified process. Every major infrastructure project requires permits from a half dozen federal agencies all using different, uncoordinated processes. There should be a uniform, centralized process that gives priority to projects of national importance. CEQ should make this a priority of its E-NEPA study under Sec. 110 of NEPA as amended by the FRA.

Major infrastructure projects should have access to a single "one-stop-shop" agency and single application process to obtain all needed permits under a single environmental review document. The "one-stop-shop" can either grant authorizations or act as a coordinator to facilitate the interagency process with directive authority. The Permitting Council created by FAST-41 could be the foundation for such an agency.

Denmark and the Netherlands have consolidated all their environmental laws into a single statute with a single permitting agency, while preserving the enforcement and regulatory authorities of traditional environmental agencies. Congress should begin the process of studying whether federal environmental laws can be updated and harmonized in a bipartisan process of consolidation.

Centralized data collection on infrastructure projects. A central data collection platform that longitudinally tracks projects from preapplication to completion or abandonment, on a sector-wide basis, could vastly improve access to financing, by making the risks of permitting more easily quantifiable. In the U.S., such information exists only for EISs, which comprise only a small fraction of infrastructure projects. A comprehensive database should cover all major infrastructure projects, federal and state. It should be designed in such a way as to serve as a common basis for official environmental assessment and authorization decisions, private investment decisions, and public comment. The data should be detailed enough to allow private companies to provide "predictive project analytics" to potential developers and investors. CEQ should also make this a priority of its E-NEPA study under Sec. 110 of NEPA as amended by the FRA.

Reduce litigation risk. Important projects are held up by lawsuits over minor omissions in environmental studies. Tightening the statute of limitations is not enough. Agencies should be held to a substantial-compliance standard, so that if reports are mostly right, a project can still go forward while the environmental document is corrected. Congress should tighten the rules on standing and revive procedural protections for defendants so that activists cannot hold up safe infrastructure over minor issues.

Empower agencies to establish programmatic and general permits. Major categories of infrastructure projects with similar environmental profiles should be subject to expedited programmatic or general permits, with mitigation and monitoring requirements. Congress should

empower agencies to create programmatic and general permits when necessary to advance national policy goals.

Conclusion

The costs, delays, and uncertainties of the NEPA process hurt everyone. They constitute the most important obstacle standing in the way of President Biden's climate goals and are depriving American families and communities of the modern infrastructure they need and deserve. I urge CEQ to take the problem of permitting reform seriously and with a sense of urgency. The Proposed Rule suggests that it is doing neither.

Thank you for your consideration of these comments.

Respectfully submitted,

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[*] These comments represent my views and not necessarily those of Florida International University or the Heritage Foundation