TESTIMONY OF JILL WITKOWSKI HEAPS
SENIOR ATTORNEY, EARTHJUSTICE

BEFORE THE U.S. HOUSE OF REPRESENTATIVES
NATURAL RESOURCES COMMITTEE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

HEARING ENTITLED "EXAMINING SYSTEMIC GOVERNMENT OVERREACH AT CEQ"

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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]

[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.").

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

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[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*.

encourage and facilitate public engagement in decision making through "meaningful engagement with communities with environmental justice concerns, which often include communities of color, low-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]

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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*.

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."

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

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[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*.
[12] *Id*.
[13] 88 Fed. Reg. at 49968.
[14] *Id*.

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.

[15] *Id*. at 49968.
[16] 42 U.S.C. 4331(a).

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 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

[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

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 of the sixteen 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 timeframe 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

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[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

[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

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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[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/