



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515

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November 22, 2021

The Honorable Brenda Mallory
Chair
The Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: National Environmental Policy Act Implementing Regulations Revisions, Docket ID, CEQ-2021-0002

Dear Chair Mallory:

On October 7, 2021, the Council on Environmental Quality (CEQ) published a notice of proposed rulemaking in the *Federal Register* titled “National Environmental Policy Act Implementing Regulations Revisions.”¹ We write in strong opposition to this proposed rule because it seeks to irresponsibly and unreasonably undo critical updates made to the National Environmental Policy Act (NEPA) implementing regulations in July 2020 by turning the clock back to obsolete rules promulgated 1978 that inhibited infrastructure growth.²

NEPA is a procedural statute meant to ensure that decision-makers such as federal, state, and Tribal agencies, project stakeholders, and the public are informed of the potential environmental impacts of certain proposed projects.³ NEPA requires that the environmental effects of potential actions that require federal permits, funding, approval, or other actions are reviewed and disclosed publicly.⁴ The United States spends roughly \$400 billion per year on infrastructure, which only illustrates the vast number of projects that must potentially go through the NEPA process.⁵ Unfortunately, before the July 2020 regulatory improvements, the NEPA

¹ National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) [hereinafter NEPA NPRM].

² *Id.*

³ 42 U.S.C. § 4321 et seq.

⁴ *Id.*

⁵ LEAH BROOKS AND ZACHARY LISCOW, BROOKINGS INSTITUTION, INFRASTRUCTURE COSTS (Aug. 2019), available at https://www.brookings.edu/wp-content/uploads/2019/08/WP54_Brooks-Liscow_updated.pdf.

process was frequently used to delay or stop crucial infrastructure growth, including critical safety and maintenance upgrades to highways, railroads, bridges, ports, and waterways, as discussed further below.⁶

First, no grounds exist to support CEQ's seemingly arbitrary, capricious, and unreasonable proposal to reverse the NEPA regulations updated just last year. The July 2020 NEPA revisions represented a badly overdue, commonsense modernization of outdated and impractical regulations issued over forty years ago.⁷ CEQ's newly proposed rule comes barely one year after the new rule went into effect, which is far too soon to fairly, accurately and reasonably assess the impacts of the update to warrant this rushed effort to undo it.⁸ As grounds for proposing this rule, CEQ vaguely asserts that: "[i]t is CEQ's view that the 2020 NEPA Regulations may have the effect of limiting the scope of NEPA analysis, with negative repercussions for environmental protection and environmental quality, including in critical areas such as climate change and environmental justice."⁹ No evidence yet exists for CEQ to reasonably reach such conclusions so soon after the new rule took effect, and therefore this equivocal claim represents nothing more than a premature assumption about a rule's impact that currently remains unknown.¹⁰

Moreover, in finalizing last year's vital update, CEQ employed a lengthy, thorough, and diligent process. CEQ began its official review of the 1978 regulations in June 2018, when it published an Advance Notice of Proposed Rulemaking seeking public comments.¹¹ It received more than 12,500 comments on improving the rule.¹² In the several months thereafter, CEQ engaged in extensive public outreach, including several stakeholder meetings, two lengthy public hearings, and the receipt of more than 150,000 comments that guided and informed its final rule.¹³ The new rule received a high amount of diverse and widespread support from infrastructure stakeholders, including representatives of truckers, railroads, general contractors, building trades, labor, road construction, and energy companies that suffered the unnecessary delays and costs borne by the old rule and universally embraced the critical updates.¹⁴ Native American Tribes, who control and manage their own unique infrastructure, also supported the 2020 final rule.¹⁵

⁶ NEPA NPRM, *supra* note 1.

⁷ National Environmental Policy Act – Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978); *see also* 40 C.F.R. §§ 1500-1508. (1978).

⁸ NEPA NPRM, *supra* note 1.

⁹ *Id.*

¹⁰ *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (stating "Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency. . .").

¹¹ Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 28,591 (June 20, 2018).

¹² Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (Jul. 16, 2020) [hereinafter NEPA Final Rule].

¹³ *Id.*

¹⁴ Unlock American Investment, *About*, available at <https://www.unlockamericaninvestment.com/about/>.

¹⁵ Kelsey Brugger, *Some Tribal Leaders Support Trump NEPA Overhaul*, E&E NEWS, (Feb. 14, 2020), available at <https://www.eenews.net/greenwire/stories/1062351015/search?keyword=NEPA>.

In now proposing to roll back parts of the NEPA regulations to their old, unworkable forms, CEQ desires to reinstitute a NEPA process that experts described to Congress as “fundamentally broken.”¹⁶ NEPA-related delays in infrastructure projects can lead to a tremendous loss of investment and extinguish the labor force when jobs are put on hold or never materialize. Such significant and persistent problems represented a big reason why national labor and commerce groups strongly supported updating and modernizing NEPA last year.¹⁷

A prominent example of how CEQ’s proposed rule will only revive problematic issues comes from CEQ’s proposal to reinstate the vague and burdensome requirements that agencies consider effects of a proposed project that are not only “direct,” but also “indirect” and “cumulative.”¹⁸ As CEQ previously noted, this wide-ranging definition of “effects” “creates confusion” and **“the terms ‘indirect’ and ‘cumulative,’ have been interpreted expansively resulting in excessive documentation about speculative effects. . . leading to frequent litigation”** [emphasis added].¹⁹ Opponents of infrastructure development projects routinely used such broad and ambiguous language in the old rule to delay or kill projects through complex and protracted NEPA litigation.²⁰ As a result, drawn out legal challenges over NEPA increased, with the U.S. Department of Justice finding that NEPA has been the most frequently litigated federal environmental statute.²¹ To cure this problem, the July 2020 rule revised the definition of “effects” to reasonably modernize, clarify and streamline NEPA reviews without removing either environmental protections or an agency’s ability to assess different potential effects of a project.²²

Moreover, the data on NEPA review delays and complications unequivocally supports the improvements in the July 2020 update. Over the past decades, the NEPA process grew unreasonably lengthy, subjective, and arduous, resulting in assessments that proved overly convoluted and unhelpful. In support of last year’s update, CEQ noted that the time for a federal agency to conduct a NEPA review averaged roughly four and a half years, with some reviews taking more than six years to complete.²³ For transportation agencies, the NEPA process recently averaged 7.72 years for the Federal Aviation Administration (FAA), 7.30 years for the Federal Highway Administration (FHWA), and 5.16 years for the Federal Railroad Administration

¹⁶ *On Paving the Way for Funding and Financing Infrastructure Investments*, Hearing Before the H. Comm. on Ways and Means, 116th Cong. 12 (Jan. 29, 2020) (statement of DJ Gribbin, Founder, Madrus LLC), *available at* https://gop-waysandmeans.house.gov/wp-content/uploads/2020/01/Gribbin_Ways-and-Means-Testimony_Final.pdf [hereinafter Gribbin].

¹⁷ Unlock American Investment, *About*, *available at* <https://www.unlockamericaninvestment.com/about/>.

¹⁸ NEPA NPRM, *supra* note 1..

¹⁹ *Id.*

²⁰ Mary B. Neumayr, *A Needed Update to the Nation’s Environmental Rules*, WASH. EXAMINER, (Jan. 9, 2020), *available at* <https://www.washingtonexaminer.com/opinion/op-eds/a-needed-update-to-the-nations-environmental-rules> (stating that “[m]ore lawsuits have been brought under NEPA than under any other environmental statute. Delays in reviews and decision-making can hold back the American economy. Such delays slow the development of critical infrastructure, including roads, bridges, highways, water infrastructure, transmission lines, and conventional and renewable energy projects, and they deter future investment in projects that would enhance the quality of life for states, tribes, and communities across the country.”).

²¹ *National Environmental Policy Act: Judicial Review and Remedies*, CONG. RESEARCH SERVICE, Sept. 22, 2021.

²² NEPA NPRM, *supra* note 1.

²³ NEPA Final Rule, *supra* note 12.

(FRA).²⁴ Moreover, the length of an Environmental Impact Statement (EIS) – a major NEPA component for some projects – averaged more than 600 pages despite recommendations by CEQ to limit EISs to fewer than 150 pages.²⁵

While proponents of the proposed rule may argue about the benefits of NEPA for the environment, prolonging the NEPA process by reverting to the 1978 regulations does not lead to improved environmental protections. For example, Australia and Canada have environmental protections comparable to the United States but historically conduct reviews in less time while outperforming America in measures of environmental quality.²⁶ Indeed, CEQ’s newly proposed rule absurdly seeks to return to a NEPA process that delays or stops environmentally friendly infrastructure projects. As the United States Congress Joint Economic Committee found, “**NEPA regularly slows down environmentally-friendly construction, such as wind farms... NEPA is not a direct, substantive environmental protection.**” [emphasis added].²⁷

Unfortunately, numerous past examples of weaponizing NEPA to kill “green” infrastructure exist, and future attempts to do so will only grow as renewable/environmentally friendly projects become more common. Such threats only further support keeping the current regulations intended to curb these abuses and allow green projects to proceed. For example, offshore wind farms such as Cape Wind and Vineyard Wind fell victim to delays and complications due to NEPA-related challenges.²⁸ Opponents of pipelines, included the Keystone XL project that President Biden unilaterally terminated, use NEPA to stop progress despite the fact that pipelines prove safer and more environmentally friendly than other modes of energy transport.²⁹ NEPA-related issues delayed a light rail transit project estimated to remove roughly 17,000 vehicles from the road – thus, significantly reducing emissions – for roughly 14 years.³⁰ Similarly, a 4.5 mile passenger rail project in Pennsylvania that began in 2013 won’t reach

²⁴ Environmental Impact Statement Timelines (2010-2017), CEQ, (Dec. 14, 2018), *available at* [CEQ EIS Timelines Report 2018-12-14.pdf \(doe.gov\)](https://www.doe.gov/CEQ/EIS/Timelines/Report_2018-12-14.pdf).

²⁵ NEPA Final Rule, *supra* note 12.

²⁶ Gribbin, *supra* note 16 (noting that “Australia manages an average approval time of 3.5 years and is looking to accelerate that performance in its once-a-decade review of its environmental protection law. Canada similarly sets a timeline of two years to complete environmental assessments. Despite the fact that these countries complete their assessments more rapidly than the United States, they still outrank the U.S. on Yale University’s Environmental Performance Index. Evidently, countries need not compromise efficiency to achieve environmental outcomes”); *See also* Thomas J. Madison, *Rebuilding our infrastructure requires rethinking environmental permitting*, THE HILL, (Mar. 6, 2020), *available at* <https://thehill.com/blogs/congress-blog/politics/486346-rebuilding-our-infrastructure-requires-rethinking-environmental>.

²⁷ United States Congress Joint Economic Committee, *A Time to Build: Unleashing the Construction Industry to Support American Families*, (Sept. 16, 2021), *available at* <https://www.jec.senate.gov/public/index.cfm/republicans/analysis?ID=0F1C70C0-C2D7-42B3-B329-56BF30B480C1>.

²⁸ Benjamin Storrow, *Solar executive with ocean views sues Vineyard Wind*, E&E NEWS, (July 20, 2021), *available at* [Solar executive with ocean views sues Vineyard Wind - E&E News \(eenews.net\)](https://www.eenews.net/stories/1060148569)

²⁹ *See* Pamela King and Hannah Northey, *Trump’s efforts to spur projects hit NEPA wall*, E&E NEWS, (Apr. 8, 2019), *available at* <https://www.eenews.net/stories/1060148569>; *see also* Brigham A. McCown, *Why Pipeline Opposition Undermines Environmental Progress And Safety*, FORBES, (Jan. 17, 2019), *available at* <https://www.forbes.com/sites/brighammccown/2019/01/17/why-pipeline-opposition-undermines-environmental-progress-and-safety/#1838b22447f2>.

³⁰ Unlock American Investment, *Purple Line Transit System* (Jan. 21, 2020), *available at* <https://www.unlockamericaninvestment.com/2020/01/22/purple-line-transit-system-maryland/>.

completion until possibly 2025 due largely to NEPA-related project freezes.³¹ Accordingly, we cannot find any justification for CEQ’s desire to revert to an obsolete, badly-drafted rule that can do more environmental harm than good.

CEQ’s impulsive and reckless attempt to turn back the clock on important revisions to the NEPA regulations represents unreasonable, impulsive, and regressive policy. The infrastructure needs of the United States are growing and rapidly changing with the creation of new technologies and innovations, including environmentally friendly projects. America cannot afford to sacrifice the economic and environmental benefits of these developments and projects by reverting to outdated regulations and counterproductive procedures. Accordingly, we strongly urge CEQ to abandon efforts to change the existing NEPA rule through this harmful, unreasonable, and misguided proposed rule.

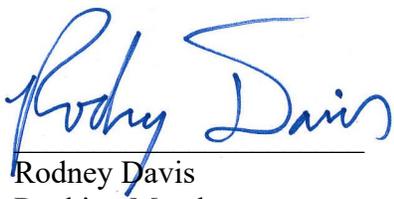
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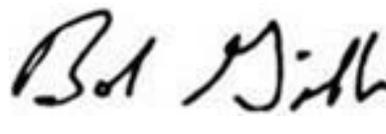
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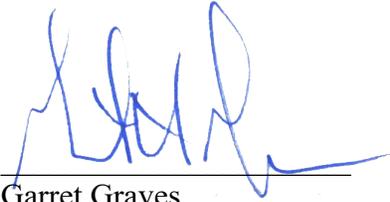


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³¹ Kyle Sammin, *Seven-year King of Prussia rail delay shows folly of modern environmental laws*, THE PHILADELPHIA INQUIRER, (Dec. 28, 2020), available at [Seven-year King of Prussia rail delay shows folly of modern environmental laws | Opinion \(inquirer.com\)](https://www.inquirer.com/news/king-of-prussia-rail-delay-2020-12-28).



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Cc: The Honorable Peter A. DeFazio, Chair
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