EXAMINING SYSTEMIC GOVERNMENT OVERREACH AT CEQ

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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CONTENTS

OVERSIGHT HEARING ON EXAMINING SYSTEMIC GOVERNMENT OVERREACH AT CEQ

Thursday, September 14, 2023
U.S. House of Representatives
Subcommittee on Oversight and Investigations
Committee on Natural Resources
Washington, DC

The Subcommittee met, pursuant to notice, at 10:10 a.m. in Room 1324, Longworth House Office Building, Hon. Paul Gosar [Chairman of the Subcommittee] presiding.

Present: Representatives Gosar, Rosendale, Hunt, Collins, Westerman; and Stansbury.

Also present: Representatives Bentz, Fulcher, Graves, Newhouse; and Huffman.

Dr. GOSAR. The Subcommittee on Oversight and Investigations will come to order.

Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time.

The Subcommittee is meeting today to hear testimony on examining systemic government overreach at CEQ.

I ask unanimous consent that all Members testifying today will be allowed to sit with the Subcommittee, give their testimony, and participate in the hearing from the dais. First, the gentleman from Oregon, Mr. Bentz; the gentleman from Louisiana, Mr. Graves; the gentleman here at the dais already from California, Mr. Huffman; the gentleman from Idaho, Mr. Fulcher; the gentlewoman from Washington, Mrs. McMorris Rodgers; and the gentleman from Washington, Mr. Newhouse.

Without objection, so ordered.

Under Committee Rule 4(f), any oral opening statements at the hearings are limited to the Chairman and the Ranking Minority Member. I therefore ask unanimous consent that all other Members' opening statements be part of the hearing record if they are submitted in accordance with Committee Rule 3(o).

Without objection, so ordered.

I am now going to recognize myself for my opening statement.

STATEMENT OF THE HON. PAUL GOSAR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Dr. GOSAR. Thank you, Chairman Westerman, for joining us today, and thank you also, Ranking Member Stansbury, for your leadership on the Subcommittee. And thank all of the witnesses for attending today.

Sadly, CEQ Chair Brenda Mallory refused to join us here today, and she refused to provide the opportunity for someone on her staff to testify on her behalf, which, quite honestly, could have been a

great opportunity. In the words of Supreme Court Justice Louis D. Brandeis, "Sunlight is said to be the best of disinfectants." But as we have seen from the Biden administration time and time again, they would prefer to operate in darkness, insisting that Congress and the American people take their word for it.

President Biden has repeatedly insisted that his actions and the actions of his family are above reproach. Yet, over the last several years, and largely thanks to the work of congressional Republicans, we now know nothing can be further from the truth. Nonetheless, the personal arrogance and lack of accountability from President Biden has infected his entire administration.

CEQ was once a small office charged with ensuring compliance for the limited number of agency actions that triggered the National Environmental Protection Act of 1969, or NEPA. CEQ has a targeted role with a budget to match. Today, President Biden has transformed CEQ's role from overseeing NEPA's compliance to an agency with both a bloated budget and role in government policy-making. It is an entity charged with implementing his radical eco-agenda, remaking Federal agencies as vehicles of social change, and leading the war on domestic energy production.

As we will hear from some of our witnesses today, CEQ's role in implementing Executive Orders and rulemaking vastly exceeds the statutory role and prescribed authority. Examples of this include: (1) refusing to implement bipartisan NEPA reforms from the Fiscal Responsibility Act on a timely basis; (2) improperly and arguably illegally imposing greenhouse gas reduction requirements that deter investment in American energy independence; (3) egregious favoritism toward radical eco-activists pushing to breach the Lower Snake River Dams; and (4) selecting an internal organization funded by one of the largest left-leaning dark money groups as the sole arbiter of emission reduction mandates for the Federal contractors.

On what now has become a routine matter, CEQ is ignoring the will of Congress, whether it be refusing to provide a witness for a hearing or to provide timely answers to routine congressional inquiries. No other Federal agency has allowed this lack of accountability, and this behavior is unacceptable. It is Congress' responsibility to assess whether Federal agencies and departments are operating in effective, efficient, and economical manners, and to gather information that may inform legislation.

Instead, before he was President, Democrat Woodrow Wilson emphasized that Congress' oversight and informing function should be preferred even to the lawmaking function. Woodrow Wilson also added that unless Congress conducts oversight, the country must remain in an embarrassing, crippling ignorance of the very affairs which it is the most important that it should understand and direct.

Time and time again, it appears that CEQ hopes that the public remains in crippling ignorance of its work. Well, I have news for Chair Mallory and President Biden. Not on my watch. We will continue to hold CEQ accountable, and we will continue to seek answers on the very questions CEQ refuses to answer. We will ultimately use every tool at our disposal to obtain the information we need from CEQ, including on rulemaking, on NEPA reforms, on CEQ's relationships with radical eco-activist organizations, and on

CEQ's potential abuse of Federal solicitation process to curry favor with dark money groups supporting Democrats. Despite the best efforts from Chair Mallory and President Biden, CEQ will not escape the watchful eye of Congress' oversight.

Thank you to all of you, and I look forward to the hearing.

I now recognize the Ranking Member Stansbury for her opening statement.

STATEMENT OF THE HON. MELANIE A. STANSBURY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Ms. STANSBURY. Good morning, and I want to just start by welcoming all of our witnesses who are here to testify today. And thank you to our Chair and to all of our colleagues who are here today.

It is interesting to always have these debates, and to discuss differing views of the world and how we see what is happening in the world. And I think today really paints a stark picture in the differences in how we view what is occurring on our planet and in our country right now.

In the 1970s, in the late 1960s and 1970s, as they dawned, our country had come to understand some of the damage that it had inflicted upon itself. The Cuyahoga River was on fire. Iconic rivers across the West were being dammed and causing catastrophic results for communities that had relied on them since time immemorial, tribal lands were being physically damaged. Mines and other projects were being permitted in proximity to vulnerable communities, and our food, water, and air, which we thought, of course, would always be there to sustain us, were in jeopardy.

And because of this, our nation came together and, in 1969, passed one of the most fundamental bedrock environmental laws. The National Environmental Policy Act was passed and signed into law by Republican President Nixon on January 1, 1970, and it was dubbed the Magna Carta of Environmental Laws as a direct response to the environmental crises of the 1960s and 1970s that was occurring.

Now, indeed, our planet, our country, our communities are facing another crisis as we sit here today, and stands at another global precipice. Last summer was the warmest summer in recorded history. We are seeing tropical storms and hurricanes stronger than ever, with flooding that is occurring all across the planet, including in Libya, where over 5,000 people were killed this last week and another 10,000 are missing. We are seeing wildfires that are the worst wildfires ever in the history of our planet that can be seen from space. And we are seeing some of the biggest impacts of drought that we have ever seen, including in my home state of New Mexico, where our river, the Rio Grande, ran dry again this past week.

These are exactly the kinds of crises that Republicans and Democrats had in mind when they came together and passed NEPA on a bipartisan basis, because they understood that if we did not empower our communities and stop the damage that we were doing to our environment, that we could cause catastrophic impacts

for our communities. And that is the purpose for why we passed NEPA.

But yet, here we are once again in this Committee, holding another oversight hearing on the implementation of this critical bedrock legislation at a time that our country is standing at a precipice. And I will remind folks that this is the third hearing that we have had on this specific topic.

But it is important to note that the President and Democrats last Congress rose to the occasion. We are working every single day to try to address this crisis. Last year, we passed the largest and most significant legislation ever in the history of the planet to address climate change with the passage of the Inflation Reduction Act. Across the country, the President, his cabinet, and Democrats are rolling out projects, including in my home state in New Mexico, where we just started and dug ground and cut ribbon on three new projects, including one of the largest wind turbine factories in the United States, the first solar manufacturer to repatriate to the United States since the passage of the Inflation Reduction Act, and we cut ribbon on the largest wind project in North America in the Western Hemisphere just 2 weeks ago.

We are at the forefront of the clean energy revolution, and understand that if we do not take urgent action now it will have catastrophic and irrevocable impacts for our communities. And that is also why the Chair of CEQ is not here today, because she is out on the ground doing the work to ensure that we prevent a catastrophic crisis for our planet and our communities. And that is the work that we have been tasked with as this body, as representatives of our communities, and as people who serve this great nation.

So, I look forward to the discussion today. It is an important discussion. It is a discussion about the role of government in serving our communities in times of crisis, helping our communities get through what is possibly one of the most difficult chapters in American history, and addressing the many faceted environmental crises that we are facing right now in this country and on this planet.

Thank you, and I yield back.

Dr. GOSAR. Thank you, Ranking Member Stansbury.

I now recognize the Chairman of the Full Committee on Natural Resources, Mr. Bruce Westerman, for a statement.

STATEMENT OF THE HON. BRUCE WESTERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. WESTERMAN. Thank you, Chairman Gosar and Ranking Member Stansbury, for holding this important hearing today, and thank you to the witnesses for being here.

I do want to point out we have an empty seat in front of us again. The Council on Environmental Quality is not exempt, regardless of what they may think, from congressional oversight. I want to make the record clear that we not only invited Chair Mallory with plenty of notice, but also allowed her to provide a designee for this hearing. And in response, her staff stated and I quote, "We do not have a designee for Chair Mallory that will be

available to testify on September 14." So, not only did she not show up, she couldn't find anybody in the office over there to come by and visit with the Committee that has jurisdiction over her agency's existence. And to me, that is just quite simply unacceptable.

Moreover, in e-mail exchanges with my staff, CEQ staff questioned the precedent of congressional oversight. The Supreme Court has on multiple occasions clarified the power of Congress to conduct oversight and investigations. Apparently, the Chair thinks this doesn't apply to her tenure at CEQ.

And since her time as Chair of CEQ, Chair Mallory has now twice refused to testify in our Committee, willfully ignored questions from Members of Congress during the hearing. She avoided the questions during the one hearing that she did show up to, and missed deadlines for regular congressional inquiries and questions for the record. And my staff informed me that late last night they got a data dump of questions that were answered from our last congressional hearing that had gone unanswered up until this point.

So, while ignoring routine oversight, the Chair and her employees at CEQ are continuing to do I don't know what, because the purpose of oversight is to find out what they are doing, why they are doing it, and how they are being stewards of the taxpayer dollars. And are they following the laws that Congress passed?

Again, I am not sure what they are doing with their time and their massive overinflated budget that is nearly 70 times their authorized amount. But it doesn't appear to be in enforcing a bipartisan law that their boss, President Biden, signed into law. And they were 100 days past the implementation of the Fiscal Responsibility Act that passed with a majority of votes in both the House and the Senate on a bipartisan measure, and was signed into law by President Biden.

And the feedback I am getting from the outside world is that not one bit of that policy is being implemented. So, I think that is a reasonable request to have the Chair of CEQ to come to this Committee and answer questions on how they are implementing the law that, again, was a bipartisan law.

And from 2019 to 2023, CEQ's baseline budget more than doubled, and they received an additional $62.5 million from the Inflation Reduction Act to support environmental and climate data collection. In short, the Administration is funneling millions of taxpayer dollars to an agency whose, as best I can tell, primary goal is "environmental justice above all," while that agency refuses to answer questions from the representatives of the American public.

Well, I can tell you that actions have consequences. And those who don't show up to work generally don't get paid. And to quote a President from long ago from the other side of the aisle, the buck will stop here. It stops in Congress. We are the ones that send the money to the Administration. And I will be working with my counterparts in the Appropriations Committee to ensure that we put a stop to egregious behavior and look to fund CEQ at a level that is commensurate with its accountability to the American people and its congressionally authorized levels.

And something that is still true today, according to our Constitution, is that Congress makes law and the Administration enforces the law. And we may have a lot of great policy ideas, we may have philosophies on society. There may be outside activist groups who think the world should operate this way or it should operate that way. But at the end of the day, according to our Constitution, the law rules, and it is the law that Congress passes and that the Administration signs. And when we have an agency that deviates from that, it is Congress' responsibility, it is our duty as representatives of the people, to hold that Administration accountable. And that is the purpose of this hearing today.

I do want to again thank the witnesses that are here. I think you can provide important information about the real-world impacts of the actions of CEQ, and I look forward to hearing the testimony.

Again, Chairman, thank you, and I yield back.

Dr. GOSAR. Thank you, Chairman Westerman. Now I will introduce our witnesses.

As we have stated before, we invited Chair Mallory from the White House's Council on Environmental Quality. While she refused our invitation and she declined to send a designee, we still did reserve her a chair in case she changes her mind.

We now have Mr. Mario Loyola, Director of the Environmental Finance and Risk Management Program and Research Assistant Professor at Florida International University Institute of Environment, that is a mouthful; Ms. Jill Heaps, Senior Attorney at Earthjustice; Mr. Scott Simms, CEO and Executive Director, Public Power Council; and Mr. Marlo Lewis, Senior Fellow at the Competitive Enterprise Institute.

Let me remind the witnesses that under Committee Rules, they must limit their oral statements to 5 minutes, but their entire statement will appear in the hearing record.

To begin your testimony, just press the on button on the microphone. We use timing lights here. When you begin, the light will turn green, and at the end of those 5 minutes, it will turn red. I ask you to please summarize and complete your statement if you start seeing the yellow.

I will also allow all witnesses to testify before having Members ask their questions.

I now recognize Mr. Loyola for his first 5 minutes.

STATEMENT OF MARIO LOYOLA, RESEARCH ASSISTANT PROFESSOR, ENVIRONMENTAL LAW, FLORIDA INTERNATIONAL UNIVERSITY, MIAMI, FLORIDA

Mr. LOYOLA. Chairman Gosar, Ranking Member Stansbury, members of the Committee, thank you for the honor of appearing before you today.

My name is Mario Loyola. I teach environmental law at Florida International University, and I am also a fellow at the Heritage Foundation. Under President Donald Trump, I served as Associate Director for Regulatory Reform at CEQ, where I was intimately involved in developing the One Federal Decision policy and the 2020 rule revision. I am appearing before you today in my individual capacity, and not as a representative of FIU or the Heritage

Foundation. I have submitted more detailed comments for the record, and will just make a few points now.

The delays and uncertainties of the Federal permitting and environmental review process are an enormous burden for American society, and a very dangerous, competitive disadvantage compared with countries like China. Not only does it deprive Americans of the modern infrastructure that they need and deserve, but even the scale of the renewable energy deployment that would be required for the clean energy revolution that Ranking Member Stansbury mentioned is completely impossible under current law because of the limits to the amount and the speed at which renewable energy capacity can be permitted.

Within the executive branch, Presidents Bush, Obama, and Trump all tried to tackle this problem of inefficient permitting. But President Biden, unfortunately, appears to have thrown in the towel on permitting reform. One fact that is incredible to me really bears this out. During the Trump administration, the rate at which renewable energy capacity was permitted actually doubled from 2017 to 2020. Under the Biden administration, it has actually gone down. And the amount of renewable energy capacity that was permitted last year was lower than in 2020.

The Fiscal Responsibility Act's historic amendments to NEPA were a huge step forward for permitting reform. But some of the most important provisions are not self-executing and require active implementation by CEQ. Unfortunately, CEQ appears to have gone in the opposite direction. Perhaps to placate the radical left or for whatever reason, CEQ has sought to undo the Trump-era reforms, of which, ironically enough, the renewable energy sector was arguably the primary beneficiary. I will name a few examples.

Where the Fiscal Responsibility Act tries to clarify that only a limited set of reasonable alternatives to the agency action need to be studied in detail, CEQ has reintroduced the concept of studying alternatives outside the agency's jurisdiction. Even worse, it has created a new requirement that the agency identify and study in detail the environmentally preferable alternatives, which is not a statutory requirement in NEPA for significance determinations. CEQ has again gone back to the 1978 regulation, and revived the context and intensity factors, thereby expanding what should be a single factor inquiry for the agencies into a dozen or more factors that they have to consider.

Likewise, CEQ has reintroduced the concept of cumulative impacts into the definition of effects that must be studied. And here I will just stop and make a point that is very important for the Committee to be clear about, and for the Committee to make clear for the American people, which is that these added procedural burdens that CEQ has reintroduced into the NEPA process are not judicially enforceable against Federal agencies. CEQ has no rulemaking authority. The CEQ regulation is really just an Executive Order, like Executive Order 12866.

And no matter what level of deference courts give CEQ, whether it is substantial deference as the Supreme Court has indicated, or more controlling deference as lower Federal courts have mistakenly done, it simply cannot be the case that the statutory term effects of the agency action can include the effects of other actions that are

not related to the agency actions, which is, of course, the concept of cumulative impacts.

Likewise, the time limits and page limits in the Fiscal Responsibility Act are not self-executing, and require CEQ guidance. Here it is very important that agencies not be allowed unfettered discretion to start the clock ticking whenever they want.

Finally, the definition of major Federal action, CEQ must make clear that it is the action and its impacts that must be within the agency's control for NEPA to be triggered.

There is more than enough capital in the private economy to build all the infrastructure that America needs if government would just make the process more predictable. Congress wouldn't have to be borrowing trillions of dollars from our children and grandchildren to subsidize infrastructure if we could just remove the uncertainties that the process contains today.

I have made several recommendations to that effect in my submitted testimony, and I look forward to answering your questions. Thank you very much.

[The prepared statement of Mr. Loyola follows:]

PREPARED STATEMENT OF MARIO LOYOLA, PROFESSOR, FLORIDA INTERNATIONAL UNIVERSITY, SENIOR RESEARCH FELLOW, HERITAGE FOUNDATION

Chairman Gosar, Ranking Member Stansbury, members of the Committee, thank you for the honor of appearing before you today. My name is Mario Loyola. I'm a research assistant professor at Florida International University, where I teach environmental and administrative law. I'm also a fellow at the Heritage Foundation, where I focus on energy, climate, and environment issues.

Under President Donald Trump, I served as associate director for regulatory reform at the White House Council on Environmental Quality (CEQ). In that role I was one of the principal drafters of the One Federal Decision policy and the revision to CEQ's Regulation of NEPA. My testimony today reflects the insights gleaned from years of work on these issues in and out of government. I'm appearing before you today in my individual capacity and not as a representative of FIU or The Heritage Foundation. The views I will express today are my own and not necessarily those of FIU or The Heritage Foundation.

Many factors contribute to the enormous costs, delays, and uncertainties of the federal process for permitting and environment review of infrastructure projects. But the root of the problem is a hydra-headed bureaucracy in which separate agencies enforce disparate environmental laws with uncoordinated and inconsistent processes. Charged with overseeing the National Environmental Policy Act (NEPA) CEQ has tried to reform the process under presidents of both parties. But all those efforts are just tinkering at the margins of a problem that only Congress can solve. Congress took a major step towards reform when it amended NEPA in the Fiscal Responsibility Act, and the members of this committee are to be particularly commended for that accomplishment. But much more needs to be done.

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 a fantasy given the delays and uncertainties of the permitting process.

The Biden administration has been remarkably slow to appreciate this, which is surprising given that its highest priority is supposed to be a transition to net zero. It's a remarkable contrast with the Trump administration. The amount of renewable energy capacity permitted has gone down in the Biden administration after doubling during the Trump administration. Ten percent less renewable capacity was permitted last year than in 2020. That should ring alarm bells in Congress. 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. 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.

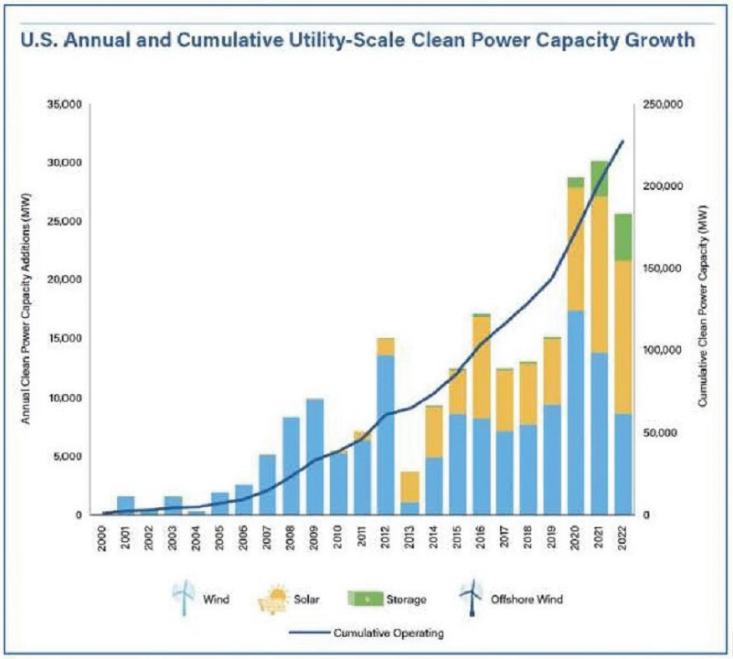

Chart: U.S. Annual and Cumulative Utility-Scale Clean Power Capacity Growth—Clean Power Annual Market Report 2022

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 key point for members of Congress to understand. 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 for private financing, Congress would not have to borrow trillions from our children and grandchildren to subsidize infrastructure.

II. CEQ's Revisions to its NEPA Implementing Regulations

A. The CEQ Regulation Does Not Create Judicially Enforceable Rights or Obligations

In 1978, under President Jimmy Carter, CEQ published a set of so-called regulations implementing NEPA. I say "so-called" because CEQ has no rulemaking authority under NEPA. The authority cited in the premises of the 1978 Regulation is a Nixon executive order, as amended by a Carter executive order.[1] The CEQ regulation is simply a White House directive dressed up to look like a regulation. Its guidelines are mandatory for executive branch agencies, just like E.O. 12866. But, like E.O. 12866, it cannot add to the judicially enforceable rights and obligations created by NEPA.

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). While lower federal courts have often treated the CEQ Regulation as controlling and judicially enforceable, the Supreme Court has gotten this right. In *Andrus v. Sierra Club*, the

[1] Executive Order 11514 (March 5, 1970), as amended by E.O. 11991 (May 24, 1977).

Court noted, "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 made clear: "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).

Hence, it is important to remember that neither CEQ nor federal courts have the power to add enforceable procedural requirements to the statutory requirements of NEPA.

B. Developments Since 2020

On July 16, 2020, CEQ finalized an extensive revision and update of the 1978 regulation.[2] The Trump-era rule revision was measured, 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.

In my view, the Biden CEQ has not been sufficiently sensitive to this danger. The rule proposed on July 31 and currently up for notice-and-comment is called "Phase 2," but it is actually the third time CEQ has changed its regulation of NEPA since 2022.[3]

Fortunately, the Fiscal Responsibility Act (FRA) enacted important amendments to NEPA. Those amendments will help anchor the NEPA process and provide much-needed stability.

III. Issues in the Biden CEQ's Phase 2 Rewrite

This section highlights important issues in the Phase 2 rulemaking, including CEQ's consistency with the FRA's NEPA amendments.

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. All the time that FERC spends studying design alternatives and routing alternatives—none of that is required by NEPA. This is something that the Phase 2 rulemaking 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

[2] 85 Fed. Reg. 43,304, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," (July 16, 2020).

[3] 88 Fed. Reg. 49,924, "National Environmental Policy Act Implementing Regulations Revisions Phase 2," July 31, 2023.

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 Phase 2 rulemaking 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 environmental preferable alternative. Federal courts have to be clear that this language is precatory as far as they're concerned, and definitely not judicially enforceable.

Significance determination. Sec. 1501.3(d) of the Phase 2 rulemaking 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 Phase 2 rulemaking 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 there is no way that greenhouse gas or climate impacts of any particular agency action could 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 policy.

Cumulative Effects. Similarly, Sec. 1508(g) of the Phase 2 rulemaking 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 of actions 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 2 years, and an EA in 1 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 Phase 2 NEPA rulemaking 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 Phase 2 rulemaking, this 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, Congress should at a minimum:

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.

Dr. GOSAR. Thank you, Mr. Loyola.

I now recognize Ms. Heaps for her 5 minutes.

STATEMENT OF JILL WITKOWSKI HEAPS, SENIOR ATTORNEY, EARTHJUSTICE, NEW YORK, NEW YORK

Ms. HEAPS. Good morning, Chair Gosar, Ranking Member Stansbury, and members of the Subcommittee. My name is Jill Witkowski Heaps. I am a public interest attorney at Earthjustice and an expert on NEPA. I have been helping communities navigate NEPA issues for almost two decades. I have also been briefed by my Earthjustice colleagues in order to provide testimony today on the Lower Snake River restoration.

I would like to start today with a story of how NEPA saved the Lower Ninth Ward in New Orleans. Pam Dashiell and her neighbors in the Holy Cross neighborhood were concerned when they learned that the Army Corps of Engineers had a plan to dredge toxic muck from the bottom of the Industrial Canal and pile it up in the marsh next to the Lower Ninth Ward. The Corps approved the dredging plan without figuring out exactly what pollutants were at the bottom of the canal, how deep they were, how toxic they were, and even if it was safe to put that pollution in the marsh.

Pam and her neighbors from the Holy Cross Neighborhood Association sued the Corps for failing to comply with NEPA. While the suit was pending, on August 29, 2005, Hurricane Katrina slammed into New Orleans. The area where the Corps planned to put the toxic muck was inundated with 19 feet of high-velocity erosional water. Had the toxic material been stockpiled in the marsh when Katrina hit, that toxic material would have spread all over the Ninth Ward, and likely other parts of New Orleans, potentially rendering them unsalvageable after the storm.

The court agreed that the Corps failed to take a hard look at the environmental consequences of its action. And this is how NEPA and a community's ability to hold agencies to comply with its mandates saved the Lower Ninth Ward so Holy Cross neighborhood could rebuild after the storm.

Many of the communities and environmental justice leaders I have worked with over the course of my career recognized NEPA's unfulfilled promise. NEPA's primary purpose is for agencies to take a hard look at the effects of a project. But in practice, agencies treat the affected community as an afterthought, a box to check. If no one bothers to sit down and have a conversation with the community until the project is a done deal, then the NEPA document is a paperwork exercise.

Many communities suffer because they are literal and figurative dumping grounds so the rest of us can live in neighborhoods free from air and water pollution, noise, and traffic that they are saddled with. These communities are dying of death by a thousand cuts. And here is where NEPA, a law where the Federal agencies are supposed to be looking at cumulative impacts of a project, a law that could alleviate more harm to already overburdened communities. But in practice, agencies sometimes overlook, ignore, and downplay the cumulative environmental impacts to the community, or, if they do look at the impacts, the agency may claim the impacts are not disproportionate, as if the communities had the exact amount of pollution that they deserved.

The Phase 2 regulations are a step in the right direction to fulfilling NEPA's promise of better Federal decisions that involve the public in the decision-making process. The regulations codify what many courts have already told us: environmental justice and climate change analysis are key elements of NEPA reviews.

If an agency relies on mitigation measures to determine that impacts are not significant, then provide certainty that mitigation will occur, use plain language in the documents, involve affected communities early in the process. All of these things will lead to more clarity in the rules, early and more meaningful community participation, and ultimately quicker and better decisions.

As for the issues with the Lower Snake River, the four federally owned and operated dams on the Lower Snake River have decimated salmon populations. This has had enormous impacts on the four Columbia River Basin Treaty Tribes who reserved their right to fish in treaties with the U.S. Government in exchange for 13.2 million acres of land. It is time for a comprehensive, basin-wide solution that restores the Lower Snake River, honors the treaties, and makes stakeholders whole.

Thank you for the opportunity to speak with you today, and I welcome your questions.

[The prepared statement of Ms. Heaps follows:]

PREPARED STATEMENT OF JILL WITKOWSKI HEAPS, SENIOR ATTORNEY, EARTHJUSTICE

Good morning, Chair Gosar, Ranking Member Stansbury, and members of the Subcommittee. I am Jill Witkowski Heaps, Senior Attorney at Earthjustice. Prior to my time at Earthjustice, I was a law professor at the University at Buffalo, at Vermont Law School, and at Tulane Law School. I have spent almost two decades of my career working on National Environmental Policy Act (NEPA) cases. From 2013–2019, I served on the National Environmental Justice Advisory Council, serving as Vice-Chair for three years. After my term on the NEJAC ended, I continued to serve as an at-large member of the NEJAC committee on the NEPA. I am familiar with the 2020 regulation changes and the proposed Phase Two Regulations. I also have been briefed by my Earthjustice colleagues in order to provide this testimony related to the Lower Snake River restoration.

Summary of Testimony

NEPA

The National Environmental Policy Act, our Nation's bedrock environmental law, mandates that agencies "look before they leap," with the intent that a hard look at the environmental consequences of an action will lead to better decision making. When NEPA is not robustly and fully implemented, it can lead to disaster. Community members in the Lower Ninth Ward and Hold Cross neighborhoods in New Orleans learned this firsthand. The Army Corps of Engineers planned to dredge the Industrial Canal and place the sediment in a marshy area next to the Lower Ninth Ward neighborhood. The Corps knew the sediment was contaminated with various toxins, but it did not know exactly where the contamination was or how severe it was. The Corps approved the dredging project and the neighbors sued, objecting that the Corps failed to take a hard look at the risks from putting toxic materials in the marsh near the neighborhood. On August 29, 2005, Hurricane Katrina slammed New Orleans. The area where the Corps planned to put the toxic materials was inundated with 19 feet of high-velocity, erosional waters. Had the Corps moved forward with their plan, the toxic dirt would have been spread all over the Lower Ninth Ward, the Holy Cross neighborhood, and other parts of New Orleans, making them potentially uninhabitable. The court agreed that the Corps failed to take a hard look at the environmental consequences of its action. NEPA—and the community's ability to challenge the analysis in court—saved those New Orleans neighborhoods so that they could be rebuilt in the hurricane's aftermath.

The Council on Environmental Quality (CEQ) shoulders the critical task of implementing the National Environmental Policy Act. As our Nation's bedrock environmental law, NEPA was adopted by a bipartisan Congress and signed into law by President Nixon to ensure that federal agencies make better decisions by "looking before they leap." NEPA created CEQ to set the backstop of minimum requirements for NEPA compliance. Then individual agencies adopt their own regulations to implement NEPA that are consistent with the CEQ regulations.

Over the more than fifty years of implementing NEPA, federal agencies have addressed emerging issues—like climate change and environmental justice—with varying degrees of focus and intention. The 2020 revisions to the 1978 NEPA Regulations in many ways undermined, rather than buttressed, NEPA. Left in place, the 2020 Regulations would have created massive uncertainty that would have required endless litigation to determine how they should be interpreted by agencies, project proponents, and stakeholders. The CEQ's Phase One Regulations, finalized in April 2022, and the proposed Phase Two Regulations are squarely within CEQ's regulatory authority and do not represent "systemic government overreach." On the contrary, these regulatory changes modernize NEPA to ensure that environmental reviews address key issues like climate change and environmental justice. The new regulations provide clarity to promote faster, more efficient decision making. They also promote meaningful participation in federal decision making to facilitate better choices, reduce environmental harms, and ensure more responsible use of taxpayer dollars.

1. The Phase Two Regulations Provide Much-Needed Clarity on How Agencies Should Address Environmental Justice Issues in NEPA Reviews.

NEPA mandates agencies consider an action's impacts on the human and natural environment. Environmental justice is defined as the just treatment and meaningful involvement of all people so that they are fully protected from disproportionate and adverse human health and environmental effects and hazards, and have equitable access to a healthy, sustainable, and resilient environment. NEPA itself therefore has required that agencies consider issues of environmental justice in their environmental reviews since at least 1994 and the issuance of Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.[1]

In 2019, the National Environmental Justice Advisory Council (NEJAC) submitted a letter to then-EPA Administrator Wheeler, detailing problems with NEPA from an environmental justice standpoint and recommending changes.[2] The NEJAC identified three specific areas where NEPA was failing communities with environmental justice concerns. The letter observed that "[t]o the extent that the analysts now address environmental justice at all, they often do it in a sanitized, checklist-driven manner."[3] This approach fails to meaningfully address cumulative impacts on the community and identify reasonable alternatives and therefore "adds little if any value to the resulting documents."[4] The NEJAC criticized that NEPA analysis often is little more than an effort to justify a preferred alternative and discount others, which fundamentally undermines the purpose of NEPA. The NEJAC also observed that analysts rarely "consider the hard connection between the economic benefit of an action and the health and welfare of workers, especially those in environmental justice communities."[5]

The NEJAC crafted recommendations based on members' "wealth of ground-level experiences in the use and misuse of NEPA" and were subject to a "broad, inquiring discussion" before they were submitted. The recommendations emphasized the need for more robust, high-quality information related to environmental justice in order to develop better decisions. The recommendations provided detailed examples of how NEPA analyses could effectively assess and mitigate harm to the human environment, how cumulative impacts analyses impacting communities should involve the communities in identifying the impacts, and ensuring community questions and concerns were addressed in meaningful, substantive ways. The NEJAC letter also requested that EPA work with CEQ and NEPA leadership across the federal family to encourage agencies to adopt and consistently use the Federal Interagency Working Group on Environmental Justice's report "Promising Practices for EJ Methodologies in NEPA Reviews."

For too long communities with environmental justice concerns have been treated as a "check the box" afterthought in the NEPA process or left out altogether. For example, in the 362-page NEPA document the Federal Highway Administration approved in 2020 for the Erie Bayfront Parkway Project, the environmental justice analysis spanned just over one page, despite vocal opposition by impacted community members and the local NAACP chapter. In the U.S. Fish & Wildlife Service's 2020 environmental assessment for a sewage pipeline right of way through the Iroquois National Wildlife Refuge, the document concluded there were no environmental justice communities in the affected area, even though the Tonawanda Seneca Nation's reservation is in the affected area.

The Phase Two Regulations address long-running shortcomings in environmental justice analysis spanning nearly 30 years since Executive Order 12,898 was finalized. The Phase Two Regulations clarify that NEPA's policy requires federal agencies, to the fullest extent possible, to encourage and facilitate public engagement in decision making through "meaningful engagement with communities with environmental justice concerns, which often include communities of color, low-

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[1] Exec. Order No. 12,898 mandates "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States," 59 Fed. Reg. 7629, 7629, 7632 (Feb. 11, 1994). *See also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 9 (D.D.C. 2020), *aff'd*, 985 F.3d 1032 (D.C. Cir. 2021) ("NEPA creates, through the Administrative Procedure Act, a right of action deriving from Executive Order 12,898.").

[2] Letter from the Richard Moore, NEJAC, to EPA Administrator Wheeler, "National Environmental Policy Act and Environmental Justice," Aug. 19, 2019 https://www.epa.gov/sites/default/files/2019-10/documents/nejac_letter_nepa.pdf

[3] *Id.*

[4] *Id.*

[5] *Id.*

income communities, Indigenous communities, and Tribal communities." The proposed regulations are a critical step to ensure all federal agencies conduct an environmental justice analysis that meaningful involves the impacted communities and lead to better decisions for the entire community.

2. The Phase Two Regulations Direct Agencies To Address Climate Change in NEPA Reviews.

While courts have long recognized that NEPA reviews must address climate impacts, various federal agencies have been slow or reticent to meaningfully tackle climate change issues in NEPA documents. While agencies preparing NEPA documents for fossil fuel projects have been incorporating climate change analysis to some extent, agencies preparing environmental reviews for other types of projects have been myopic in their failure to meaningful look at an action's impacts on climate change and the likely impacts on the action from climate change. While we know that transportation is both a key contributor to climate change and has the potential to be greatly impacted by climate change—like sea level rise and the increased frequency and severity of storms—the Federal Highway Administration has mostly refused to meaningfully address climate change in its reviews. For example, the Federal Highway Administration's 360-page NEPA review from 2020 for the Erie Bayfront Parkway failed to even use the words "climate change." The project proposed lowering an elevated waterfront roadway in a flood-prone area, ignoring the possibility of increased flooding of the underpass, despite seeing real-life examples from New York City and Philadelphia during recent flooding events. Similarly, the Federal Highway Administration has failed to examine whether a project will increase or maintain vehicle miles traveled, when there is consensus that we must reduce vehicle miles traveled to meet our climate goals.[6]

Also missing from NEPA analyses are meaningful looks at things like extreme heat, sea level rise, coastal and inland flooding, and severe weather events. Examining all the potential climate change effects are critical to a full and meaningful examining of environmental justice impacts as well. A recent EPA report, Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts, found that Black and African American individuals are projected to face higher impacts of climate change for all six impacts analyzed in the report, compared to all other demographic groups.[7] The report also noted that Hispanic and Latino individuals are about 50% more likely to currently live in areas with the highest estimated increases in traffic delays due to increases in coastal flooding.[8]

Climate change is the quintessential environmental impact. It is long settled that agencies consider not only the impacts of a project on climate, but also the impacts of climate on species and critical infrastructure.[9] The failure to clarify exactly how agencies should consider these puts communities, critical infrastructure, and taxpayer dollars at risk.

The Phase Two Regulations clarify that "agencies should consider reasonably foreseeable future climate conditions on affected areas rather than merely describing general climate change trends at the global or national level."[10] CEQ directs that a NEPA analysis "should incorporate forward looking climate projections rather than relying on historical data alone."[11] Also, the description of baseline conditions and reasonably foreseeable trends in an analysis should be incorporated into to an agency's "analysis of environmental consequences and mitigation measures."

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[6] *See* 2021 Pennsylvania Climate Action Plan, which includes as a goal "reduced vehicle miles traveled for single occupancy vehicles." PA Climate Action Plan (2021) at 57. The plan explains that vehicle miles traveled "reduction efforts are paired with land-use and development policies that promote and incentivize sustainable transportation modes (e.g., walking, biking, transit) in densely populated urban areas and assume the expansion of options for sustainable mobility to and from urban centers (bus rapid transit, carpool) in the medium and long terms." *Id.*

[7] EPA. 2021. Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts. U.S. Environmental Protection Agency, EPA 430-R-21-003.

[8] *Id.*

[9] *See, e.g WildEarth Guardians v. Zinke*, 368 F. Supp.3d 41 (Dist. D.C. 2019)(finding BLM's failure to quantify greenhouse gas emissions that were reasonably foreseeable effects of oil and gas development on public land, during the leasing stage of the development process, was arbitrary and capricious); *Pac. Coast Fed. of Fishermen's Ass'ns v, Gutierrez*, 606 F.Supp.2d 1122, 1184 (E.D. Cal. 2008) (rejecting NEPA analysis based on NMFS' "total failure to address, adequately explain, and analyze the effects of global climate change on the species.")

[10] 88 Fed. Reg 49967, 49949 (July 31, 2023).

[11] *Id.*

3. The Phase Two Regulations Fix Problems Created by the 2020 Regulations.

The 2020 Regulations made several changes that undermined NEPA and its purpose and made it more difficult for affected communities to participate in the NEPA process. The Phase Two Regulations fix these problems in several ways. The Phase Two Regulations remove the barriers to community participation by eliminating the changes around the bond requirement, the comment specificity requirements, and the exhaustion requirements. The Phase Two Regulations also remove language that undermines the purpose of NEPA, which is better decisions, not merely more paperwork.

Many of the changes made in the 2020 Regulations reflected a view that the NEPA process is merely a paperwork exercise with minimal connection to substantive environmental protection. But the text of the law explains that NEPA's purpose is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." [12]

The Phase Two Regulations make clear the linkages between our national environmental policies and the NEPA process,[13] emphasize federal agencies' responsibilities to interpret and administer their policies and regulations and authorizing legislation in accordance with NEPA's policies and the CEQ regulations,[14] and restore the mandate to comply with the Act "to the fullest extent possible." [15] The Phase Two Regulations also rightly reject the assertion from the 2020 Regulations that the purpose and function of NEPA is satisfied if the agencies consider information that is presented through the environmental impact assessment process and if the public is informed of the process. In fact, the purpose of NEPA is not just to consider information—even good quality information—but to act on it. And the public wishes to participate in the process, not just be informed.

The Phase Two Regulations correctly restore to federal courts questions related to bonds, exhaustion, ripeness, remedies, causes of actions and defenses, and other issues associated with litigation. These limitations overstepped CEQ's authority in order to limit the ability of communities to challenge bad NEPA environmental reviews in court. CEQ has appropriately restored these questions of administrative law to the courts.

The 2020 Regulations narrowed the factors agencies should consider when determining the appropriate level of environmental review for a federal action. The Phase Two Regulations seek to reinstate "intensity" as a factor in determining significance. The Phase Two Regulations also will restore the broader definition of "context" in determining significance, which is important to ensure full and fair consideration of an action's indirect and cumulative impacts.

In sum, the CEQ has been carrying out its duties to fulfill that the National Environmental Policy Act's purpose "to use all practicable means and measures, including financial and technical assistance, . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." [16] In the Phase Two Regulations, CEQ is adding much needed certainty to the environmental review process under NEPA taking a welcome first step towards ensuring that critical infrastructure is built not only quickly, but equitably, with an eye towards ensuring taxpayer dollars are spent responsibly.

LOWER SNAKE RIVER RESTORATION

Salmon are in crisis. Up and down the West Coast, salmon populations are dwindling, commercial, recreational, and tribal fisheries are closing, and the chances of recovery appear to be shrinking. In the Columbia-Snake River system, once the primary source for salmon in the Pacific Northwest, four federal dams on the Lower Snake River are pushing those populations to the brink of extinction. For more than two decades, conservation and fishing groups have called for breaching those dams in order to save the region's salmon and steelhead. Courts have found five separate biological opinions for dam operations to be fundamentally flawed for failing to adequately consider the impact of the dams on salmon. In the intervening years, the

[12] *Id.*
[13] 88 Fed. Reg. at 49968.
[14] *Id.*
[15] *Id.* at 49968.
[16] 42 U.S.C. 4331(a).

necessity and feasibility of dam breaching has only become clearer. But salmon cannot wait much longer. We must restore the Lower Snake River before it is too late.

1. Salmon Recovery in the Columbia River Basin

The Columbia River Basin was historically one of the most productive salmon fisheries in the world. Estimates suggest that 7.5 million to 16 million salmon and steelhead historically returned to spawn across the Columbia River Basin every year.[17] Now, less than 250,000 wild salmon and steelhead make that same journey. The decline is even worse on the Snake River, a tributary which traditionally produced a significant portion of the Columbia River Basin's salmon. Of the more than 2 million salmon that used to spawn in the Snake River, just 40,000 do today. Thirteen species of Columbia and Snake River Salmon are currently listed under the Endangered Species Act as threatened or endangered. Since Snake River Sockeye were listed in 1991, the Northwest has spent nearly $20 billion on salmon recovery, and yet wild salmon populations continue to stagnate and decline. Put simply, the status quo is failing salmon, Tribal Nations, and the entire region.

2. The Columbia River Basin Tribes and Salmon

Salmon have held a position of central importance to the Indigenous people in the Pacific Northwest since time immemorial. For millennia, the ancestors of today's Columbia River Treaty Tribes (the Yakama, Warm Spring, Umatilla, and Nez Perce) and other Tribal Nations hunted, gathered, and fished within the basin. Of all their traditional foods, "salmon was the most important."[18]

When each of the four Columbia River Basin Tribes signed treaties with United States in 1855, they explicitly reserved their right to fish in perpetuity. They did this while under considerable pressure and while ceding significant portions of their traditional territory to the United States. Provisions in each of the four treaties contains nearly identical language reserving to the Tribes "the exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians: as also the right of taking fish at all usual and accustomed places in common with citizens of the territory."[19]

In the years since the treaties were signed, salmon populations have declined dramatically. Tribal members today can harvest only a fraction of their historical catch of salmon, despite years of effort by the Tribes, state and federal agencies, and others to raise additional fish in hatcheries, restore habitat, increase spill over the dams, and even barge juvenile salmon below the dams. Everything has been tried to recover the salmon that are guaranteed to the Tribes, except for breaching the dams.

3. The Impact of the Four Lower Snake River Dams

The four federally owned and operated dams on the Lower Snake River are the greatest impediments to salmon recovery in the Columbia River Basin. These four dams (Ice Harbor, Lower Monumental, Little Goose, and Ice Harbor) are part of the Federal Columbia River Power System of 31 total dams that provide power, navigation, and other services to the Pacific Northwest.[20] However, those benefits have come at the explicit cost of reduced salmon populations and hardship for the Tribal nations who depend on them.

The construction of the Lower Snake River dams transformed 140 miles of free-flowing river into a series of large, slow-moving, reservoirs that prevent countless salmon from reaching their spawning habitat. Salmon that hatch in these waters must make it past not just the four Lower Snake River Dams but also the four Lower Columbia River Dams in order to reach the ocean, and then make it past those eight dams again to return as adults. According to the National Oceanic and Atmospheric Administration and National Marine Fisheries Service, direct and indirect impacts from hydropower infrastructure are the largest limiting factor for ten

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[17] NOAA & NMFS. September 30, 2023. Rebuilding Interior Columbia Basin Salmon and Steelhead. https://www.fisheries.noaa.gov/resource/document/rebuilding-interior-columbia-basin-salmon-and-steelhead

[18] 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

[19] U.S.-Nez Perce Indians. Treaty between the United States of America and the Nez Perce Indians. June 11, 1855. 12 Stat. 957.

[20] Northwest Power and Conservation Council. A Brief History of the Federal Columbia River Power System and Power Planning in the Northwest. April 22, 2011. https://www.nwcouncil.org/media/filer_public/dc/c3/dcc38ff6-6572-4ce6-ac1d-395eb9c9e3a3/2011_10.pdf

of the 16 Interior Columbia River stocks, including all of the Snake River stocks.[21] Juvenile salmon that enter the Lower Snake River regularly encounter lethally hot water, an abundance of predators, and other stressors.[22] Those that do make it through the dams do so by expending much more energy and over a much longer time frame than they would have in a natural river, leading to delayed mortality lower down the river or in the ocean. Adult fish face additional challenges navigating back up the river and past the dams, further reducing the number of salmon who survive the journey to the ocean and back. The Lower Snake River dams also drowned countless areas that were used by Tribes for generations to fish, hunt, gather foods, practice ceremonies, bury their ancestors, and live the lives they wished to live.[23]

Breaching the dams is not only a matter of biological imperative for the salmon, but also a necessity if the government is to honor the treaties it signed with Columbia River Basin Tribes.

4. A Comprehensive, Basin-Wide Solution for Salmon

Restoring salmon and steelhead in the Columbia River Basin to healthy and harvestable levels will require a comprehensive, basin-wide solution with breaching the Lower Snake River dams at its center. Dam breaching would draw down the reservoirs and allow the river to naturally reestablish itself around the remaining powerhouse and associated structures. It would ease the migration of salmon up and down the river and increase access to more than 5,000 miles of pristine cold-water spawning habitat. Other important actions that will help restore salmon populations if implemented alongside breaching include reducing predation and competition, restoring habitat and water quality, and reintroducing stocks into currently blocked areas.

Breaching the dams should also be accompanied with investments to replace and improve upon the services currently provided by the dams such as electricity generation, transportation via barges, and irrigation. Proposals from Rep. Mike Simpson (R-ID)[24] and a report from Gov. Jay Inslee (D-WA) and Sen. Patty Murray (D-WA)[25] have shown that the services the dams currently provide can be replaced. Other studies have even shown that their benefits such as electricity can be improved upon with alternatives that would be even more reliable than hydropower and at minimal cost.[26] Earlier this year, the State of Washington enacted a budget with funding for studies to help plan for the replacement of the transportation, energy, and irrigation services provided by the dams. It is no longer a question of if we can replace the dams, but rather how best to replace the services provided by the dams on a timeline that avoids extinction of salmon and steelhead.

5. Conclusion

The Columbia River Basin, once one of the most productive river systems in the world for salmon, is dangerously close to losing them altogether. Continuing with the status quo is effectively choosing extinction. It is time to choose a better future for the region that includes restoring the Lower Snake River, honoring the treaties, saving salmon, and securing prosperity for the entire region.

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[21] NOAA & NMFS. September 30, 2023. Rebuilding Interior Columbia Basin Salmon and Steelhead. https://www.fisheries.noaa.gov/resource/document/rebuilding-interior-columbia-basin-salmon-and-steelhead

[22] 68 Scientists send letter to NW policymakers on Snake River salmon and dams. February 22, 2021. https://www.orcaconservancy.org/blog/68-scientists-send-letter-to-nw-policymakers-on-snake-river-salmon-and-dams

[23] 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

[24] Rep. Mike Simpson. The Columbia Basin Initiative. https://simpson.house.gov/salmon/

[25] Lower Snake River Dams: Benefit Replacement Report. Commissioned by Sen. Murray & Gov. Inslee. August 2022. https://governor.wa.gov/sites/default/files/2022-11/LSRD%20Benefit%20Replacement%20Final%20Report_August%202022.pdf

[26] Energy Strategies. Commissioned by NW Energy Coalition. Lower Snake River Dams Power Replacement Study. March 2018. https://nwenergy.org/featured/lsrdstudy/

QUESTIONS SUBMITTED FOR THE RECORD TO MS. JILL HEAPS, SENIOR ATTORNEY, EARTHJUSTICE

Questions Submitted by Representative Gosar

Question 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.

Answer. 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 Submitted by Representative Grijalva

Question 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?

Answer. 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.

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

Answer. 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

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

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.

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,

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[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 notice in the middle at the original depth" to allow enough draft for passing ships.").

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.

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

Answer. 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.

Question 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?

Answer. 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 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

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[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*.

[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.

engagement processes to avoid harming communities while effectively speeding up development of much-needed infrastructure to enable a rapid clean energy transition.

Question 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?

Answer. 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.

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

Answer. 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.

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

Answer. 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.

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

Questions Submitted by Representative Huffman

Question 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?

Answer. 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.

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.

[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.*

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.

Dr. GOSAR. I thank the gentlewoman.

I now recognize Mr. Simms for his 5 minutes.

STATEMENT OF SCOTT SIMMS, CEO AND EXECUTIVE DIRECTOR, PUBLIC POWER COUNCIL, PORTLAND, OREGON

Mr. SIMMS. Good morning, Chairman Gosar, Ranking Member Stansbury, and members of the Subcommittee. My name is Scott Simms, and I serve as the CEO and Executive Director of the Public Power Council, or PPC.

PPC represents a majority of non-profit, consumer-owned electric utilities operating in rural and urban areas of the great Pacific Northwest that purchase electricity and transmission services from the Bonneville Power Administration, or BPA. And they collectively pay 70 percent of BPA's $3.9 billion annual revenue requirement.

Our utilities fund the nation's largest ESA effort. We have a keen interest in ensuring that fish mitigation measures are science based, cost effective, and have a clear nexus with the operations of the Federal Columbia River Power System, or FCRPS.

We are fully committed to paying our share of mitigation responsibilities, but no more and no less. This balance is what enables PPC members to offer affordable, reliable, clean, and environmentally responsible power to the communities they serve.

Unfortunately, the FCRPS operations have been mired by long-running litigation. Roughly 13 months ago, the Federal District Court judge overseeing litigation in the Columbia Basin operations approved a stay while the CEQ engaged the Federal Mediation and Conciliation Service, FMCS, to resolve the issues being litigated. While the stay was set to expire on August 31, 2023, the U.S. Government and the plaintiffs requested and the court subsequently granted a 60-day extension of the stay until October 31, 2023.

So, PPC entered the CEQ-led negotiations with guarded optimism that the mediation process would be finally pursued in a fair,

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[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.nwcouncil.org/sites/default/files/2021_05_4.pdf

confidential, and collaborative manner led by skilled third-party mediators. Regretfully, our experience has been to the contrary. It has been a frustrating bureaucratic process with little discussion of new ideas and much less progress toward regional compromise. Labeling any of this as mediation was a sham from the beginning, and it is quite an abuse of the very word.

What CEQ has done is put a thumb squarely on the scale for certain parties. That was evidenced by the sideboards set for the stay and litigation and subsequent mediation. PPC has repeatedly raised new ideas and proposed tangible solutions, yet no substantive action has come of these efforts because CEQ refused all offers. At most, we have basically received a pat on the head.

We have serious concerns that many of the topics being discussed are likely outside the plaintiffs' areas of expertise, or, at a minimum, are topics where we have immense expertise that we could share. In any event, we should be in these discussions early, not as a last step to sign on. We are dismayed at what was sold to us as a solutions-based mediation process.

This is detailed more explicitly in my submitted report, but let me just share here that we at PPC recruited credible third-party biologists to point out the serious flaws in a report CEQ conveniently floated as NOAA's so-called "latest science," for which CEQ uses as a basis to push a specific agenda. This new NOAA report, "Rebuilding Interior Columbia Basin Salmon and Steelhead," has apparently paved over NOAA's prior decades of established scientific evidence and record. CEQ probably didn't like us raising the issue of a sudden 180-degree shift at NOAA, so we were just ignored when we first raised the issue, and continue to be ignored to this day.

Let me be clear for everyone as a witness here today at this hearing. This so-called new NOAA report is the flimsy house of cards CEQ built and is trying to keep upright in order to justify its biased approach in this process.

The challenges of supplying affordable, reliable electricity services, which is now widely considered a basic need for human survival, is only becoming more difficult for today's utilities. We also have a growing concern about adequately meeting the needs of vulnerable communities, which are intensifying in rural and urban areas alike.

As I work toward my conclusion, let me connect some dots here. While this Administration contemplates operational changes to the dams, I must emphasize that this also has a devastatingly detrimental impact on system reliability. Ironically, it would also have a huge negative impact on meeting the Administration's climate goals by reducing the amount of clean, renewable hydropower produced. Simply put, any operational changes this Administration might suggest that would breach dams, increase spill, or draw down water would have grave implications for communities in the Northwest.

A crucial component of BPA's predominant hydropower fleet is a target by some in this process, and that is the Lower Snake River dams. These dams are some of the biggest producers and lowest cost hydro units in BPA's Federal system. They are an invaluable resource for the entire West, even beyond BPA's territory. They

also help integrate wind and solar power into the grid and, importantly, come to the rescue when power crises hit the West, which is a dynamic we are seeing more and more often, certainly mentioned this morning by Ranking Member Stansbury.

Despite the invaluable role played by these dams, various special interests continue to fuel a campaign to devalue and even destroy them.

Thank you for your leadership in hosting this hearing today. We greatly appreciate the Committee's focus on this critical set of issues, and seeking transparency from CEQ for all Americans. I would gladly answer any questions.

[The prepared statement of Mr. Simms follows:]

PREPARED STATEMENT OF SCOTT SIMMS, CEO & EXECUTIVE DIRECTOR, PUBLIC POWER COUNCIL

Good morning, Chairman Gosar, Ranking Member Stansbury, and members of the Subcommittee. My name is Scott Simms, and I serve as the CEO and Executive Director of the Public Power Council (PPC).

PPC represents the majority of the non-profit, consumer-owned electric utilities in the Pacific Northwest, serving people and businesses in Washington, Oregon, Idaho, western Montana, and parts of Nevada and Wyoming. These large and small utilities in rural and urban areas of the Great Pacific Northwest purchase electricity and transmission services from the Bonneville Power Administration, or BPA—the largest Power Marketing Agency of the four under the U.S. Department of Energy. These consumer-owned utilities collectively pay 70 percent of BPA's $3.9 billion-dollar annual revenue requirement, with the remainder of BPA's budget covered from sales to others. All of BPA's consumer-owned utility customers are committed to ensuring BPA complies with its statutory obligation to provide the lowest possible rates to consumers consistent with sound business principles.

BPA markets power from 31 federal hydroelectric dams on the Columbia River and its tributaries and from the Columbia Generating Station—a nuclear power plant located on the Hanford Site in Eastern Washington. BPA has more than 15,000 miles of high voltage transmission lines and 261 substations, operating about 75% of the total transmission system in the Northwest.

As stewards focused on affordability and reliability of BPA's power and transmission services, PPC utilities also have a strong environmental interest and are committed to mitigating the impacts of Federal Columbia River Power System (FCRPS) operations. As the largest single contributor to the nation's largest ESA effort, we have a keen interest in ensuring that fish mitigation measures are science based, cost effective, and have a clear nexus with the operations of the FCRPS. Such measures serve dual purposes—they promote the restoration of the region's valued endangered and threatened species, and ultimately, reduce the fish and wildlife impacts and costs associated with FCRPS operations. We are committed to paying our full mitigation share—no more and no less. This balance is what enables PPC members to offer affordable, reliable, clean, and environmentally-responsible power to the communities they serve. Unfortunately, the FCRPS operations have been mired by long-running litigation. Roughly 13 months ago, the federal district court judge overseeing litigation on the Columbia Basin System Operations approved a stay, while the Council on Environmental Quality (CEQ) engaged the Federal Mediation and Conciliation Service (FMCS) to resolve the issues being litigated. While the stay was set to expire on August 31, 2023, the U.S. government and the plaintiffs requested, and the court subsequently granted, a 60-day extension of the stay, until October 31, 2023.

PPC entered these negotiations with guarded optimism that the mediation process would be finally pursued in a fair, confidential and collaborative manner, led by skilled third-party mediators. Regretfully, our experience has been to the contrary. It has been a frustrating bureaucratic process with little discussion of new ideas and much less progress toward a regional compromise. Confidentiality has been conveniently used to protect "private caucuses" between CEQ and select parties, consistently described by several credible sources as the states of Oregon, Washington, various Northwest tribes, and environmental NGO plaintiffs.

Non-sovereign stakeholders have been left in the dark and have not been equal parties, despite our best efforts to advance new ideas and share new information,

and despite the dire financial and operational consequences—and even health and human safety risks—we could face from ill-conceived "agreements." Again, it's worth noting here that public power utilities pay the lion's share of FCRPS costs and are the real parties in interest. And yet, we've been walled off from the conversations between the CEQ and plaintiffs that inevitably involve future cost obligations of Northwest ratepayers either from further operational constraints, direct cash outlays—or both. Worse still, it appears that the U.S. Government is making private piecemeal deals with one or two parties rather than pursuing the promised balanced, sustainable solutions designed to bring our region—and the federal resources we use to keep the lights on—the much needed operational certainty.

It is critical that you as members of Congress learn about this dynamic, because, after all, this is an oversight hearing, so here is my opinion and observation on the process, especially since I have been through a number of federal and state processes in my 25+ year career in the Northwest energy industry. Our plea is for you to get involved.

First, branding any of this as "mediation" was a sham from the beginning, with CEQ putting its thumb squarely on the scale for certain parties. That was evidenced by the "sideboards" set for the stay and subsequent "mediation." I can also tell you that PPC has repeatedly raised new ideas and proposed solutions. While those have been aired in two "private caucuses" with the federal government, at no time have they been scheduled for discussion among the broader group, nor has an anonymous survey been held to assess broader interest. At most, we feel like we have received a pat on the head and are then expected to sit quietly and watch.

While we are not among the "inner circle" despite being the obvious funders of any commitments placed on BPA, we have learned from public sources that some of the favored parties were engaging in private sessions with the U.S. Government (USG) and even "exchanging papers" in recent months on some of the issues within the broader agenda. We have serious concerns that these topics are likely outside the plaintiffs' areas of expertise or, at a minimum, are topics where we have immense expertise that we could share and, therefore, should be involved in the discussions early on, not as a last step to "sign on." We're dismayed at what was sold to us as a solutions-based mediation process.

A second, especially problematic issue in this process is that we are uncertain whether the inputs PPC has worked tirelessly to provide in good faith throughout the many months of work are being reviewed or considered by the USG. For instance, in our collective utility industry and river navigation interest efforts to engage in the process, two detailed reports and a technical letter raising extensive issues and considerations were among the materials PPC submitted to the USG: one recent report was a scientific literature review addressing the "delayed mortality" hypothesis, and the other report was a comprehensive study on the potential impacts of breaching, titled: "Regional & National Impacts Triggered by Breaching Lower Snake River Dams: Summary of Transportation, Climate and Social Justice Concerns." Additionally, a little more than one year ago, PPC submitted (and has received no response to) a detailed letter citing official technical and scientific documents that pointed out the many inaccuracies and shortcomings of NOAA's "Rebuilding Interior Columbia Basin Salmon and Steelhead" draft report, which has been used extensively as a basis for CEQ's breaching advocacy efforts during the stay in litigation.

My job is to represent the utilities of the Northwest and let me be clear that the impact of BPA power rates is not a matter of dry economics for us. It is about the people in our communities and the ability to supply this human need. The Northwest public power utilities I represent are not-for-profit organizations dedicated to providing their communities with affordable, reliable, and environmentally responsible electricity at cost. Unlike investor-owned utilities, there are no profit margins or shareholders to absorb increased costs.

Any costs passed to the utility are passed on to the customers, in many cases, the most economically vulnerable communities in the Northwest. Given our diverse membership, this hits differently throughout the region. But whether urban or rural, and no matter which Northwest state, our communities and their utilities are feeling the pressure. PPC member utilities aren't monolith, faceless corporations. They are non-profit entities run by the communities they serve and today are managing far more than the bystander might see. For instance, our utilities are handling such critical issues as balancing tens of millions of dollars unpaid bills from tens of thousands of customers. They also are trying to keep the power flowing while addressing needs of vulnerable communities, including Tribal communities throughout the Columbia River Basin and in places physically distant from the Columbia River, but still highly dependent on its reliable, low-cost power. Every utility we work with has a list of gut-wrenching stories in which families and

businesses are making incredibly difficult decisions—such as choosing to pay a past-due bill or choosing to serve their kids a meal.

Meanwhile, the challenges of supplying affordable, reliable electricity services—which is now widely considered a basic need for human survival—is only becoming more difficult for today's utilities. Supply chain and labor challenges are just the tip of the iceberg, as our industry is also battling a dwindling supply of dependable 24/7 electricity sources at a time when fleet electrification and other new consumer demands are growing and while new clean energy regulations are being phased in. And if that weren't enough, extreme heat and wildfires and dangerous cold weather events are now more regularly gripping our country's communities, and we've only begun to see the devastating impacts of this dangerous combination of factors as our utilities struggle to deliver this basic human need.

To fully understand the gravity of what we face if our electricity services become less reliable and/or more expensive, I would encourage you to turn to CEQ's own interactive "Climate and Economic Justice Screen Tool," which identifies census tracts that are "overburdened and underserved." While we understand this Administration's commitment to environmental stewardship, I would be remiss if I did not emphasize that the direction we are headed in the FMCS/CEQ mediation contradicts these goals. I must stress any increased funding from BPA comes on the backs of those who can least afford to pay. I should also note that the vast majority of fish mitigation efforts in the Columbia-Snake River Systems is paid for by electric ratepayers—despite the considerable economic benefits to the broader taxpayers, like flood control and commercial salmon harvest.

I mentioned briefly that reliability is paramount in these communities. Let's connect some dots here. While this Administration contemplates operational changes to the dams, I must emphasize that this also has a devastatingly detrimental impact on system reliability. Ironically, it would also have a huge negative impact on meeting the Administration's climate goals by reducing the amount of clean, renewable hydropower produced. Any operational changes this Administration might suggest that would breach dams, increase spill, or draw down water would have grave implications for communities in the Northwest.

A crucial component of BPA's predominant hydropower fleet is the role of the Lower Snake River Dams (LSRDs). Completed in the 1970s, these dams are some of the biggest producers and lowest-cost hydro units in BPA's federal system. At 1,000 average megawatts and an ability to generate for peak periods at about double that, they are an invaluable resource for not just consumer-owned utilities but for integrating wind and solar and, importantly, for coming to the rescue when power crises hit the West.

Despite the invaluable role played by these dams, various special interests continue to fuel a campaign that seeks to convince the Administration to remove or devalue these vital resources. Rash decisions to remove these hydro projects pose devastating consequences. The LSRDs regularly are the defining line between keeping the power flowing and parts of the West being plunged into rolling blackouts. Case in point: last Labor Day—just over a year ago—the West was locked in a heatwave, and the Northwest was exporting electricity to the full extent it could to California and the Southwest. If the LSRDs were taken out of the mix, that part of the West would have gone into rolling blackouts, and things would have been more critical for us in the Northwest. We estimate that if the Northwest had been just ten degrees warmer that weekend—we were hot but not scorching—we wouldn't have been able to help the Southwest, surely sealing their fate for no air conditioning and total darkness. This is how close we are getting to the system we have—it's an annual gamble in the winter and summer extremes. We need more stable, available generation capacity, not less of it. Remember this point, too, as our nation explores relying on electricity to play an even more prominent role in our lives, such as through vehicle electrification.

The Biden Administration has recently released two documents regarding the Lower Snake River Dams. In July 2022, an analysis was prepared by outside consultants on behalf of the Bonneville Power Administration, exploring the costs and environmental impacts of grid reliability through several scenarios, including the removal of the LSRDs. The result would require tens of billions of dollars in funding and an expected 65% rate increase to power customers in the Northwest. The report concluded that there was no possible way to remove the LSRDs without jeopardizing grid reliability. The National Oceanic and Atmospheric Administration (NOAA) released the second report and called for at least partial removal of the LSRDs. The NOAA report was prepared in conjunction with plaintiffs who sought removal of the LSRDs, was anonymously produced, was not peer-reviewed, and had glaring biological errors. Yet that report is increasingly cited as the "best and latest science." I

mentioned that report earlier—we have consistently raised questions about the integrity and purpose of that report, yet have only been met with silence from CEQ.

Thank you for your leadership and for hosting this hearing today. We greatly appreciate the Committee's focus on this critical set of issues and seeking transparency for CEQ for all Americans. I would gladly answer any questions.

Dr. GOSAR. Thank you, Mr. Simms.

I now recognize Mr. Lewis for his 5 minutes.

STATEMENT OF MARLO LEWIS, SENIOR FELLOW, COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC

Mr. LEWIS. Chairman Gosar, Ranking Member Stansbury, and honorable members of this Subcommittee, thank you for the opportunity to testify on government overreach at CEQ. I am Marlo Lewis, an energy policy analyst at the non-profit Free Market Competitive Enterprise Institute. My testimony develops three main points.

First, CEQ's attempt to align NEPA project reviews with the Administration's climate policy agenda is unlawful under the Supreme Court's Major Questions Doctrine. The proposed alignment entails a major shift in national policy, yet it lacks anything like a clear congressional authorization. The terms "climate," "global warming," "greenhouse," or "carbon" occur nowhere in NEPA.

CEQ's January 2023 proposed guidance on greenhouse gas emissions concedes that NEPA does not require agencies to prioritize climate change mitigation. But then, in the same breath, CEQ gives agencies their marching orders: "In line with the urgency of the climate crisis, agencies should use NEPA to help inform decisions that align with climate change commitments and goals." Footnotes to this and similar passages reveals that agencies are to align NEPA proceedings with President Biden's Paris Agreement pledge to reduce U.S. emissions 50 to 52 percent below 2005 levels by 2030, and with the net-zero 2050 target.

Now, someone might say, well, that is just guidance, it is not legally binding. But executive agencies typically follow presidential orders. Thus, when finalized, the guidance will, in practice, bind agency actions until it is overturned in court or repealed by a future administration. Moreover, CEQ has big plans for the GHG guidance. In the Council's July 2023 proposed NEPA implementing regulations, CEQ proposes "to codify the guidance in whole or part."

Thus, both effectively and formally, CEQ aims to require agencies to vet project proposals in light of the Administration's aggressive GHG reduction targets. A net-zero aligned permitting process would be adverse to any project anticipated to increase emissions, either directly or by inducing economic growth.

CEQ flouts *West Virginia v. EPA*. Just as the EPA's Clean Power Plan attempted without clear authorization to suppress investment in GHG-emitting power plants, so CEQ's proposed guidance attempts without clear authorization to suppress investment in GHG-emitting infrastructure. No statute passed by Congress makes the President's Paris pledge the law of the land. None

authorizes agencies to use net-zero as a factor in permitting decisions.

My testimony's second point is that a net-zero aligned NEPA process is unlawful on statutory grounds. NEPA is concerned with agency actions "significantly affecting the quality of the human environment." It is well known, and CEQ has acknowledged since 2010, that the GHG emissions of even the largest infrastructure project have no significant impact on the quality of the human environment.

Finally, my testimony disputes CEQ's claim that America "faces a profound climate crisis, allowing little time left to avoid a dangerous, potentially catastrophic climate trajectory." That claim conflicts with 50 years of dramatic improvements in global life expectancy, per capita income, food security, and various health-related metrics.

Of particular relevance, the global annual average number of climate-related deaths per decade has declined by 96 percent since the 1920s. Factoring in population growth, the average person's risk of dying from extreme weather has declined by more than 99 percent. Similarly, global weather-related losses per exposed GDP have declined about fivefold since the 1980s. In short, there is no bona fide emergency, such as might seem to justify the Council's overreach as "a desperate measure for desperate times."

Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF MARLO LEWIS, JR., SENIOR FELLOW IN ENERGY AND ENVIRONMENTAL POLICY, COMPETITIVE ENTERPRISE INSTITUTE (CEI)

Summary

- CEQ's strategy to shift investment away from fossil-fuel infrastructure by 'aligning' project reviews with the Biden administration's climate agenda lacks a clear congressional authorization. It is unlawful and vulnerable to challenge under the Supreme Court's major-questions doctrine.
- The greenhouse gas emissions of even the largest infrastructure projects have no detectable climate change impacts. Consequently, such emissions are not "significant" effects under NEPA.
- Climate change is not a crisis. Hence, no bona fide emergency exists such as might justify the Council's overreach as a 'desperate measure for desperate times.'

I. Introduction

Chair Gosar, Ranking Member Stansbury, and Members of the Subcommittee on Oversight and Investigations, thank you for inviting me to testify on "systemic government overreach" at the Council on Environmental Quality (CEQ). Today's hearing spotlights a current example of a "recurring problem" identified by the Supreme Court in *West Virginia v. EPA*: "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." [1]

The National Environmental Policy Act (NEPA),[2] enacted on January 1, 1970, is a procedural statute intended to ensure that federal agencies examine the potential environmental impacts of proposed actions before deciding, for example, to approve construction of infrastructure projects.[3]

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[1] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

[2] The text of NEPA as amended through P.L. 118-5, Enacted June 3, 2023, is available at https://www.energy.gov/sites/default/files/2023-08/NEPA%20reg%20amend%2006-2023.pdf.

[3] Code of Federal Regulations, Title 40, Chapter V, Subchapter A, Part 1500, https://www.ecfr.gov/current/title-40/chapter-V/subchapter-A/part-1500.

Through its proposed January 9 NEPA guidance on consideration of greenhouse gases and climate change ("Proposed Guidance")[4] and July 31 proposed Phase 2 NEPA implementing regulations ("Proposed Rule"),[5] CEQ directs agencies to use NEPA as a climate policy framework—a purpose for which the statute was not designed and which Congress has not subsequently authorized.

II. Flouting West Virginia v. EPA

CEQ acknowledges that "Neither NEPA, the CEQ Regulations, or this guidance require the decision maker to select the alternative with the lowest net GHG emissions or climate costs or the greatest net climate benefit." But then, in the same breath, CEQ proceeds to give agencies their marching orders: "in line with the urgency of the climate crisis, agencies should use the information provided through the NEPA process to help inform decisions that align with climate change commitments and goals."[6]

Which commitments and goals? The footnote at the end of the sentence just quoted references the April 22, 2021 White House Fact Sheet setting forth President Biden's Paris Agreement pledge to reduce U.S. emissions 50–52 percent below 2005 levels by 2030. The same document reaffirms the President's goal of achieving economy-wide net-zero emissions by 2050.[7]

In another passage, the Proposed Guidance "encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change."[8] The footnote at the end of that sentence also references the April 22, 2021 White House Fact Sheet.

Note also that the phrase "science-based GHG reduction policies established to avoid the worst impacts of climate change" is code for NetZero agenda, which seeks to virtually eliminate economy-wide greenhouse gas emissions by 2050 (IPCC).[9] There is as yet no known way to achieve net-zero emissions by 2050 without compromising economic growth, household purchasing power, affordable automobility, and electric power reliability.[10]

A bit later on the same page, CEQ suggests that by promoting "Accurate and clear climate change analysis," the guidance "Enables agencies to make informed decisions to help meet applicable Federal, State, Tribal, regional, and local climate action goals."[11] The footnote at the end of that sentence states: "For example, the United States has set an economy-wide target of reducing its net GHG emissions by 50 to 52 percent below 2005 levels in 2030. See United Nations Framework Convention on Climate Change (UNFCC), U.S. Nationally Determined Contribution (Apr. 20, 2021), https://unfccc.int/NDCREG."

Some may say that guidance is just a statement of administration policy and lacks the binding force of a regulation. But executive agencies are expected to follow the President's orders. Moreover, Proposed Rule reveals that CEQ has big plans for the Proposed Guidance. Namely, "CEQ proposes to incorporate some or all of the 2023 GHG guidance, which would require making additional changes in the final

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[4] Council on Environmental Quality (CEQ), National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 FR 1196, January 9, 2023, https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00158.pdf.

[5] CEQ, National Environmental Policy Act Implementing Regulations Phase 2, Proposed Rule, 88 FR 49924, July 31, 2023, https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15405.pdf.

[6] 88 FR 1196, 1204.

[7] White House, FACT Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies, April 22, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

[8] 88 FR 1196, 1197.

[9] IPCC, Special Report on Global Warming of 1.5°C, Chapter 2, p. 2, https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Chapter_2_LR.pdf.

[10] Kevin Dayaratna, Katie Tubb, and David Kreutzer, "The Unsustainable Costs of President Biden's Climate Agenda," Heritage Foundation, June 16, 2022, https://www.heritage.org/energy-economics/report/the-unsustainable-costs-president-bidens-climate-agenda; Daniel Turner and Kent Lassman, "What the Green New Deal Could Cost a Typical Household," Competitive Enterprise Institute, July 29, 2019, https://cei.org/sites/default/files/Daniel_Turner_and_Kent_Lassman_What_the_Green_New_Deal_Could_Cost_a_Typical_Family.pdf; Francis Menton, The Energy Storage Conundrum, The Global Warming Policy Foundation, Briefing 61, 2022, https://www.thegwpf.org/content/uploads/2022/11/Menton-Energy-Storage-Conundrum.pdf.

[11] 88 FR 1196, 1197.

rule to codify the guidance in whole or part, as is or with changes, based on the comments CEQ receives on this proposed rule." [12]

This is a clear case of systemic overreach. President Biden's pledges under the Paris Agreement, a treaty never submitted to the Senate for its constitutional advice and consent, do not enlarge or modify any federal agency's statutory powers or obligations. No statute passed by Congress, including the Inflation Reduction Act, makes the President's Paris pledges the law of the land. None authorizes agencies to use project reviews and permitting decisions to advance the NetZero agenda.

In *West Virginia v. EPA* (2022), the Supreme Court vacated the Environmental Protection Agency's Clean Power Plan (CPP) on major-questions grounds. The CPP attempted to settle a major question of public policy—whether the U.S. government should force a national shift from fossil fuel-generation to renewable-generation—without a clear authorization from Congress. The Court granted Cert due to the obvious fact that the EPA had claimed to find in a long-extant statute an unheralded power to restructure the U.S. electricity sector but could identify no language in the CPP's putative statutory basis—section 111(d) of the Clean Air Act—clearly authorizing such a policy.[13]

NEPA, too, is a long-extant statute. Claims that NEPA proceedings should suppress investment in fossil fuel infrastructure are of recent vintage, and cannot be squared with public convenience and necessity determinations under the Natural Gas Act (NGA). The NGA directs the Federal Energy Regulatory Commission (FERC) to follow NEPA when reviewing proposed natural gas infrastructure projects. Using NEPA to reject natural gas infrastructure projects based on climate concerns would conflict with the NGA's "principal purpose," which is to "encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices." [14]

Far from NEPA containing a clear statement authorizing its use to make climate policy, the words "climate," "carbon," "greenhouse," "global," and "warming" do not occur in the statute. Just as the CPP attempted without clear authorization to block investment in GHG-emitting powerplants, so CEQ's Proposed Guidance and Proposed Rule attempt without clear authorization to block investment in GHG-emitting infrastructure projects. Such projects include gas and oil pipelines, obviously, but also potentially any infrastructure that increases emissions by inducing economic growth.[15]

III. Project-Specific GHG Emissions Are Not "Significant" Effects under NEPA

CEQ contends that "Climate change is a fundamental environmental issue, and its effects on the human environment fall squarely within NEPA's purview." [16] However, NEPA is concerned with agency actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332. It is well-known—and CEQ has acknowledged many times—that the GHG emissions of even the largest infrastructure project has no measurable, traceable, or verifiable impacts on the quality of the human environment, much less a significant impact.

Illusory Thresholds of Meaningfulness and Significance

Both the Obama and Trump CEQs acknowledged that individual projects do not discernibly influence global climate change, beginning with CEQ's 2010 Draft NEPA Guidance on Greenhouse Gas Emissions and Climate Change Effects. The document noted a stark difference between GHG emission sources and non-GHG emission sources: "From a quantitative perspective, there are no dominating sources and fewer sources that would even be close to dominating total GHG emissions." [17] Which of the large universe of non-dominating sources should be covered?

The 2010 Draft GHG Guidance proposed that 25,000 tons or more of annual carbon dioxide-equivalent (CO_2e) emissions could provide "an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and

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[12] 88 FR 49924, 49945.

[13] *W. Virginia v. EPA*, 142 S. Ct. 2587 (2022).

[14] NAACP v. FPC, 425 U.S. 662 (1976).

[15] "Indirect [environmental] effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 88 FR 49924, 49986.

[16] 88 FR 1196, 1197.

[17] CEQ, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions February 18, 2010, p. 2, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf (hereafter CEQ, 2010 Draft GHG Guidance).

the public."[18] However, CEQ immediately clarified that it was not making a claim about climatic impact: "CEQ does not propose this as an indicator of a threshold of significant effects, but rather as an indicator of a minimum level of GHG emissions that may warrant some description in the appropriate NEPA analysis for agency actions involving direct emissions of GHGs."[19]

The 2010 Draft Guidance further stated: "CEQ does not propose this [25,000 ton] reference point as an indicator of a level of GHG emissions that may significantly affect the quality of the human environment." Lest anyone mistakenly infer climatic significance, CEQ reiterated: "However, it is not currently useful for the NEPA analysis to attempt to link [proposed projects to] specific climatological changes, as such direct linkage is difficult to isolate and to understand."[20]

Stakeholders were confused. How can NEPA analysis of a project emitting 25,000 tons of greenhouse gases per year be "meaningful" if that quantity of emissions is not environmentally significant?[21]

CEQ's 2014 Draft GHG Guidance devoted several pages to the issue without resolving it. CEQ again proposed a 25,000 metric ton reference point while disclaiming an intent to make a "determination of significance."[22] Rather, the significance of an agency action depends on multiple factors, such as "the degree to which the proposal affects public health or safety, the degree to which its effects on the quality of the human environment are likely to be highly controversial, and the degree to which its possible effects on the human environment are highly uncertain or involve unique unknown risks."[23]

However, that restates rather than resolves the perplexity. The degree to which GHG emissions from an individual project affect public health and safety is for all practical purposes zero. The climatic insignificance of individual projects is noncontroversial and highly certain. Greenhouse gas emissions from individual projects are not suspected of posing unique unknown risks.

After wrestling with comments ranging from 'no project-level emissions are big enough to quantify' to 'no project-level emissions are too small to quantify,' CEQ judged that a 25,000-ton disclosure threshold is "1) low enough to pull in the majority of large stationary sources of greenhouse gas emissions, but also 2) high enough to limit the number of sources covered that state and local air pollution permitting agencies could feasibly handle."[24] In other words, administrative convenience rather than science would determine the cutoff.

Then, two years later, the final 2016 GHG guidance silently dropped the 25,000-ton threshold. The whole topic disappeared without a word of explanation or comment. Perhaps CEQ just gave up trying to explain how quantifying emissions that are not climatically "significant" could still be "meaningful."[25]

False Proxies

Although the climatic insignificance of project-related emissions has been Council's consistent view since 2010, CEQ in 2014 continued to propose and in 2016 required agencies to quantify facility-level GHG emissions, and use that information to evaluate proposed actions, alternatives, and mitigation measures.

Based on what scientific rationale? CEQ argued that "projection of a proposed action's direct and reasonably foreseeable indirect GHG emissions may be used as a proxy for assessing potential climate effects."[26] That is misleading at best.

A proxy voter can cast a real, countable, ballot for an absentee voter. Data from tree rings, ice cores, fossil pollen, ocean sediments, and corals can be calibrated to instrumental data and then serve (albeit imperfectly) as proxies for climatic conditions in pre-industrial times. In contrast, no testable, measurable, or otherwise observable relationship exists between project-level GHG emissions and climate change effects. Imaginary proxies are not proxies.

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[18] CEQ, 2010 Draft GHG Guidance, p. 2.
[19] CEQ, 2010 Draft GHG Guidance, p. 2.
[20] CEQ, 2010 Draft GHG Guidance, p. 3.
[21] CEQ, Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 FR 77802, 77825, December 24, 2014, https://www.govinfo.gov/content/pkg/FR-2014-12-24/pdf/2014-30035.pdf.
[22] 79 FR 77802, 77810.
[23] 79 FR 77802, 77810.
[24] 79 FR 77802, 77818.
[25] CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, August 1, 2016, https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf (hereafter CEQ, 2016 Final GHG Guidance).
[26] CEQ, 2010 Draft GHG Guidance, p. 3; 79 FR 77825; CEQ, 2016 Final GHG Guidance, pp. 4, 10.

CEI has made that point in previous comments to the CEQ. Maybe that is why the Proposed Guidance says nothing about proxies.

The Proposed Guidance declines to propose "any particular quantity of GHG emissions as 'significantly' affecting the quality of the human environment."[27] That avoids the problem of having to defend the climatic "significance" of whatever reporting threshold is chosen. But that raises another problem. The absence of any tonnage threshold would seem to imply that no quantity of CO_2 emissions is too small to be estimated, reported, and mitigated. Neither science nor benefit-cost analysis supports such a policy.

Permitting Policy Is Not Climatically Significant

Perhaps CEQ believes that a GHG-focused permitting policy could significantly affect the quality of the human environment, even if individual permitting decisions cannot. The Proposed Guidance states: "Major Federal actions may result in substantial GHG emissions or emissions reductions, so Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis."[28] In fact, not even adoption of a GHG-centric permitting regime would discernibly affect global warming and any associated climate impacts.

For example, a 2022 Heritage Foundation analysis shows that a complete ban on the construction of new natural gas pipelines would achieve a negligible 0.74 percent reduction in U.S. annual CO_2 emissions through 2050 and an undetectable 0.069°C reduction in global temperatures through 2100.[29] Those conclusions are based on a clone of the U.S. Energy Information Administration's (EIA's) National Energy Modeling System (NEMS) and the EPA's Model for the Assessment of Greenhouse Induced Climate Change (MAGICC).[30]

CEQ's Rebuttal: A Response

While disavowing an attempt to establish a particular quantity of emissions as climatically significant, CEQ insists that NEPA "requires more than a statement that emissions from a proposed Federal action or its alternatives represent only a small fraction of global or domestic emissions." That tells us nothing "beyond the nature of the climate change challenge itself—the fact that diverse individual sources of emissions each make a relatively small addition to global atmospheric GHG concentrations that collectively have a large effect."[31]

Respectfully, CEQ ignores the obvious. The "nature of the climate challenge" is what renders scrutiny of project-level GHGs a waste of time and effort. Attempting to solve the "climate change challenge" one project at a time is like trying to drain a swimming pool one thimbleful at a time. It is a fool's errand.

Unless the real objectives are political, such as promoting climate angst, mobilizing activists, and expanding government control of the economy.

CEQ states that although "individual sources of emissions each make relatively small additions to global atmospheric GHG concentrations," the myriad diverse sources "collectively have large effect."[32] The policy implication is obvious: To mitigate "large effect," permission should be denied to as many sources as possible—ideally to all.

The chief problem with that policy—aside from the enormous economic losses it would entail—is that Congress has not authorized it. CEQ should take great care not to encourage agencies to do piecemeal what they clearly lack authority to do at the pace and scale dictated by the NetZero agenda.

IV. No Bona Fide Climate Emergency

CEQ's core rationale for requiring agencies to consider GHG emissions in NEPA proceedings is the opinion that America "faces a "profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory."[33]

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[27] 88 FR 1196, 1200.

[28] 88 FR 1196, 1197.

[29] 0.069°C is smaller than the 0.11°C standard deviation for estimating changes in annual average global surface temperatures. J. Hansen, et. al. 1999. GISS Analysis of Surface Temperature Change. *Journal of Geophysical Research*, Vol. 104, No. D24, 30,997-31,022, https://agupubs.onlinelibrary.wiley.com/doi/pdf/10.1029/1999JD900835.

[30] Comments submitted by Patrick Michaels, Kevin Dayaratna, and Marlo Lewis, Federal Energy Regulatory Commission, Order on Draft Policy Statements, Docket No. PL21-3-000, March 24, 2022, https://cei.org/wp-content/uploads/2022/04/CEI-Comments-Michaels-Dayaratna-Lewis-Docket-No.-PL21-3-000-April-25-2022.pdf.

[31] 88 FR 1196, 1201.

[32] 88 FR 1196, 1201.

[33] 88 FR 1196, 1197; 88 FR 49924, 49928.

That is incorrect. If climate change were a global ecological and economic crisis, we would expect to find evidence of declining health, welfare, and environmental quality over the past 50 years. Instead, we find dramatic improvements in global life expectancy, per capita income, food security, crop yields, and various health-related metrics.[34] Disease mortality rates increased after January 2020 but that was due to the COVID-19 pandemic,[35] not climate change.

Increasing Climate Safety

Of particular relevance, the average annual number of climate-related deaths per decade has declined by 96 percent during the past hundred years—from about 485,000 deaths annually in the 1920s to 18,362 per year in 2010–2019.[36] This spectacular decrease in aggregate climate-related mortality occurred despite a four-fold increase in global population. That means the individual risk of dying from extreme weather events declined by 99.4 percent over the past 100 years.[37] Far from being an impediment to such progress, fossil fuels were its chief energy source.[38]

Decreasing Climate Vulnerability

We often hear that the weather is becoming increasingly destructive. For example, the National Oceanic and Atmospheric Administration (NOAA) recently reported that, "In 2020 alone, a record 22 separate climate-related disasters with at least $1 billion in damages struck across the United States, surpassing the previous annual highs of 16 such events set in 2011 and 2017."[39] Citing NOAA's report, the Securities and Exchange Commission's (SEC's) climate risk disclosure proposal asserts that "the impact of climate-related risks on both individual businesses and the financial system as a whole are well documented."[40] Similarly, the Financial Stability Oversight Council cites the trend in billion-dollar weather disasters as evidence that climate change is a "threat to financial stability."[41]

In reality, not only is the increasing number of billion-dollar disasters not evidence of a climate crisis, it is not even evidence of climate change.[42]

NOAA's billion-dollar disaster charts adjust climate-related damages for inflation but not for population growth and exposed wealth. NOAA—and, thus, the SEC and FSOC—ignore what Danish economist Bjorn Lomborg calls the "expanding bull's eye." More people and more stuff in harm's way lead to bigger climate-related damages even if there is no change in the weather.

Since 1900, Lomborg notes, Florida's coastal population has "increased a phenomenal 67 times." In fact, just two Florida counties, Dade and Broward, have a larger population today than lived along the entire coast from Texas to Virginia in 1940. Consequently, "For a hurricane in 1940 to hit the same number of people as a modern hurricane ripping through Dade and Broward today, it would have had to tear through *the entire Gulf of Mexico and Atlantic coastline*."[43]

Normalizing the damages—estimating the economic losses from an historic extreme weather event if the same event were to occur under present societal

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[34] Our World in Data, https://ourworldindata.org/.

[35] Our World in Data, Cumulative Deaths from All Causes Compared to Projection Based on Previous Years, Per Million People, Sep. 11, 2022, https://ourworldindata.org/grapher/cumulative-excess-deaths-per-million-covid?time=2022-09-11&country=MEX~PER~FRA~BRA~USA~GBR~BGR~ISR~AUS.

[36] Bjorn Lomborg, "We're Safer from Climate Disasters than Ever Before," *Wall Street Journal*, November 3, 2021, https://www.wsj.com/articles/climate-activists-disasters-fire-storms-deaths-change-cop26-glasgow-global-warming-11635973538; "Fewer and Fewer People Die from Climate-Related Disasters," Facebook, https://www.facebook.com/bjornlomborg/posts/475702943914714/.

[37] Bjorn Lomborg, "The risk of dying from climate-related disasters has declined precipitously." Twitter, January 1, 2023, https://twitter.com/BjornLomborg/status/1612790152539131904.

[38] Alex Epstein, *Fossil Future: Why Human Flourishing Requires More Oil, Coal, and Natural Gas—Not Less* (New York: Penguin Random House, 2022).

[39] NOAA, National Centers for Environmental Information (NCEI) U.S. Billion-Dollar Weather and Climate Disasters (2022), https://www.ncei.noaa.gov/access/billions/.

[40] SEC, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 FR 21334, 21336, April 11, 2022, https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf. 87 FR 21336.

[41] FSOC, *Report on Climate-Related Financial Risk* 2021, p. 12, https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf.

[42] Lest anyone mistake my meaning, greenhouse gases are radiative (climate warming) gases, and anthropogenic warming is real.

[43] Bjorn Lomborg, Bjorn Lomborg, *False Alarm: How Climate Change Panic Costs Us Trillions, Hurts the Poor, and Fails to Fix the Planet* (New York: Basic Books, 2020), pp. 70-71 (original emphasis).

conditions—creates a very different picture from that touted by federal agencies. Consider hurricane damages, which constitute the largest portion of U.S. weather-related damages. There has been no trend in normalized U.S. hurricane damages since 1900. Consistent with that data, there has been no trend in the frequency and severity of U.S. landfalling hurricanes since 1900.[44]

From a sustainability perspective, what matters most is not total damages but relative economic impact—extreme weather damages as a share of GDP. Globally, weather-related losses per exposed GDP declined nearly five-fold from 1980–1989 to 2007–2016.[45] In both rich and poor countries, economic growth outpaced the increase in climate-related damages.

Methodological Bias: Inflated Emission Scenarios

One often hears that climate change is happening so fast it will overwhelm humanity's adaptive capabilities. In CEQ's words, "there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory."[46] That assessment clashes with the positive trends discussed above. Three other key facts weigh against the alleged urgency for "climate action."

First, the rate of warming in the lower-troposphere, as measured by satellites and weather balloons, has not accelerated over the past 44 years. In the University of Alabama in Huntsville satellite record, the warming rate is 0.14°C per decade.[47]

A second major reason is that the emission baselines long used to project global warming and sea-level rise are wildly inflated. Those scenarios assume the world "returns to coal" absent aggressive political interventions to suppress the exploration, production, and utilization of fossil fuels.[48] That assumption underlies the high-end "radiative forcing" scenarios,[49] notably RCP8.5 and SSP5-8.5, featured in official and academic climate change impact estimates. Such scenarios are no longer credible.[50]

It is difficult to exaggerate the extent to which RCP8.5 and SSP5-8.5 distort climate science, needlessly scare the public, and mislead policymakers. According to Google Scholar, since 2019, researchers published 17,400 papers featuring RCP8.5 and 3,800 papers featuring SSP5-8.5.[51] One or both of those scenarios was the source of the scary-sounding climate impact projections in the Intergovernmental Panel on Climate Change's (IPCC's) 2013 Fifth Assessment Report (AR5), the IPCC's 2018 Special Report on Global Warming of 1.5°C, the IPCC's 2021 Sixth Assessment Report (AR6), and the U.S. Global Change Research Program's 2018 Fourth U.S. National Climate Assessment.

At its zenith, the academic "consensus" endorsing those scenarios may have reached the fabled 97 percent.[52] It is now crumbling.

SSP5-8.5 is a "socioeconomic pathway" calibrated to match the forcing trajectory of RCP8.5. RCP8.5, in turn, derives from an earlier storyline (A2r) from the IPCC's

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[44] Philip J. Klotzbach, Steven G. Bowen, Roger Pielke Jr., and Michael Bell. 2018. Continental U.S. Hurricane Landfall Frequency and Associated Damage: Observations and Future Risks. *Bulletin of the American Meteorological Society* Vol. 99, Issue 7, https://journals.ametsoc.org/view/journals/bams/99/7/bams-d-17-0184.1.xml?tab_body=pdf.

[45] Giuseppe Formetta and Luc Feyen. 2019. Empirical Evidence of Declining Global Vulnerability to Climate-Related Hazards, *Global Environmental Change*, 57: 1-9, https://www.researchgate.net/publication/333507964_Empirical_evidence_of_declining_global_vulnerability_to_climate-related_hazards.

[46] 88 FR 1196, 1197.

[47] Roy Spencer, UAH Global Temperature Update for August, 2023: +0.69 deg. C, RoySpencer.Com, September 4, 2023, https://www.drroyspencer.com/2023/09/uah-global-temperature-update-for-august-2023-0-69-deg-c/.

[48] Justin Ritchie and Hadi Dowlatabi. 2017. Why Do Climate Change Scenarios Return to Coal? *Energy* 140: 1276–1291, https://www.sciencedirect.com/science/article/abs/pii/S0360544217314597.

[49] RCP stands for "Representative Concentration Pathway"; SSP stands for Shared Socioeconomic Pathway. In both RCP8.5 and SSP5-8.5, the rise in GHG concentrations between 2000 and 2100 increases the preindustrial greenhouse effect by 8.5 watts per square meter (W/m^2).

[50] Roger Pielke, Jr. and Justin Ritchie, "How Climate Scenarios Lost Touch with Reality," *Issues in Science & Technology*, Vol. XXXVII, No. 4, Summary 2021, https://issues.org/climate-change-scenarios-lost-touch-reality-pielke-ritchie/.

[51] Some of those papers could, of course, be critical of high-end emission scenarios. However, the first 50 entries on SSP5-8.5 are exclusively studies that use the scenario to project climate change impacts. Hardly an exhaustive survey but quite suggestive.

[52] David R. Legates et al. 2015. Climate Consensus and 'Misinformation': A Rejoinder to Agnotology, Scientific Consensus, and the Teaching and Learning of Climate Change. *Sci & Educ* 24: 299-318, https://lweb.cfa.harvard.edu/~wsoon/myownPapers-d/LegatesSoonBriggsMonckton15-ScienceandEducation-FINAL.pdf.

2007 Fourth Assessment Report.[53] Such scenarios assumed that learning-by-extraction would make coal the increasingly affordable backstop energy for the global economy.[54] In fact, nominal coal producer prices in July 2023 were 221 percent higher than in July 2001.[55] RCP8.5 was based on the expectation that global coal consumption would increase almost tenfold during 2000–2100.[56] That is not happening and there is no evidence that it will.

In the International Energy Agency's (IEA's) baseline scenarios ("current policies" and "pledged policies"), global CO_2 emissions in 2050 are less than half those projected by SSP5-8.5.[57] Strikingly, in Resources for the Future's (RFF's) baseline scenario, global CO_2 emissions in 2100 are less than one-fifth of those projected by SSP5-8.5.[58] These dramatic reductions in baseline emission estimates decrease the urgency for "climate action."

Methodological Bias: Overheated Models

CEQ's Proposed Rule requires agencies to use "projections when evaluating reasonably foreseeable effects, including climate change-related effects," and "expects that modeling techniques will continue to improve in the future, resulting in more precise climate projections."[59] This brings us to the third reason to doubt the urgency for "climate action": the persistent mismatch between modeled and observed warming in the troposphere, the atmospheric layer where most of the greenhouse effect occurs. The IPCC used the CMIP5 generation of climate models in AR5 and the CMIP6 generation of models in AR6. According to Google Scholar, since 2019, researchers published 68,000 papers featuring CMIP5 models and 22,600 papers featuring CMIP6 models.

The CMIP5 models hindcast about 2.5 times the observed warming in the tropical troposphere since 1979.[60] About one-third of the AR6 models have higher equilibrium climate sensitivities than any model in the AR5 ensemble.[61] Equilibrium climate sensitivity (ECS) is the term used to describe how much warming will occur after the climate system fully adjusts to a doubling of atmospheric CO_2 concentrations.

CEQ believes climate models are improving. If anything, the CMIP6 models are less accurate than the CMIP5 models. One CMIP5 model (INM-CM4) accurately hindcasts global temperatures in the topical troposphere. No CMIP6 model does. All overestimate warming in that atmospheric region.[62] Why is that significant? All models predict a strong warming signal in that region (the tropics at 300–200 hPa). The region is well monitored by satellites and weather balloons. Most importantly, climate models are not "tuned" to match temperature trends in that region, so the model simulations are genuinely independent of the data used to test them.[63]

V. Conclusion

CEQ should withdraw the proposed GHG emission guidelines, which would require agencies to use NEPA as a climate policy framework—a purpose for which it was not designed and which Congress has not subsequently authorized. Language

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[53] Kewan Riahi et al. 2011. RCP8.5—A Scenario of Comparatively High Greenhouse Gas Emissions. *Climate Change* 109: 33-57, https://link.springer.com/article/10.1007/s10584-011-0149-y.

[54] Justin Ritchie and Hadi Dowlatabadi, The 1,000 GtC Coal Question: Are Cases of High Future Coal Combustion Plausible? Resources for the Future, RFF DP 16-45, 2016, https://media.rff.org/documents/RFF-DP-16-45.pdf.

[55] St. Louis FED, Producer Price Index by Industry: Coal, https://fred.stlouisfed.org/series/PCU21212121 (accessed 9/11/2023).

[56] Riahi et al. Op. cit.

[57] Zeke Hausfather and Glenn P. Peters, "Emissions—the 'business as usual' story is misleading," *Nature*, January 29, 2020, https://www.nature.com/articles/d41586-020-00177-3.

[58] Kevin Rennert et al. *The Social Cost of Carbon: Advances in Long-Term Probabilistic Projections of Population, GDP, Emissions, and Discount Rates, Resources for the Future*, October 2021, https://www.rff.org/publications/working-papers/the-social-cost-of-carbon-advances-in-long-term-probabilistic-projections-of-population-gdp-emissions-and-discount-rates/.

[59] 88 FR 49924, 49951.

[60] John R. Christy and Richard T. McNider. 2017. Satellite Bulk Tropospheric Temperatures as a Metric for Climate Sensitivity. *Asia-Pac. J. Atmos. Sci.*, 53(4), 511-518, https://www.sealevel.info/christymcnider2017.pdf.

[61] Zeke Hausfather, "Cold Water on Hot Models," The Breakthrough Institute, February 11, 2020, https://thebreakthrough.org/issues/energy/cold-water-hot-models.

[62] McKitrick and J. Christy. 2020. Pervasive Warming Bias in CMIP6 Tropospheric Layers. *Earth and Space Science*, 7, Issue 9, https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2020EA001281.

[63] Ross McKitrick and John Christy. 2018. A Test of the Tropical 200- to 300-hPa Warming Rate in Climate Models. *Earth and Space Science*, 5: 529-536, https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2018EA000401.

in the Proposed Rule requiring NEPA-based scrutiny and mitigation of project-specific climate effects should be deleted.

Far from NEPA containing a clear statement authorizing its use to make climate policy, the words "climate," "carbon," "greenhouse," "global," and "warming" do not occur in the statute.

NEPA is centrally concerned with "major" federal actions "significantly affecting the quality of the human environment." The GHG emissions of even the largest infrastructure project have no discernible, traceable, or verifiable impacts on the quality of the human environment.

CEQ proceeds as if the "climate crisis" is important enough to make any level of GHG emissions climatically significant, and dire enough to compel NEPA's alignment with Paris Agreement and NetZero 2050 emission reduction targets. If so, CEQ unlawfully attempts to settle a major question of public policy without clear congressional authorization.

CEQ should question the climate crisis narrative, which conflicts with ongoing long-term improvements in global life expectancy, per capita income, crop yields, and health; dramatic declines in climate-related mortality; and substantial declines in the relative economic impact of damaging weather.

Finally, CEQ should question the "science" underpinning the crisis narrative—a doubly-biased methodology in which overheated models are run with inflated emission scenarios. Absent those biases, climate change assessments would project less warming, smaller climate impacts, and lower tipping point risks.

Dr. GOSAR. Thank you, Mr. Lewis. I am now going to go to the dais. I recognize the gentleman from Oregon, Mr. Bentz, for his 5 minutes.

Mr. BENTZ. Thank you, Mr. Chair.

Mr. Simms, I held a hearing as the Chair of the Water Subcommittee of Natural Resources up in Richland, Washington back in June. And it became apparent from the testimony of some of the witnesses from various government agencies, that we weren't going to get the straight of what was really going on, and that is a blatant attempt to circumvent congressional authority to breach or remove those four Lower Snake River dams.

And by blatant attempt I mean an attempt to use operational neutering, as I have chosen to call it, of those four projects, as opposed to actual breaching of the dams. That was the conclusion I reached in that hearing. Can you comment?

Mr. SIMMS. Well, good morning, Congressman Bentz. Thank you for that opportunity to respond.

The situation in the region is exactly as you described and what has been provided by testimony and others. These dams are being hobbled operationally. The folks that are pushing an agenda for their breaching or the removal are trying to make them less significant, less operationally significant than what they have done historically. And I think that has been an effort by folks to be continued on a single-focused path of breaching or de-optimizing them, no matter which way they can work that.

And you are right, Congress does have the authority, and I appreciate you, as a Member of Congress, stressing that authority. It has been affirmed by both the Democrats and the Republicans that Congress is the single writing authority on those Lower Snake River dams, and the dams in general, and their authorizations.

I will conclude by saying that there is an established record by the U.S. Government, the Columbia River System Operations Environmental Impact Statement issued in September 2020. And that was the U.S. Government's view after an exhaustive, multi-

million dollar effort involving stakeholders across the basin that those dams can and should exist with some very minimal efforts and investments around them because, of course, we are paying the world's largest Endangered Species Act mitigation program currently, and that was and is the government's record that stands today, despite the shenanigans from CEQ.

Mr. BENTZ. Right, and these shenanigans are being driven by CEQ, as you just said, as I understand it. But that was certainly not clear from my questions to, I think it was NOAA or the Corps. And there seemed to be a huge reluctance to share with the public exactly how this incredibly important decision to the Northwest was going to be made.

Do I have that right, that this is being conducted in secret, this attempt to operationally destroy those four projects?

And we will learn, I guess, when Judge Simon issues his order, if he does, on October 31. So, how can one justify, if you are part of the CEQ, such an approach to such an incredibly damaging activity in the Northwest?

Mr. SIMMS. Well, sir, it is a great, great question, and I would say I am not standing in the shoes of CEQ. And having been witness to 25 years of Federal, state, and regional process around these Federal facilities and around the power system in the Pacific Northwest, it is incredibly difficult and very complex, and requires the involvement of a lot of stakeholders. That is typically how we have moved policy in our region is by transparent involvement of all sectors, making sure that folks are read in and understanding where things are headed and when they have a voice. And that has been completely the opposite, unfortunately, in this situation with CEQ.

And as I outlined in my brief comments today, but also submitted comments, the NOAA report that CEQ had a hand in and has essentially put its basis upon is completely different than the decades of NOAA research and science on these issues to date. And we believe that has been the fuel, essentially, for the CEQ fire to burn down our region and effectively sidestep any kind of public process.

Mr. BENTZ. Right, and I thank you for that.

And Mr. Lewis, what, in your opinion, is the most egregious, expansive CEQ power under the Biden administration?

Mr. SIMMS. What specifically is, sir?

Mr. BENTZ. Yes, just give me one. Give me the one you think is the worst.

Mr. SIMMS. Well, I believe that having——

Mr. BENTZ. That was actually for Mr. Lewis.

Mr. SIMMS. Oh, I am sorry.

Mr. BENTZ. That is OK.

Mr. SIMMS. Pardon me. I will yield to Mr. Lewis.

Mr. BENTZ. Sure.

Mr. LEWIS. I am not sure I can give you an example, because I am not really following CEQ's actions with respect to particular projects or locations the way Mr. Simms is. He is really the expert here.

The abuse of power that I was looking at was the way they are trying to stretch a statute that was never intended to be a

framework for climate policy into such a framework. And it is well known that NEPA does not even require agencies to elevate environmental concerns above other considerations when they deliberate on whether or not to grant a permit or approve the construction of a project.

And what I am finding is that CEQ wants to elevate the President's very specific climate goals and commitments, which are not commitments in law, but just of Administration policy, into a make-or-break factor for deciding on whether projects should be allowed.

Mr. BENTZ. And we are going to have to stop there. My time has been exhausted, but thank you so much.

Mr. LEWIS. Yes. That is basically my notion of what their abuse is that I was concerned with.

Mr. BENTZ. Thank you. I yield back.

Dr. GOSAR. I thank the gentleman. The gentleman from California, Mr. Huffman, is recognized.

Mr. HUFFMAN. Thank you, Mr. Chairman. Mr. Chairman, forgive me for being a little bit cynical about the work of this Subcommittee this morning, because I just see an awful lot of gaslighting and projection, and performative partisan theater. Ranting about dark money environmental groups while trotting out witnesses from the darkest of dark money right-wing groups in this hearing? Give me a break.

Getting us started by climbing on a high horse, thesaurus in hand, and calling the Biden administration and CEQ Chair Mallory every name in the book because she dares to undo some really wrongheaded Trump administration policies, because she is trying to make sure we consider climate change and impacts to disadvantaged communities when we move forward with projects?

I am old enough to remember during the 4 years of the Trump administration, when we tried to do oversight, which apparently suddenly the Republican Majority thinks is really important, and what we got back from the Interior Secretary when we wanted to find out if he was still doing business with his former oil and gas industry clients, because we, unfortunately, confirmed an Interior Secretary that was a lobbyist for the oil and gas industry, when we wanted to ask about that we got pages and pages of fully redacted empty calendar entries. We got nothing. But that was just fine with the Republican Majority during the Trump administration, because they knew that that Secretary of the Interior was doing the bidding of their puppet masters in the oil and gas industry.

It is also rich to hear the Chairman of the Full Committee wax sanctimonious about the Fiscal Responsibility Act. And apparently, the CEQ Chair is not being forceful enough in implementing the gimmicky NEPA reforms that were in that piece of legislation. And they were nothing more than gimmicks.

While at the same time, our Republican colleagues are proceeding to tear the Fiscal Responsibility Act into tiny little pieces as they push our country to the brink of a government shutdown in violation of the agreement behind that legislation.

So, this is all a lot of partisan theater, and that goes for the discussion about the Lower Snake River dams, as well. We know that our Republican colleagues recently said that the NMFS 2022

report was untethered from scientific standards and statutory authority. Mr. Simms added a rhetorical flourish, saying that it was a house of cards, a flimsy house of cards that CEQ built.

Well, we have had 20 years of litigation over biological opinions on these Lower Snake River dams, and every single lawsuit has found that we are not doing enough to meet the standard of avoiding jeopardy, much less getting the salmon in the Columbia River Basin on a path toward recovery.

So, based on all of this science, it sure looks to me like this is more than a house of cards. It looks like seriously considering what these Lower Snake River dams are doing to salmon in the Columbia River Basin is inevitable, certainly under the Endangered Species Act.

And also, if you give a damn about salmon, if you give a damn about tribes, if you give a damn about the dwindling orca populations in Puget Sound, let me just ask Ms. Heaps, what am I missing here?

Ms. HEAPS. Congressman Huffman, I think you are right on the point. CEQ's undoing what happened in 2020 with the regs and taking the step forward to really implement NEPA for what we need today to address climate change, to address environmental justice.

And I would also like to say that voices are missing here, where is the tribal representation? I mean, that perhaps is the most stark point that hasn't been made yet, is that we have a government obligation to the tribes, that they have treaty rights to these fish. And that is our No. 1 thing that we have done wrong, and that should be the priority here, is centering the tribes and fixing these salmon runs so that they have their tribal treaty rights.

Mr. HUFFMAN. Thank you. The salmon in this basin are trending toward extinction, despite all the money that we have been spending on mitigation, correct?

Ms. HEAPS. Yes, that is true. The Nez Perce actually, in fact, said extinction is imminent if we don't do something.

Mr. HUFFMAN. So, rather than just the usual thoughts and prayers we hear from our colleagues across the aisle, shouldn't we follow the science and do what we need to do if we care about salmon, and tribes, and all of the economic benefits?

We heard the world would end if these dams came out. But aren't there a lot of economic considerations when it comes to salmon in the Columbia River Basin?

Ms. HEAPS. Yes, absolutely. And also breaching the dams would give an opportunity to actually diversify the power system, and actually increase reliability of the power system, and open up additional recreational opportunities as well.

Mr. HUFFMAN. I thank the witness and yield back.

Dr. GOSAR. I think it is kind of rich of what we want, and to understand the Constitution is about the law.

I now recognize the Chairman of the Full Committee, Mr. Westerman.

Mr. WESTERMAN. Thank you, Mr. Gosar, and thank you to the witnesses.

And Mr. Huffman, I honestly don't know if you voted for the Fiscal Responsibility Act, but regardless, it is still the law. I know

you might want to call it a gimmick, but it is a gimmick that had bipartisan support, and President Biden signed it. And the point is, it is the law.

And Ms. Heaps, I appreciate your testimony because it was passionate. It was a plea for policies, but it was a plea for policies that have never been passed into law by Congress. It would be fitting for a testimony at a hearing on legislation. But I think it is somewhat irrelevant on a hearing for oversight of an agency regarding established law. And I think this gets to the root of the problem. It illustrates where the breakdown is in the process.

Ms. Heaps, a July 5 Earthjustice blog post stated, and I quote, "Radical Republicans are actively trying to weaken NEPA. They are trying to make it easier for industry to build toxic facilities in communities already overburdened by the worst impacts of climate change and pollution."

Now, I want to point out that that post goes on to talk about how the NEPA Phase 2 requirements should focus on environmental justice and ensure climate change is part of the review process. This was published on July 5, 2023.

The CEQ proposed Phase 2 NEPA regulations were published in the Federal Register on July 31, 2023. Those regulations more closely mirrored recommendations in the Earthjustice blog post, not the reforms agreed upon in what has been called gimmicky bipartisan Fiscal Responsibility Act.

So, yes or no, Ms. Heaps, did you or a member of the Earthjustice team meet with CEQ regarding the development of the proposed Phase 2 NEPA process?

Ms. HEAPS. I am one employee at a very large organization that has 500 employees, so I am not familiar with who was meeting with who.

Mr. WESTERMAN. So, you didn't——

Ms. HEAPS. I did not personally meet with CEQ, no. That is all I could speak to.

Mr. WESTERMAN. Did you or a member of Earthjustice participate in drafting the Phase 2 regulations?

Ms. HEAPS. I do not have knowledge to that. I did not.

Mr. WESTERMAN. Is there somebody at Earthjustice that would have knowledge of that?

Ms. HEAPS. Can you explain what you mean by writing the Phase 2 regulations? Because my understanding is this is an administrative process in which all of America actually participates in the regulation writing because there are draft regulations, and then it goes through——

Mr. WESTERMAN. Did you or an employee meet with CEQ regarding these Phase 2——

Ms. HEAPS. I have not met with CEQ about——

Mr. WESTERMAN. Did you or a staff member of Earthjustice have access to an advanced copy of the CEQ proposed Phase 2 regulations prior to their publication in the Federal Register?

Ms. HEAPS. CEQ does a notice of advanced proposed rulemaking. So, all of America had an idea of what Phase 2 was going to look like.

Mr. WESTERMAN. So, you had an advance copy?

Ms. HEAPS. No, I didn't say I had an advance copy.

Mr. WESTERMAN. So——

Ms. HEAPS. I said the rulemaking procedures allow——

Mr. WESTERMAN. Are you or Earthjustice, as a non-profit, currently a party and/or representing a party in litigation against the Federal Government?

Ms. HEAPS. We are not a party, no. We are lawyers.

Mr. WESTERMAN. Are you representing a party in litigation against the Federal Government?

Ms. HEAPS. Are we representing a party in litigation? Yes.

Mr. WESTERMAN. Do any of these lawsuits involve NEPA?

Ms. HEAPS. I have personally represented parties on NEPA at Earthjustice. I don't know what——

Mr. WESTERMAN. So, is this a potential conflict of interest for Earthjustice and/or its employees?

Ms. HEAPS. Absolutely not.

Mr. WESTERMAN. OK. For the record, Ms. Heaps, I would like to note that your disclosure for the Committee states that Earthjustice is not a party to any litigation against the Federal Government, despite the fact that it uses this as an advertising tool in its tagline and on your website.

So, do you feel, again, yes or no, is falsification of information to Congress acceptable?

Ms. STANSBURY. Will the gentleman yield, please?

Mr. WESTERMAN. No.

Dr. GOSAR. The gentleman's question will stand. We need an answer.

Ms. HEAPS. I answered that question truthfully. Earthjustice is not a party to litigation, and that is what the question asks for.

Mr. WESTERMAN. The question was a party to or representing a party in litigation.

Ms. HEAPS. That is not what the question asked. It was a party to litigation.

If you would like a list of the litigation to which Earthjustice is currently in litigation, I am sure we could find——

Mr. WESTERMAN. I have a whole list of other questions. If I am out of time, we will submit those questions. I also have questions for the other witnesses. But I am out of time, and I yield back.

Dr. GOSAR. The gentleman from Montana is recognized for 5 minutes.

Mr. ROSENDALE. Thank you very much, Mr. Chair and Ranking Member Stansbury, for holding this hearing today.

President Biden's big-government, climate-activist agenda has wholly captured the once small Council on Environmental Quality, transforming it into a compliance council, or an activist organization. President Biden's CEQ is hell bent on implementing climate and social policies that are destroying our country's energy production and jobs.

CEQ Chair Brenda Mallory, who was too scared to face this Committee today, has previously described her role as focusing on addressing the environmental justice and climate change challenges. Nowhere in CEQ's authorizing charter does it mention environmental justice. Nor did Congress grant CEQ the power to focus on climate justice and climate change challenges.

CEQ's purpose is to ensure compliance with NEPA, nothing more. Nothing more, nothing less. Yet, we have President Biden using this Council to push through his outrageous and harmful Executive Orders and rulemaking with CEQ's Chief of Staff describing the power Biden has given CEQ as "unprecedented." This isn't just our words.

During his presidency, Biden has signed Executive Orders providing CEQ with more and more power over American citizens' lives, no longer solely focused on NEPA compliance, but instead on environmental justice per the President's orders. We have just begun to see the damage this rogue, relatively unknown agency can wreak on this country and our economy.

Last July, we saw the results of this agency's activism at the Lower Snake River dams. The CEQ has been working behind closed doors with plaintiffs in an ongoing lawsuit over the Columbia River System Operation's EIS, all while promoting a supposedly open and transparent stakeholder listening process meant to develop a regional solution for salmon and the river system. This action by CEQ shows their goal is not a cleaner and more efficient economy and power generation, but instead forwarding their climate goals and trying to destroy any power generation that they cannot control directly.

Mr. Loyola, we can all see the significant differences in how CEQ was run under the Trump administration versus the current one: permitting delays, a focus on climate justice, et cetera. However, are there lesser understood or seen differences influencing our country that my constituents would be surprised to hear about?

Mr. LOYOLA. Well, if I was to name one, Congressman, I would say that in the Trump administration we were building on the work of previous administrations, including the Obama administration. We recognized that doing a rule revision carries risks of inserting instability into a process that is already so unpredictable that Americans across the spectrum suffer from it.

So, we tried to have a very inclusive process and produce very common-sense reforms that would have bipartisan buy-in and that would stand the test of time. That is why, as it turned out, the renewable energy sector was arguably the most immediate beneficiary of many of those reforms, as renewable energy capacity permitting doubled under the Trump administration.

And what concerns me is that this process that CEQ has undertaken in recent years has been, I think it is fair to say, a more partisan and special interest group-driven process than certainly the one that we tried to have in the Trump administration. And as a result, the CEQ has guaranteed that when there is another change of administration, there is going to have to be yet another change in the procedures for NEPA to make them more balanced once again. So, that is the danger that I see there.

Mr. ROSENDALE. Thank you very much. This is exactly the ripsaw effect that we see when executives on either side of the aisle start making Executive Orders and directing policy instead of utilizing the process that our founders created for us, which is this body creating the laws. And we have lost that, which has also created a loss of confidence in the general public in these institutions because they see them going off and making their own

decisions, making their own rules, and a complete disregard for the rule of law that has been put in place.

Mr. Chair, if I could squeak one more question in, do you believe any of President Biden's CEQ's actions have violated the Constitution, Administrative Procedure Act, or the Supreme Court's precedent?

Mr. LOYOLA. I think that there is a potential for that, and I would like to take that question for the record, if I may.

Mr. ROSENDALE. Thank you very much, Mr. Chair. Thank you for your indulgence and I yield back.

Dr. GOSAR. I thank the gentleman. The gentleman from Georgia is recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I want to follow up real quickly on Chairman Westerman's opening statement.

America, during the last hearing, CEQ Chair Mallory, and CEQ by the way is an unauthorized agency created by the Biden administration, which has increased to a bloated budget and out-of-control agency. Chair Mallory refused to answer simple questions I had about foreign contractors. As a matter of fact, she refused to answer any more questions.

Now, she wasn't refusing to answer me, but she was refusing to answer you, every taxpaying American out there, because she, like so many of these other out-of-control agencies, they don't think they have to answer your questions. They don't even have to answer your comments you submit, because they don't care what you think.

As a matter of fact, they think it is even beneath them to have to even answer your questions or, as you see, even show up. Because, you see, for years, to Chuck Schumer's delight, we have passed omnibus bills up here. Omnibus bills have been crammed down the American people's throat with no oversight and no accountability by these out-of-control agencies. And it has done nothing more than continue to embolden them. Well, I tell you what, I am here to tell you those days are over.

Now, Mr. Chairman, with that being said, I am excited that we do have those of you that are here with us today, and I thank you for that.

CEQ projected reviews, they are 5 years, on average, from reaching a record of decision. And at the most extreme, the average time to conduct a final EIS by the Federal Highway Administration is 7.37 years. And none of these timelines take into account the litigation that likely ensues for this final Record of Decision, or ROD.

So, Ms. Heaps, what are the reasons for an environmental impact statement to take almost 5 years to complete?

Ms. HEAPS. I think in some instances environmental impact statements can take a long time, based on what kind of studies are being done, if you are doing noise studies, if you are studying certain impacts to wildlife, if you have to do baseline research. So, that could be one reason.

I have not been privy to any interaction between an applicant and an agency to actually know what they are doing in that time until the NEPA document goes out for public comment. There may be another witness here who has a better answer to that question.

But I could speak more clearly to what happens when a document goes to public comment and then what happens after that.

Mr. COLLINS. Thank you.

Well, I will tell you what, Mr. Lewis, do you agree that these timelines are not acceptable?

Mr. LEWIS. I am sorry, Congressman, please repeat that question.

Mr. COLLINS. Well, I was asking Ms. Heaps what are the reasons that these environmental impact statements take almost 5 years.

Mr. LEWIS. Oh, why they take so long, right. Well, I will give you a quick answer, but I would say that my colleague, Mario Loyola, knows much more detail here.

But one reason is that it is to bulletproof the environmental impact statement from litigation. Because no matter how many different factors or aspects you consider, because the world is such a big and complex place, some litigation group can always find something that the agency didn't consider. And sometimes courts will then just overturn the decision, or make them do the study over.

So, litigation drives a lot of the time expended——

Mr. COLLINS. I would agree with you 100 percent. And many times at our Federal Government they move the goalposts due to these litigations and all these frivolous lawsuits that these environmentalists impose, and it is a continual.

What do you think can be done to cut these timelines?

Mr. LEWIS. I really think Mario could speak much better to that than I could.

Mr. COLLINS. Well, we will give him a shot at it.

Would you care to answer that?

Mr. LOYOLA. Yes, Congressman, thank you for that.

And thank you, Marlo, for creating more work for me.

[Laughter.]

Mr. COLLINS. He is sitting three doors down.

Mr. LOYOLA. So, Congressman, I think that in addition to the factor that Mr. Lewis mentions, which is litigation risk that drives the agencies to an inordinate amount of time spent trying to make sure they get every comma and period right, is the fact that the NEPA process is so resource intensive for agencies that agencies can only produce a, you know, a handful of EISs every year.

So, you have, for example, the Nevada office of the Bureau of Land Management only has the resources to work on one to three permit applications at the same time, given how much of the staff resources every one of these things costs, and suddenly they are facing 20 permit applications. Well, they can still only work on two at a time. So, that means that there is an enormous backlog of these things created.

And as far as ways to resolve this, to help improve the situation and speed this up, I think I have several recommendations in my submitted testimony, and I have written about this a fair amount. I will just say I think it is very important that the agency not have unfettered discretion of when to start the clock ticking.

Mr. COLLINS. He is over here tapping on me. I can answer that question as well. Some call it tort reform.

Mr. Chairman, I am sorry for going over, and I appreciate it, and I yield back.

Dr. GOSAR. I thank the gentleman from Georgia. The gentleman from Washington, Mr. Newhouse, is recognized for 5 minutes.

Mr. NEWHOUSE. Thank you, Chair Gosar, and I appreciate very much the opportunity to be part of this hearing. I thank the guests for being here today.

I am from the state of Washington. As you are familiar, the four Lower Snake dams are certainly what many people call, me included, the lifeblood of central Washington. They literally transform an arid desert into bountiful farmland. They provide irrigation, an agricultural industry, navigation, flood control, a source of clean, renewable, CO_2-free power throughout the region. So, they are very important.

And to ensure their continued success, I have consistently engaged with many people throughout the region that represent utilities, public power, hydropower, certainly water groups, many groups that are impacted and benefit from the presence of the dams. We literally represent millions of people in the West, and this is such an important process for us to be talking about, and I appreciate you guys being here.

The common theme, all of these groups consistently raise the same concerns that they have within the CRSO process, the Columbia River System Operations, that the CEQ, the Council on Environmental Quality, has not adequately involved them. It is very frustrating. These are the stakeholders in this mediation process. It is very frustrating.

In fact, in one case, stakeholders like the Public Power Council and the Northwest River Partners were invited to an August 18, 2023 meeting, a meeting that was scheduled 13 days prior to the expiration of the mediation. So, certainly stakeholders had a chance to express their concerns, but I am guessing they were registered, but none of their concerns were addressed or remedied.

I was very excited when I came in the room and I saw that the name tag for Chair Mallory of the CEQ was there. And I apologize, Mr. Loyola, I mistook you for Mr. Mallory. So, I was going to direct some questions to you. But not being able to do that, I have to redirect my thoughts to others.

So, Mr. Simms, if you would avail yourself, do you think that 13 days is enough time for CEQ to incorporate any potential recommendations into the mediation?

Mr. SIMMS. Congressman Newhouse, good morning. Thirteen days is certainly not enough for CEQ to incorporate our input.

Mr. NEWHOUSE. In your opinion, how do you believe that this lack of collaboration will impact the end result that we may see from this mediation process?

Mr. SIMMS. Sadly, sir, I would say, as a fourth generation Washingtonian myself, we are further apart than we were when we started this process. And I used a four-letter word earlier to describe it. It is a sham, s-h-a-m. I think that this process has really isolated folks from the ability to really engage and find true compromise in the middle. And I do believe that there is a middle for compromise.

And I was sad to see Congressman Huffman leave the room so that we could address some of the issues he raised about salmon, because we do care deeply about the salmon in our region, the

survival of the salmon, the habitat investments, the predation reduction investments that we are making. Those are all critical for their survival. And we are all in. We live in those communities, and we want those salmon to succeed.

Mr. NEWHOUSE. I am kind of an optimist, I guess, not naïvely so, so I was glad to see the extension so that maybe we could address some of these long-standing concerns that I didn't think there was adequate time given to address.

In the remainder of this extension that we have before us, what would you recommend that, in your opinion, CEQ could do differently than they have over the past 2 years to make sure that these concerns that are being raised are incorporated into the mediation process, and that we end up where we need to be, with a fair, equitable resolution?

Mr. SIMMS. Well, sir, I am looking at the clock and seeing there is probably a long list of things that could happen. But I would say first and foremost is there probably needs to be some reading and some studying done at CEQ, and that is the current record from the U.S. Government about where the government landed on the future of the Columbia River System, which was the CRSO EIS from September 2020.

As well, as I outlined earlier, the NOAA report that CEQ has heralded and put forth is unsubstantiated, and is a 180-degree difference from the former and established NOAA science in this basin.

So, we have to actually do some homework in this region, and we have to get folks back together to the table in a way where we can compromise. I am hopeful we can do that in the remaining days of this stay.

Mr. NEWHOUSE. Yes, I am, too. Like I said, I am optimistic, but hopefully not naïvely so, and look forward to a positive resolution to this once and for all.

Thank you, Mr. Chairman. I am over my time. And again, I appreciate being allowed to sit in on this hearing.

Dr. GOSAR. Thanks for being here. The Western caucus is always endeared here.

I now recognize the gentleman from Texas, Mr. Hunt, for his 5 minutes.

Mr. HUNT. Thank you, Mr. Chairman, and thank you, witnesses, for being here today.

CEQ was originally created to issue guidance to Federal agencies on how to comply with NEPA. Nevertheless, everyone in this room knows that CEQ has grown into an action arm for President Biden's radical eco-agenda. Look no further than the Biden administration's settlement with the Sierra Club over a possible, a possible, sighting of a Rice's whale in the Gulf of Mexico almost a decade ago. It is insanity.

Instead of simply overseeing NEPA compliance, the CEQ is reshaping Federal agencies as a vehicle of social change and leading the war on domestic energy production.

CEQ and Biden's White House care far more about ESG than they care about the American public and our livelihood, and what we are going to do about having energy abundance for our future.

Mr. Loyola, sir, thank you for being here. In your testimony, you mentioned that the American people need to understand that the goal of net-zero is a fantasy. And given the delays and uncertainties of the permitting process, could you elaborate on that, please?

And for the record, sir, I am from Houston, Texas. The entire energy corridor is in my district, so I can't agree more with this statement, but I would love for you to speak a little bit more about that, please.

Mr. LOYOLA. Thank you for the question, Congressman Hunt.

I would say that under current law there are enormous constraints on the ability to deploy renewable energy on the scale and at the speed that would be required. Just to give an example, the Princeton Net-Zero Study talks about requiring 500 gigabytes of new solar capacity. That is about 1,000 utility scale solar plants that would need to be built. That is an area approximately the size of New Jersey covered in solar panels.

Mr. HUNT. Wow.

Mr. LOYOLA. And I will just point out, in the Snake River dams that we have been talking about, there are many very sympathetic stories on the ground of stakeholders. Every single renewable energy project has similar stories and has similar people opposing them.

And the problem with the NEPA process is that it elevates small pockets, what can sometimes be very small pockets of local opposition over national policy priorities. And it is happening even with respect to the national policy priorities of the current Administration, which hasn't been able to increase the rate at which renewable energy gets permitted because of this sort of local opposition.

The problems operate at two levels. One of them is that the risks to any particular project are so enormous because of the uncertainties of the process that those projects in the project application phase, during the NEPA phase, have only very restricted access to financing. Only people who can afford to lose $25 or $30 million or $100 million on a permit application, who can literally afford to throw that money away, are waiting for someone to call them back, and are only tempted to get into a project because of the promise of exorbitant returns on investment, which is a premium that is passed onto consumers eventually.

Mr. HUNT. Always, always.

Mr. LOYOLA. All of these inefficiencies come at a great cost.

And then the macro level issue, which I discussed a moment ago, which is that the entire process is so taxing of agency staff resources that the entire Federal Government is only able to produce 70 or 80 EISs a year.

The entire Federal Government in the last year, I mean, I don't know this for a fact, I will take it for the record, but in the last year I bet that the entire Federal Government has only issued three or four solar project permit applications. And in order to get to net-zero, they have to build 1,000 solar plants and have them operational before 2035. I am not a mathematician or anything, but doing the math I don't see how they are going to get there.

So, I think the principle that we followed in the Trump administration was that the uncertainties and inefficiencies of the NEPA process hurt everybody.

Mr. HUNT. Yes.

Mr. LOYOLA. And that making the process more predictable would be a benefit to everybody. Maybe not the litigation, the cottage industry of litigation groups that has grown up challenging agency actions. But again, I don't see this as a partisan issue of Republicans versus Democrats. I see this as public interest versus special interests.

So, what we tried to do and what CEQ will hopefully do in the future is to put the public interest and efficient and effective agency action first, and try to streamline the NEPA process as called for in the Fiscal Responsibility Act.

Mr. HUNT. Thank you very much for your answer, and I will yield back the rest of my time.

Thank you, sir.

Dr. GOSAR. I thank the gentleman from Texas. The gentlewoman from New Mexico is recognized for her 5 minutes.

Ms. STANSBURY. All right. Well, thank you so much, Mr. Chairman. And I do thank all of my colleagues for the rich discussion and debate this morning, and that is part of the democratic process is to have debates about public policy, and our goals, and what we would like to achieve with the tools of governance.

But what we don't get to do is to make up facts and put false statements into the mouths of our witnesses and then try to get them on the record. So, I will remind my colleagues that this is not behavior that is fitting with the decorum of this Committee, and would like to correct some of the misinformation that has been stated here at this hearing today.

First of all, let's talk about NEPA and CEQ. In 1969, this body on a bipartisan basis passed NEPA. And guess what? It actually authorized and created the Council on Environmental Quality. And then Richard Nixon signed it on January 1, creating the Council on Environmental Quality. I heard some statements this morning that it was an unauthorized agency, and that is factually untrue.

Second, I heard a lot of commentary this morning from various Members about unauthorized activities of the executive office of the President. Well, this is how it works. Congress passes laws and then the executive branch implements them. And last year and the year before, Congress passed the Bipartisan Infrastructure Law, which is the largest investment in infrastructure in generations, and last summer, we passed the Inflation Reduction Act, which directed the Council on Environmental Quality, our executive offices, to implement the most comprehensive implementation of climate action ever in the history of the United States and of any government in the history of this planet. So, the Council and the other agencies of the executive office are carrying out their mandates, which Congress passed.

Third, I heard that the Council on Environmental Quality is implementing unauthorized budgetary authority. Well, guess what? The U.S. Constitution says Congress holds the purse strings and we authorized and appropriated that funding. And the reason why we did that is so that we could implement NEPA and actually expedite our infrastructure so that we could build out our clean energy and other infrastructure. And that is exactly what the Council and other Federal agencies are doing.

Finally, I would love to remind everyone here that administrative law and the way in which our Constitution laid out was that there is a separation of powers. So, each president gets to create an advisory body within the Executive Office of the President to advise that president on how they carry out their duty. They also can sign Memorandums and Executive Orders that direct his agencies and his bodies to do what a president, he and, hopefully, in the future, she or they, may choose to do. And that is exactly what the Council on Environmental Quality is doing.

So, I think it is just important for the purposes of the record to make sure that we are being accurate in what we are describing in terms of the law, congressional authority, executive authority, and the mandates of this agency.

I do want to just take a moment to talk about the fisheries situation in the Pacific Northwest. While I do represent a state in the Southwest, I had the tremendous honor, as a former Senate staffer, to work for a Senator from the Pacific Northwest, and had the opportunity to work on these issues. And what I know to be true is that, indeed, the fisheries of the Pacific Northwest are protected by treaty between the U.S. Government and the tribes who signed those treaties with the U.S. Government. And the subject of litigation is not only the Endangered Species Act, but the right of those tribes to access and utilize those fisheries in perpetuity.

So, it is important again that we are accurate about the law, we are accurate about the goals of litigation, and why these things are happening.

Finally, I just want to wrap up here and talk about accountability to agreements. Two months ago, this body literally had a debate about whether or not we would shut down the global economy and accede to the demands of folks in the radical right who basically wanted to gut government functions. And as a pound of flesh, they mandated that the President and the rest of our country vote for a bill called the Fiscal Responsibility Act that cut funding for individuals who are struggling with food insecurity, that made agreements about how the budget would be implemented, that would cut overall spending levels if we didn't hold to those agreements, and which attempted to gut the National Environmental Policy Act, and which the Administration is trying to implement in good faith right now.

But you know who is not acting in good faith right now? The individuals who actually demanded that pound of flesh, because right now, this week, we are just 2 weeks away from the government shutting down because we have not passed a budget that meets the responsibilities and the agreements that were in the Fiscal Responsibility Act.

And we were supposed to take a vote today on one of those appropriations bills. And guess what? They couldn't even get a rule out to take a vote on the House Floor. So, we are going to go down to the floor after we adjourn this hearing, and we are going to take a vote on electric cars, and these folks are going to go home.

So, I say to the American people, let's talk about government accountability and responsibility, but let's make sure that Congress is doing its job, and let's keep the government open.

And with that, I yield back.

Dr. GOSAR. I thank the gentlewoman. You know, it is priceless here. We are going to run a $2 trillion deficit this year, $2 trillion. And we are not going to talk about that expenditure thing again. You can't keep doing this. That is why our money is play money now.

So, I think the ranting and raving on both sides is merited, because I think people are frustrated because we are not back to what the government should be doing. Congress defines the laws, makes those laws, and these agencies embrace them. Groups like Ms. Heaps' have a right to intervene if they so feel. But we all have to do this together, and it is crazy.

When you look at this $2 trillion deficit, how much was it that was done in regards to the military? Here is a military that can't find 60 percent of its assets. Does that sound like something you want to throw a bunch of money at? Not me. I think every dollar that comes to the forefront should be accountable. We have to be determining that aspect to have it done. So, I don't care for the grandstanding. I think it has a place, because we have to look at each other in how we get this stuff done.

Mr. Loyola and Mr. Lewis, when you talk about these green infrastructure projects, tell me how this worked with the Trump administration working collaboratively versus the Biden administration. Why was there so much more done during the Trump administration than the Biden administration?

Mr. LOYOLA. Chairman Gosar, during the Trump administration, I think it is fair to say that attitudes toward renewable energy within the Administration ranged from agnostic to hostile. But the President was very committed to efficient government processes, and especially very committed to cutting red tape and to making agency processes work efficiently.

An important part of the One Federal Decision process was not just timelines and page limits, but also an accountability system that was developed and managed jointly by the Council on Environmental Quality and the Office of Management and Budget that held the agencies to report cards, and brought up to the principal's level, to the cabinet officer level, projects and processes that had fallen behind their published schedules.

And in my opinion, it was this entire system of expedited procedures, added resources to expedite those procedures and, crucially, the accountability system that was put in place by OMB that increased the rate of permitting across NEPA reviews, generally. And as a result, because renewable energy projects tend to be, for a variety of reasons, NEPA-intensive, it emerged not as an objective of the policy, but as a by-product of the policy that the renewable energy sector was an enormous beneficiary of the Trump-era reforms.

Dr. GOSAR. Let me intervene there. I thought my understanding was agencies pre-dating the Obama era looked at corridors that were actually pre-selected sites for these green energy. Is that true?

And why did that not play a big part?

Mr. LOYOLA. Well, I will take as an example the 2012 Solar Programmatic Environmental Impact Statement for the six Western states, which was put in place in 2012 by the Bureau of

Land Management in order to expedite solar project development in the part of the country that has the highest solar energy capacity factor, which is the desert in the Western states, in Nevada and surrounding states in particular. They divided up the geographic area into solar energy zones, solar energy no-go zones, and then variance areas.

The problems with the areas that they designated for solar energy development is that they were absolutely in the middle of nowhere, and not near any interconnection points. And the long pole in the tent for all of this stuff is building the transmission lines. So, they were in danger of building a bunch of solar projects that could be waiting for the rest of the 21st century for transmission lines to arrive.

And as it turned out, when private developers started coming in and trying to develop solar projects under this scheme, they realized that the only feasible places to get a return on investment and get a solar project interconnected to the grid was within the variant zones, and the variant zones basically dialed everything back. Instead of having a programmatic permit where you could batch permit all of this whole group of solar projects, now you were back to square one with the same NEPA process that you had before.

So, I think the failure there was to not look at it enough from the business people's point of view who actually have to develop these projects, and try to figure out where it would make sense to develop them.

Dr. GOSAR. That is wonderful.

I am just going to ask you real quick, going down the line, what was the one question you wanted asked today that wasn't asked, and what is the answer?

We will start with you, Mr. Loyola.

Mr. LOYOLA. What is the most important thing——

Dr. GOSAR. No, what was the question you wanted most to answer.

Mr. LOYOLA. Sorry, this is suddenly Jeopardy, but I am trying.

So, the question is what is the most important thing that Congress can do to reform the NEPA process, and the answer to that question, after conducting a study of how other countries do environmental review and permitting, is that I think the time may have come for Congress to consider and start studying a general consolidation of all of the environmental laws in a single statute, as the Netherlands and Denmark have done, which would consolidate all permitting within a single permitting agency, with a single permit application, and a single predictable timetable for projects of national importance that would still retain enforcement and regulation within the agencies that exist today.

Dr. GOSAR. Ms. Heaps.

Ms. HEAPS. Thank you. I would have liked to be asked how are the Phase 2 regs consistent with congressional intent of NEPA.

Dr. GOSAR. Say that one more time.

Ms. HEAPS. How are the Phase 2 regulations consistent with NEPA's congressional intent, and I think there are four ways, particularly with climate change and environmental justice.

The declaration of congressional intent is that Congress recognized the profound impact of man's activity on the interrelations of all components of the natural environment. That is climate change as an umbrella, especially as related to resource exploitation.

Congress declared a continuing policy to use all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony. They said that they recognize its continuing responsibility of the Federal Government to use all practical means to improve Federal decisions to fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations.

We know through Juliana, we know through the Montana litigation that our young generations are demanding that we take action on climate change.

And then finally, that declaration of national environmental policy, Congress recognizes each person should enjoy a healthful environment. That loops in environmental justice. Thank you.

Dr. GOSAR. Thank you.

Mr. Simms.

Mr. SIMMS. Yes, thank you for that question. The question I was hoping you would ask is can you talk about the balance you work to achieve between the health of salmon and production of clean, renewable hydropower, and my answer is that I represent nonprofit electric utilities, and $0.25 on every dollar is spent on fish recovery. And we are making meaningful impacts.

We need to talk in our region more about sustaining the harvest for treaty tribes, for sure. But as well, we need to talk about the offshore harvest that is happening on an annualized basis and the massive take of fish. So, as we are trying to produce fish, they are also being hauled in.

I think, as well, we are facing more and more extreme weather events in our world. And you certainly did raise that, I think, in your opening comments. And we definitely are seeing utilities being stretched more and more. In fact, last year, California hit a peak, 51 gigawatts during Labor Day of 2022. The Northwest came to the rescue with, actually, those Lower Snake River dams.

So, it is all about a balancing factor. And for us, I think what we are trying to do is make sure folks realize we actually live and work in this basin. We care deeply about it, and we are trying our best, like Congress, to find that balance pathway between all the needs that are put on this vast river system. Thank you.

Dr. GOSAR. Thank you.

Mr. Lewis.

Mr. LEWIS. I would have liked to have been asked to elaborate a bit on the CEQ's exaggerated understanding of the climate risks that we actually face. CEQ, in its greenhouse gas guidance, basically thinks that agencies have at their fingertips an excellent set of resources in terms of modeling and projections of climate risks that they can rely on to inform their decisions.

And one of the things that I stressed in my testimony is that, for years, a set of emissions scenarios have dominated all the official climate impact assessments, whether it is the Intergovernmental Panel on Climate Change or the U.S. National Climate Assess-

ment. These scenarios, they are called RCP 8.5 and SSP 8.5. They are basically the high-end emissions scenarios.

And just to give you a sense, just since 2019, 17,400 papers have been published in the peer-reviewed literature examining climate risks in terms of this RCP 8.5. Now, it turns out that the latest information shows that this emissions scenario, which is the dominant scenario for years now, or more than a decade, exaggerates the likely quantity of carbon dioxide emissions in the global economy by more than double by the year 2050, and by more than 5 times by the year 2100.

So, there is this enormous systemic bias, if you will, in the climate impact assessment literature, and I don't think that CEQ is aware of any of this. They certainly don't take notice of it. There are newer scenarios that are much more realistic, including those produced by the organization Resources for the Future, and then the International Energy Agency also.

Anyway, there are some aspects to climate science there that I think they are completely missing.

Also, about the models that are used, the generation of models that was used in the 2013 Intergovernmental Panel on Climate Change report, and then by our National Climate Assessment, and then the later generation called CMIP6, if people are interested in the names, in the sixth assessment report of the IPCC, all those models over-estimate or hindcast about 2½ times as much warming as has actually been observed in the tropical mid-atmosphere, the bulk atmosphere.

So, the practice in climate science has been to run inflated emissions scenarios like RCP 8.5 with these overheated models, and then that becomes the consensus. And based on that consensus, people who are clever with words will elaborate a narrative of existential threat, and crisis, and emergency. And I think all of this really needs to be toned down and rethought at the highest levels of our government.

Dr. GOSAR. Well, I thank you so very, very much.

Did you want to put something in the record? Go ahead.

Ms. STANSBURY. Mr. Chairman, before we adjourn I would like to ask for unanimous consent to enter into the record two letters that has been signed by multiple organizations in support of CEQ's NEPA Phase 2 rule.

Dr. GOSAR. Without objection, so ordered.

[The information follows:]

September 13, 2023

Hon. Paul Gosar, Chairman
Hon. Melanie Stansbury, Ranking Member
House Natural Resources Committee
Oversight and Investigations Subcommittee
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Gosar, Ranking Member Stansbury, and members of the Subcommittee:

Ahead of the Subcommittee hearing on Thursday, September 14th, our organizations write to express our support for the Biden administration's proposed "Bipartisan Permitting Reform Implementation Rule," which will finalize the White House Council on Environmental Quality's (CEQ) update to the National Environmental Policy Act (NEPA) regulations. This rule embodies a commitment to environmental protection and the rule of law, and we support its focus on climate action, environmental justice, and the rapid and responsible development of truly clean, renewable energy infrastructure.

NEPA has been a cornerstone of environmental policy for more than five decades, ensuring that federal actions consider and address their environmental, health, and economic impacts. Strong NEPA rules are particularly important for Indian Country and tribal citizens as it is one of the few safeguards for actions on lands held in trust by the federal government. CEQ's proposed revisions to the NEPA rule are a welcomed effort to modernize and improve this bedrock environmental law that Congress should recognize and support.

While long overdue, we applaud CEQ's commitment to incorporating climate change and environmental justice considerations into NEPA reviews. Recognizing the existential threat that climate change poses and the disproportionate impacts it has on marginalized communities, this aspect of the draft rule is both timely and essential. By integrating climate considerations and explicitly incorporating environmental justice concerns into federal decision-making, the rule takes a significant step towards ensuring a more sustainable, equitable, and resilient future.

Our organizations look forward to working collaboratively with the Administration to ensure that the rule strengthens environmental protections, advances the fight against climate change, promotes environmental justice for all, and is finalized as soon as possible.

Sincerely,

American Rivers

CalWild

Center for Oil and Gas Organizing

Coalition to Protect America's National Parks

CURE

Dakota Resource Council

Earthjustice

Earthworks

Environmental Law & Policy Center

Food & Water Watch

Fort Berthold Protectors of Water and Earth Rights

National Wildlife Federation

Natural Resources Defense Council

Northeastern Minnesotans for Wilderness

Ocean Conservancy

Ocean Conservation Research

Ocean Defense Initiative

Operation HomeCare, Inc.

Oxfam America

Sierra Club

Silvix Resources

Southern Environmental Law Center

GreenLatinos	Southern Utah Wilderness Alliance
Information Network for Responsible Mining	The Wilderness Society
Interfaith Power & Light	WE ACT for Environmental Justice
LCV	Western Environmental Law Center
Los Padres ForestWatch	Winter Wildlands Alliance
National Parks Conservation Association	Zero Hour

September 13, 2023

Hon. Paul Gosar, Chairman
Hon. Melanie Stansbury, Ranking Member
House Natural Resources Committee
Oversight and Investigations Subcommittee
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Gosar, Ranking Member Stansbury, and members of the Subcommittee:

We write to you on behalf of millions of our members to call attention to the critical need to protect and restore Columbia and Snake River salmon and steelhead in advance of the Thursday, September 14 hearing in the House Natural Resources Committee's Subcommittee on Oversight and Investigations.

Salmon and steelhead are an integral part of life in the Northwest. They are the foundation of an entire ecosystem from forests to orcas; they support multi-billion dollar industries and family wage jobs from commercial fishing to tourism and manufacturing in rural communities; and most importantly, they are indispensable to the culture and way of life for many Northwest Tribes that have relied on them since time immemorial and to whom we owe solemn legal responsibility enshrined in treaties and other agreements.

The Columbia and Snake Rivers were once the largest salmon-producing river system in the contiguous United States, but now many runs—and all of those that still return to the Snake River—are listed as endangered or threatened. Many others have already been lost. Decades of scientific study confirm that the federal hydroelectric dams on the Columbia and Snake Rivers play a leading role in these devastating declines.

It is impossible to imagine the Northwest without salmon—yet we are perilously close to losing many runs of these remarkable fish. The federal government's own analysis predicts that the continued operation of these dams will drive many Snake River salmon runs to extinction in the near term.[1] More recent analysis by fisheries experts with the Nez Perce Tribe predicts that many of these same Snake River populations may become functionally extinct as soon as 2025, unless we act with urgency to change their trajectory.[2]

The loss of our native salmon is as unnecessary as it is unacceptable. Salmon scientists have repeatedly concluded that even in a warming world, we can restore

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[1] *See* NMFS' Endangered Species Act Section 7(a)(2) Biological Opinion for the Continued Operation and Maintenance of the Federal Columbia River Power System at p.275 ("Based on life-cycle modelling of [hydrosystem operations in combination with] future RCP 8.5 climate emission scenario for [Snake River] spring/summer Chinook salmon populations, the median abundance of stream-type spring and summer-run Chinook salmon populations could decline substantially in the next two to three decades. Declines of this magnitude, if they were to occur, would threaten to extirpate a large number of small populations, and would substantially reduce the abundance and productivity of larger populations."). PDF

[2] Nez Perce Tribe and the New Perce Fisheries: Snake Basin Chinook and Steelhead Quasi-Extinction Threshold Alarm and Call to Action (May 2021) PDF

Snake River salmon and steelhead to healthy and abundant levels—**if and only if** we restore the lower Snake River by breaching its four costly federal dams.[3]

In 2021 Representative Simpson of Idaho (R) put forth an ambitious and comprehensive proposal (Columbia Basin Initiative), effectively advancing an important conversation across the region regarding the urgency and opportunities to responsibly restore the lower Snake River and replace the services provided by its four dams so that the Northwest will continue to have abundant and affordable clean energy, accessible transportation for agricultural products and other goods, and irrigation for established farmland.

Additional analyses, including the recent lower Snake River report and recommendations by Senator Murray and Governor Inslee, stated, "***status quo is not a responsible option; extinction of salmon is categorically unacceptable"***. Senator Murray and Governor Inslee further stated in their recommendations, "*we must move forward in a way that restores our salmon populations and acknowledges and redresses the harms to Tribes while responsibly charting the course to an energy and economic future for Washington state and the region. It is for these reasons that we previously stated that breaching of the Lower Snake River Dams should be an option, and why we believe, at the conclusion of this Process, that it must be an option we strive to make viable*".[4]

Governor Inslee and Washington State legislators followed through on these commitments and secured $7.5 million dollars in 2023 to begin the planning processes to replace the energy, transportation, and irrigation services currently provided by the dams. We can feasibly and affordably replace the services of the 4 lower Snake River dams with reliable, modernized systems, but we must start that effort in earnest now—and we need Congressional leadership and support.

We ask the members of this subcommittee to replace the services of the Snake River dams so we can restore the river and breach the dams by 2030 at the latest. Working with the Administration, Congress can help direct unprecedented federal investments through the Inflation Reduction Act and Infrastructure Investment and Jobs Act to regional projects that advance our clean energy and climate goals, modernize our transportation systems, and address other interests affected by river restoration.

The Biden Administration has articulated a clear set of commitments to restore healthy and abundant salmon runs and honor our nation's obligations to Tribes by turning away from the "business as usual" approach of the past and charting a new path forward in the Columbia Basin.[5] We urge you to work with the Administration to achieve these goals. Our region's native fish face extinction today, and the time for action and leadership is now.

Now more than ever, we ask you to seize every opportunity to speak the truth in the face of misleading information and polarizing tactics. Defenders of a failed and costly status quo have never been more vocal in their opposition to actions that are essential to salmon restoration, including the restoration of the lower Snake River and its wild salmon and steelhead.

In a recent congressional field hearing, for example, supporters of the status quo asserted that salmon runs are not in any imminent danger and are increasing—despite the fact that Snake River runs are hovering near extinction levels.[6] They also provided exaggerated and misleading information about the role these dams play in our regional economy. And remarkably, not a single Tribal representative was invited to testify, despite the fact that Tribes have been the first and worst impacted by generational declines in the salmon runs.[7]

Misinformation and polarizing tactics will never form the backbone of a durable solution. Building support for a real and durable solution starts by acknowledging the facts. We ask you to lend your voices to elevate fact over divisive rhetoric.

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[3] National Oceanographic and Atmospheric Administration (NOAA): Rebuilding Interior Columbia Basin Salmon and Steelhead; National Marine Fisheries Service (Sept. 30, 2022) PDF

[4] Sen. Murray/Gov. Inslee: Pacific Northwest Salmon Recovery Recommendations (Aug, 2022) PDF

[5] Biden Administration Columbia Basin Salmon Recovery Commitment Document (Aug, 2022) PDF

[6] *See* The Spokesman Review, Environmentalists, politicians clash over Republican hearing to defend Snake River dams (June 26, 2023), available at https://www.spokesman.com/stories/2023/jun/26/environmentalists-politicians-clash-over-republica/

[7] Id.

It is critical that Congress and the Administration work with Tribal Nations, stakeholders, and all others in the Northwest to implement a comprehensive solution that will restore healthy and abundant salmon in the Columbia and Snake Rivers, provide a long-overdue measure of justice for Native American Tribes, and ensure a successful transition to a strong and robust future.

Sincerely,

Liz Hamilton,
Executive Director
Northwest Sportfishing Industry Association

Bradley Williams,
Associate Advocacy Director
Sierra Club

Tiernan Sittenfeld,
Sr Vice Pres. for Gov. Affairs
League of Conservation Voters

Giulia Good Stefani,
Senior Attorney, Oceans
Natural Resources Defense Council

Rev. AC Churchill,
Executive Director
Earth Ministry/Washington Interfaith Power and Light

Shawn Cantrell,
Vice Pres., Field Conservation
Defenders of Wildlife

Thomas O'Keefe,
Northwest Regional Director
American Whitewater

Joseph Bogaard,
Executive Director
Save Our wild Salmon Coalition

Shari Tarantino,
Executive Director
Orca Conservancy

Brian Brooks,
Executive Director
Idaho Wildlife Federation

Nancy Hirsh,
Executive Director
NW Energy Coalition

Norm Ritchie,
Board Member
Association of Northwest Steelheaders

Julian Matthews,
Co-Founder
Nimiipuu Protecting the Environment

Leda Huta,
Executive Director
Endangered Species Coalition

Lennon Bronsema,
Acting CEO
Washington Conservation Action

Lindsey Scholten,
Executive Director
Oregon League of Conservation Voters

Travis Williams,
Executive Director
Willamette Riverkeeper

Nic Nelson,
Executive Director
Idaho Rivers United

Rick Williams PhD,
Board Member
Fly Fishers International

Whitney Neugebauer,
Executive Director
Whale Scout

Tom Uniack,
Executive Director
Washington Wild

Donald Miller,
Environmental Liaison
Snohomish County Indivisible

Rialin Flores,
Executive Director
Conservation Voters for Idaho

Trish Rolfe,
Executive Director
Center for Environmental Law & Policy

Kyle Smith,
Snake River Director
American Rivers

Deborah A. Giles, PhD,
Science & Research Director
Wild Orca

Glen Spain,
Northwest Regional Director
Pacific Coast Federation of Fishermen's Associations

Rich Simms,
Founder and Board Member
Wild Steelhead Coalition

Joel Kawahara,
Board Member
Coastal Trollers Association

Mitch Cutter,
Salmon and Steelhead Associate
Idaho Conservation League

Lauren Goldberg,
Executive Director
Columbia Riverkeeper

Bob Rees,
Executive Director
Northwest Guides and Anglers Association

Ms. STANSBURY. Thank you very much, Mr. Chairman.

I would just like to take one short moment, with your permission, to correct the record on the previous statements that were just made.

Global circulation models show that under all carbon scenarios, including the highest levels of emissions and if we hit our global goals for carbon, that we will continue to see increased heating and challenges around changing weather and climatic issues. So, we can't make up the science here, and I think it is important that the record reflect that the last statements were untrue. Thank you.

Dr. GOSAR. I don't know that they were untrue. I think you have to didactically look at them. I mean, I think we occupy such a small point of time on this world. Take a look at trees. Trees tell us a lot more. Rocks tell us a lot more. So, you have to constantly go back to the data to keep checking and reassessing it. And that is why peer review comes into place. That is a big key.

So, from that standpoint, I am going to tell everybody thank you very much for the debate. I appreciate it. I thank the witnesses for all their comments and testimony.

The members of the Committee may have some additional questions for you, and we ask that you respond to these in writing. Under Committee Rule 3, members of the Committee must submit questions to the Subcommittee Clerk by 5 p.m. on September 19. The hearing record will be held open for 10 business days for those responses.

If there is no further business, we are adjourned.

[Whereupon, at 11:50 a.m., the Subcommittee was adjourned.]

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