

Committee on Natural Resources
Subcommittee on Oversight and Investigations
Oversight Hearing
1324 Longworth House Office Building
September 14, 2023
10:00 a.m.
Oversight Hearing titled “Examining Systemic Government Overreach at CEQ.”

RESPONSES TO QUESTIONS FOR THE RECORD
October 4, 2023

Questions from Rep. Paul A. Gosar for Ms. Jill Heaps, Senior Attorney, Earthjustice

- 1. Please list any current or pending litigation that Earthjustice is involved in against the Federal government. This includes, but is not limited to, litigation in which Earthjustice serves as counsel and/or represents a party to the litigation. As applicable, please disclose the case name, docket number, court, and subject matter of the litigation.**

Earthjustice is a non-profit public interest law organization providing legal counsel and representation to clients, as many other non-profit public interest law organizations so provide to their clients. As indicated in my disclosure form, dated September 14, 2023, Earthjustice is not a party in any pending litigation to which the federal government is a party.

Questions from Rep. Raúl Grijalva for Ms. Jill Heaps, Senior Attorney, Earthjustice

- 1. Based on your experience as an attorney, can you speak to specific instances in which NEPA regulations have successfully protected a community from harm?**

As I explained in my written testimony, NEPA litigation challenging the Army Corps’ plan to widen and deepen the Industrial Canal helped protect communities in New Orleans from catastrophic toxic contamination during Hurricane Katrina. The court determined that the Army Corps of Engineers failed to take a hard look at the impacts of placing contaminated sediment in the wetlands adjacent to the Lower 9th Ward, given the whole area is susceptible to hurricanes. *Holy Cross Neighborhood Ass’n v. U.S. Army Corps of Eng’rs*, 455 F. Supp.2d 532 (E.D. La. 2006).

The Corps’ additional environmental review was also insufficient. The Corps proposed a deep-draft dredging project on the Industrial Canal. However, the Industrial Canal serves to connect the Mississippi River and the Mississippi River—Gulf Outlet, which was no longer open to deep-draft traffic. The community again challenged the NEPA analysis and the Corps’ failure to analyze a shallow-draft dredging project, as required by NEPA regulations. 40 C.F.R. § 1502.14. The court agreed with the community and found the NEPA alternatives analysis insufficient. *Holy Cross Neighborhood Ass’n v. U.S. Army Corps of Eng’rs*, 2011 WL 4015694 (E.D. La. 2011). The NEPA litigation saved the community from the harms of disposing millions of tons of contaminated sediment and from having their taxpayer dollars spent on a project that was not needed.

Also in Louisiana, residents in St. Tammany Parish concerned about aggregate wetland loss due to unchecked development were able to use NEPA to protect their community. *See O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225 (5th Cir. 2007). The Fifth Circuit required the Army Corps of Engineers to take a hard look at cumulative wetland loss and its consequences, including flooding and stormwater runoff, as the CEQ regulations require. 40 C.F.R § 1508.7. The court also concluded that the Corps failed to demonstrate how the mitigation measures would succeed and render the adverse effects insignificant. While the court's decision about mitigation measures were not yet incorporated into the CEQ regulations, the proposed Phase 2 regulations aim to ensure that mitigation measures identified in a NEPA process are completed and reduce the environmental impacts of the action.

2. Can you speak to instances in which a failure to follow a comprehensive environmental review process has negatively impacted a community?

The Army Corps of Engineers' failure to consider climate change impacts when approving deep-draft dredging of the lower Mississippi River is having disastrous consequences for Louisiana residents and threatens the drinking water of nearly 1 million people. A wedge of saltwater is making its way up the Mississippi River from the Gulf of Mexico and is slated to reach the New Orleans metro area's Algiers plant by October 22, 2023. If the saltwater wedge reaches the drinking water intake, the water supply from New Orleans will likely become undrinkable.¹ When evaluating deep draft dredging, the Corps recognized that such dredging would facilitate saltwater intrusion into the Mississippi River. In the Corps' latest NEPA analysis of the dredging from 2018, the Corps acknowledged that the dredging would force water plants to "shut down operations as saltwater reaches their water intake facilities."² The Corps also acknowledged, "For communities at the lower reaches of the river, this shutdown could last longer than their storage reserves can accommodate."³ However, the Corps only acknowledged that the saltwater intrusion issue could affect residents of Plaquemines Parish. The Corps failed to analyze how climate change-driven changes in precipitation could lead to drought conditions, meaning that saltwater intrusion could leave nearly 1 million people without safe drinking water. The Corps' mitigation plan to protect drinking water from encroaching saltwater was an underwater sill, which was overtopped on September 20.⁴ The Corps never identified the risk of the sill being overtopped or whether the plan to raise the sill, but leave a "notch" in the saltwater barrier sill to allow continued deep draft navigation, will actually protect affect drinking water intakes.⁵ This impending drinking water crisis in New Orleans stems directly from the Corps' lax NEPA review.

¹ Mike Smith, "Pricey pipeline plan to protect New Orleans drinking water detailed. Officials say there's time," NOLA.com, Oct.3, 2023.

² U.S. Army Corps of Engineers, "Mississippi River Ship Channel Gulf to Baton Rouge, LA, Integrated General Reevaluation Report and Supplemental Environmental Impact Statement," April 2018, Page 2-23 available at https://www.mvn.usace.army.mil/Portals/56/docs/Projects/Miss%20Deep/01_MRSC_Main%20Report.pdf.

³ *Id.*

⁴ *See* Smith, "Pricey pipeline plan to protect New Orleans drinking water detailed. Officials say there's time."

⁵ *See id.* ("The Corps is now raising the sill to 30 feet below the surface, but will keep a notch in the middle at the original depth" to allow enough draft for passing ships.").

In Western New York, the U.S. Fish and Wildlife Service completed an environmental assessment and issued a Finding of No Significant Impact for an industrial wastewater pipeline through the Iroquois National Wildlife Refuge. The purpose of the pipeline is to incentivize industrial manufacturers to build on a 1,250 acre “mega industrial site” directly adjacent to the Tonawanda Seneca Nation’s reservation. During the NEPA process, the U.S. Fish and Wildlife Service failed to conduct any outreach to the Tonawanda Seneca Nation and excluded them from the NEPA process. The NEPA process also failed to examine the cumulative impacts of the industrial development on the Tonawanda Seneca Nation, the local wildlife, and the environment. The NEPA process also failed to examine whether the soils in the Iroquois National Wildlife Refuge were appropriate for directional drilling and examine the risk to the Refuge from spills of drilling fluid. Despite the Tonawanda Seneca Nation asking the U.S. Fish and Wildlife Service and Secretary of the Interior Deb Haaland to withdraw the pipeline permit until they consulted with the Tonawanda Seneca Nation and completed a full environmental review, the U.S. Fish and Wildlife Service rejected that request and allowed the drilling to begin in late July 2023. In less than two months of drilling, there have already been two major spills of fracking fluid that have entered wetlands in the Iroquois National Wildlife Refuge and have had untold damage to the Refuge and the Tonawanda Seneca Nation, whose citizens use and enjoy the Refuge. The drilling is currently paused, but the U.S. Fish and Wildlife Service has refused to rescind the permit.

In New Orleans after Hurricane Katrina, the Department of Veterans Affairs wanted to build a new hospital. The VA entered into an agreement with Mayor Ray Nagin to obtain a large plot of land where it wanted to build the hospital, even though the land encompassed an entire neighborhood. The neighborhood was primarily populated with Black residents and contained gabled Victorian homes constructed in the late 19th century. After the agreement was executed, the VA began the NEPA process for the new hospital. The VA claimed that the new hospital, which would have 200 beds, needed to be built on 60 acres of land, even though other local hospitals with the same number of beds were built on just a few acres. Although community groups came forward with other options where the hospital could be built or abandoned hospitals that could be modernized, the VA’s NEPA analysis ignored those alternatives and concluded the preferred land was the only place where the hospital could be built. The neighborhood was destroyed, and the residents were relocated so that the hospital could be built in the VA’s preferred location.

In Erie, Pennsylvania, the failure to follow a comprehensive environmental review process for a highway expansion in downtown Erie has been devastating for local residents. The Bayfront Parkway separates Erie residents living downtown from the bus station, library, restaurants, a museum, and other recreational opportunities. Because many drivers use the Bayfront Parkway as a short-cut across the city, crossing the road was dangerous for pedestrians and cyclists. In the process to reimagine the Bayfront Parkway, many residents were eager to see a pedestrian and cyclist-friendly corridor with slower traffic and a narrower roadway. Instead, the Pennsylvania Department of Transportation, backed by local business interests, proposed an expanded roadway, to move cars across the waterfront quicker but making it even more perilous for pedestrians and cyclists. To make up for the increased traffic, the Department of Transportation proposed that someone should build a pedestrian bridge. But the pedestrian bridge was unfunded and not a part of the widening plan, and there was no plan of who would maintain the bridge during the snowy winter—or that residents would use the pedestrian bridge. The residents geared up to participate in the public comment process for the environmental

assessment and share their frustration in the hopes of swaying the decision. Instead, the Federal Highway Administration signed off on “downscoping” the NEPA document from an environmental assessment to a categorical exclusion—and then skipped the public review process and approved the project. The Pennsylvania Department of Transportation has begun expanding the roadway, which will cut off the downtown Erie residents from the waterfront.

3. How does and can NEPA play a positive role in advancing our energy development and responsibly utilizing American tax dollars?

NEPA plays a positive role in advancing our energy development and responsibly using tax dollars. First, at its heart, NEPA’s mandate that agencies “look before they leap” and engage in a robust public process means that agencies must research alternatives and quantify environmental harms to make more informed, better decisions. NEPA’s requirement that agencies examine cumulative impacts of the action together with past, present, and reasonably foreseeable future actions forces agencies to take the long view in approving projects, like energy development, which may look individually like a minor issue but when taken collectively cause a significant impact. This directs agencies towards approving a suite of energy development projects that, taken together, are better for our communities, our environment, and our country.

NEPA’s requirements that agencies examine the direct, indirect, and cumulative impacts of the project on climate change, while also examining the impact climate change may have on the project can also save taxpayers money in the long run. We know that costs to adapt to climate change and mitigate climate change’s effects will run in the billions of dollars. NEPA incentivizes smart, long term financial choices that take into account not just financial benefits of energy development, but the financial costs of climate harms to which the development may cause or contribute.

4. My friends on the other side of the aisle have claimed that litigation slows energy projects. What effect does NEPA have on litigation of major energy projects?

The 2022 Clean Power Annual Market Report identified causes of delays in clean power projects. The report acknowledges that “Solar accounts for 68% of delayed clean power capacity, due primarily to difficulty sourcing panels as a result of trade restrictions.”⁶ Wind projects represent 18% of total delays, and “causes of wind delays range from ongoing supply chain constraints to grid interconnection delays.”⁷ The report did not identify NEPA litigation as a significant cause of delays in implementing clean energy projects.

NEPA encourages meaningful community engagement and public participation early and often during the NEPA review process. My experience with NEPA has taught me that when there is early engagement and meaningful opportunities to participate in decision-making, parties can reach consensus, make better decisions, and get projects built faster. Recent research by MIT bears this out. A 2022 MIT study examined fifty-three large-scale clean energy projects that

⁶ American Clean Power, Clean Power Annual Market Report 2022, https://cleanpower.org/wp-content/uploads/2023/05/2022-ACP-Annual-Report_Public.pdf

⁷ *Id.*

were delayed or canceled.⁸ The study concluded that “early engagement with potential local opponents can avoid extended delays or project cancellations.” Robust, upfront engagement in Maryland was key to securing both approval for 1654 MW of offshore wind and commitments to ensure that the projects are constructed and operated in a responsible manner.

Our experience at Earthjustice shows that permitting processes that include thorough, upfront engagement can actually speed up the transmission build-out and ensure that we are developing in a way that does not cause undue harm to communities, sensitive ecosystems, and cultural resources. The proposed Phase 2 regulations promote strong environmental review and meaningful public engagement processes to avoid harming communities while effectively speeding up development of much-needed infrastructure to enable a rapid clean energy transition.

5. How have President Biden’s Permitting Action Plan and investments in the Inflation Reduction Act to help expedite federal agency permitting impacted timelines for completing environmental reviews and permitting processes? How are CEQ’s NEPA Phase 2 revisions expected to affect permitting timelines?

The Inflation Reduction Act reflects an unprecedented national commitment to clean power and is the largest policy investment in clean energy on record. As the 2022 Clean Power Annual Market Report predicts, “The IRA is set to catalyze clean energy growth, ultimately more than tripling annual installations of wind, solar, and battery storage by the end of the decade.”⁹

The Phase 2 regulations direct agencies to actively reach out to Tribal governments and affected and interested members of the public. The Phase 2 regulations direct agencies to “conduct early engagement with likely affected or interested members of the public (including those who might not be in accord with the action).” By directing agencies to engage early with those who oppose the project or action, the Phase 2 regulations will reduce the likelihood that concerns can be addressed during the NEPA process, a better decision will be made, and permitting timelines can be sped up.

⁸ Lawrence Susskind et. al. “Sources of opposition to renewable energy projects in the United States,” *Energy Policy*, vol 165, June 2022 *available at* <https://www.sciencedirect.com/science/article/pii/S0301421522001471>.

⁹ American Clean Power, *Clean Power Annual Market Report 2022*, https://cleanpower.org/wp-content/uploads/2023/05/2022-ACP-Annual-Report_Public.pdf

6. Republicans have claimed that the Biden administration has permitted fewer renewable energy projects than the Trump administration. Is this claim accurate?

This claim is not accurate, as is reflected in the chart from the 2022 Clean Power Annual Market Report Mr. Loyola included in his testimony. The chart reflects the following “Annual Clean Power Capacity Additions (MW)”

Year	President	Annual Additions (approximate)
2017	Trump	12,000
2018	Trump	12,500
2019	Trump	14,500
2020	Trump	28,000
2021	Biden	30,000
2022	Biden	25,000

In the first two years of President Biden’s term, his administration permitted 55,000 MW of clean power. of the Trump Administration permitted approximately 67,000 MW of clean power over four years. On an annual basis, President Trump’s administration permitted approximately 16,750 MW per year during his term, compared to 27,750 MW per year during President Biden’s administration.

7. Is there anything else you would like to add?

Yes, when agencies and project proponents meaningfully involve the affected community in the decision-making process and the NEPA review, we have seen outcomes that work for everyone. For example, in North Charleston, South Carolina, the City of North Charleston, the South Carolina State Ports Authority, and community groups like Lowcountry Alliance for Model Communities came together to during a NEPA process to ensure the community received mitigation for the negative impacts from development of a new container terminal at the former Navy base. After negotiations, the Port Authority made a \$4 million mitigation commitment to impacted North Charleston residents, who used the funds to hire experts to assist with environmental justice projects around air pollution, brownfields redevelopment, and other issues related to community health and safety. Involving the community early in the process and mitigating negative effects of projects are two key points in the Phase 2 Regulations. The North Charleston example shows how this approach can work to lead to better projects, stronger communities, and faster project completion.

Questions from Rep. Huffman for Jill Witkowski Heaps, Senior Attorney, Earthjustice

- 1. As you mentioned in your testimony, 13 species of salmon or steelhead in the Columbia River Basin are currently listed under the Endangered Species Act, including all remaining populations in the Snake River. The Columbia River Basin Treaty Tribes reserved the right to fish for these salmon forever in their treaties with the United States government, and yet the Nez Perce Tribe recently found that many sub-populations are at imminent risk of extinction. Can you elaborate on how the declines in salmon populations have impacted Tribes and the consequences of salmon extinction for those Tribes?**

The four Columbia River Basin Treaty Tribes (now known as the Yakama, Warm Springs, Umatilla, and Nez Perce) and other Tribal Nations have hunted, gathered, and fished within the Columbia River Basin since time immemorial. Of all the traditional foods eaten by the Tribes, “salmon was the most important.”¹⁰ But salmon are not just a source of sustenance for Indigenous peoples in the Pacific Northwest, they are a critical component of their culture and life ways. According to Donald Sampson, a former executive director of the Confederated Tribes of the Umatilla Indian Reservation and Columbia River Inter-Tribal Fish Commission, “Salmon are the centerpiece of our culture, religion, spirit, and indeed, our very existence... Our people’s desire is simple--to preserve the fish, to preserve our way of life, now and for future generations.”¹¹ To guarantee their ability to fish for salmon in perpetuity, each of the four Columbia River Basin Treaty Tribes reserved the right to fish at “all usual and accustomed places” in treaties with the United States in 1855.

Since the construction of the four lower Snake River dams, wild salmon populations have declined precipitously. Just a fraction of the fish that used to return to the Columbia River Basin each year do so today, severely limiting the number of salmon that can be harvested by Tribal members. Two reports published by the Columbia River Inter-Tribal Fish Commission – the 1999 Tribal Circumstances Report and the 2019 Tribal Perspectives Report – describe the importance of salmon and other native fish species to the Columbia River Basin Treaty Tribes and the Shoshone-Bannock Tribe and the impacts that the four lower Snake River dams have had on the fisheries, cultures, and economies of those Tribes. Importantly, they do so by highlighting the voices of Tribal members themselves.

¹⁰ Meyer Resources. Developed for the Columbia River Inter-Tribal Fish Commission. April 1999. Tribal Circumstances and Impacts of the Lower Snake River Project on the Nez Perce, Yakama, Umatilla, Warm Springs and Shoshone Bannock Tribes. <https://critfc.org/wp-content/uploads/2021/10/circum.pdf>

¹¹ *Id.*

Below is a table from the 1999 report that reveals the stark declines in salmon harvested by each of the Tribes from contact with Europeans to the present day.

A Comparison of Estimated Tribal Harvests from the Columbia/Snake System Contact Times to the Present					
Benchmark	Nez Perce	Shoshone/ Bannock	Yakama	Umatilla	Warm Springs
	harvest in thousands of pounds				
Estimated harvest in Contact Times	2,800	2,500	5,600	3,500	3,400
Percentage of fish in diet.	40%	28%	40%	38%	50%
Estimated Harvest at Treaty Times.	1,600	1,300	2,400	1,600	1,000
Current tribal harvest.*	160	1	1,100	---77---	
Percentage of Treaty-Period Salmon lost.	90.0%	99.9%	54.0%	97.0%	
Present Harvest as a Percentage of Present Need.	9.4%	0.04%	14.3%	1.7%	

The impact of these immense declines have been great, affecting not only food resources but the cultural, social, and economic well-being of the Tribes. According to Chris Walsh, a Yakama Psycho-Social Nursing Specialist: “If you lose your foods, you lose part of your culture - and it has a devastating effect on the psyche. You also lose the social interaction. When you fish, you spend time together - you share all the things that impact your life - and you plan together for the next year. Salmon is more important than just food.”¹² Today, Tribal members who would otherwise fish for economic or cultural benefits struggle to do so. Current poverty rates within the Columbia River Basin Treaty Tribes far exceed the national average and are actually higher for three of the four Tribes than they were in 1999.¹³ The decrease in salmon populations already experienced by the Tribes has been devastating.

Salmon extinction is not an option for the Columbia River Basin Treaty Tribes. In 2021, the Nez Perce Tribe presented a call to action to the Northwest Power and Conservation Council based on new analyses that found 42% of Snake River spring/summer Chinook populations are at or below quasi-extinction levels.¹⁴ It is imperative that we act now to avoid an irreversible decline in salmon abundance. The United States must do everything in its power to stop salmon extinction to save these incredible species and honor its treaty obligations. That includes breaching the lower Snake River dams.

¹² Meyer Resources. Developed for the Columbia River Inter-Tribal Fish Commission. April 1999. Tribal Circumstances and Impacts of the Lower Snake River Project on the Nez Perce, Yakama, Umatilla, Warm Springs and Shoshone Bannock Tribes. <https://critfc.org/wp-content/uploads/2021/10/circum.pdf>

¹³ Columbia River Inter-Tribal Fish Commission. June 2019. Tribal Perspectives Report. <https://critfc.org/documents/tribal-perspective-report/>

¹⁴ Nez Perce Tribe Department of Fisheries Resource Management. Snake Basin Chinook and Steelhead Quasi-Extinction Threshold Alarm and Call to Action. May 2021. https://www.nwccouncil.org/sites/default/files/2021_05_4.pdf