COMPETITIVE ENTERPRISE INSTITUTE

Comments to the Council on Environmental Quality

"Update to the Regulations for Improving the Procedural Provisions of the National Environmental Policy Act"

June 20, 2018

These comments are respectfully submitted on behalf of the Competitive Enterprise Institute (CEI). CEI is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy.

Background

Early in its first term, the Obama administration spent nearly $900 billion dollars on an economic stimulus package that failed to spur economic growth and job creation. In contrast, the Trump Administration has embarked on an entirely different stimulus strategy, one focused on removing federal impediments to private sector investment and job creation. This approach is already yielding positive economic results, and has the added benefit of not costing taxpayers anything. The Administration's Executive Orders and other administrative actions reducing the regulatory and permitting burdens are to be lauded for their contribution to job creation levels that proved elusive to the prior administration.

However, the decades-long buildup of federal red tape has only begun to be cut. A great deal more needs to be done. In particular, the National Environmental Policy Act (NEPA), especially its requirement of an extensive Environmental Impact Statement (EIS) prior to the permitting of most major infrastructure or industrial projects, has proven to be a source of unnecessary delays and even cancellations of worthy projects. This 1969 statute is overdue for a review.

Ultimate responsibility for the proper implementation of NEPA rests with the Council on Environmental Quality (CEQ), which, among other tasks, issues the guidance that other agencies follow when evaluating projects under the statute.[1] CEQ's June 20, 2018 Advance Notice of Proposed Rulemaking begins the process of updating these implementing regulations.[2] It builds on Executive Order 13807 and other Trump administration actions designed to streamline and improve the federal permitting process.

These ongoing efforts have included several reform ideas, such as imposing a "shot clock" on a NEPA process that currently contains no firm deadlines and routinely drags on for many years. Perhaps most importantly, the Administration has focused on the need for "One Federal

[1] National Environmental Policy Act of 1969 as amended, https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-NEPA.pdf.

[2] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, *Federal Register*, June 20, 2018, https://www.federalregister.gov/documents/2018/06/20/2018-13246/update-to-the-regulations-for-implementing-the-procedural-provisions-of-the-national-environmental.

Decision" rather than multiple agencies operating independently of each other without co-ordination of requirements and timetables. For this reason, our comments largely focus on the first of the 20 questions for which CEQ requested comments:

> Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

In this regard, one particular area ripe for clarification surrounds the role of the U.S. Environmental Protection Agency (EPA) under the Clean Water Act (CWA) in the NEPA process. Section 404 of the CWA specifies that the Secretary of the Army is responsible for issuing any required permits to discharge dredged or fill material into navigable waters that are associated with a project.[3] This task is undertaken by the Army Corps of Engineers as part of the EIS. The statute also authorizes the EPA, pursuant to subsection 404(c), to deny any such permit for any defined area as a disposal site based on criteria set out in statute.[4] It has long been understood that the 404 permit process, including the EPA's permit veto authority, would be exercised concurrently with the larger NEPA process and not as something outside of it, and that the process would begin after a permit application had been submitted and before the NEPA process is complete and a permit has been issued.

EPA Circumvention of the NEPA Process

This decades-long precedent was upset by the Obama administration EPA. In two instances, the agency effectively vetoed CWA permits independently of the NEPA process—one a prospective veto before the NEPA process had commenced and another after the NEPA process had been completed and the project approved.[5] Both types of extra-NEPA actions are highly problematic and seriously undercut the role and proper functioning of NEPA.

In the case of the project subject to a pre-emptive veto, the Pebble Mine in Alaska, the analysis on which the EPA relied was deficient, and was so precisely because it was done outside of the NEPA process. For one thing, no mine permit application had yet been submitted, thus EPA was analyzing its own hypothetical mine scenarios without knowing the actual specifics of the Pebble Mine proposal, including measures to mitigate potential environmental impacts. In addition, the detailed analysis that goes along with the development of a section 404 permit and EIS had not yet been completed, and thus the EPA had to rely on its own, much more limited assessment (the agency also ignored the extensive data and analysis conducted in anticipation of the NEPA process).

Nowhere has the agency adequately identified why it could not consider the exercise of its veto authority as part of the NEPA process, and in so doing base its decision upon a specific mine

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[3] Clean Water Act, Section 404, https://www.law.cornell.edu/uscode/text/33/1344.
[4] Environmental Protection Agency, Section 404 Permit Program, https://www.epa.gov/cwa-404/section-404-permit-program.
[5] House Energy and Commerce Committee, Major Projects Major Problems, September 14, 2014, pp. 6-7, https://archives-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20140915MajorProjectsMajorProblems.pdf.

proposal and a much larger and more thoroughly vetted body of evidence, rather than proceed with a preemptive shot in the dark.

Compounding matters is the broad scope of the EPA's veto. The agency did not (and without a permit application, could not) reject a particular mine in a particular location, so it effectively did so for virtually any mine project in the vast Bristol Bay region, which at 42,000 square miles is about the size of Ohio.[6] Indeed, any such agency action that predates a specific permit application will tend to be overly broad.

It is also important to remember that one of the hallmarks of the NEPA process is its interactive nature, in that it allows multiple opportunities for all interested parties to weigh in. This was considerably less so during the EPA's 404(c) veto process in the Pebble Mine case. Among the interested parties is the State of Alaska, which asserted at the time that it was largely bypassed during the EPA's Pebble Mine deliberations, despite the fact that state-owned mineral rights were at issue.[7] The CWA is designed to protect the "primary responsibilities of States."[8] The EPA's preemptive veto preempted meaningful input from the state of Alaska, along with other interested parties.

In the case of the retroactively rejected project, the Spruce coal mine in West Virginia, the extensive NEPA process was rendered irrelevant by the EPA's after-the-fact reversal.[9] The chilling effect of this precedent is especially troublesome, as the project's investors had undertaken the considerable expense of successfully navigating the NEPA process and meeting all of its requirements, only to have this effort negated afterwards by the EPA.

Allowing either the preemptive or retroactive example to stand would create a highly dangerous precedent of making NEPA effectively meaningless and subject to an EPA override at any time.

The Solution: Aligning EPA's Actions with the NEPA Process

The EPA recently announced that it will conduct a rulemaking to restrict the prospective and retroactive use of the CWA 404(c) veto authority.[10] According to the agency, these new regulations "should reflect today's permitting process and modern-day methods and protections, including the robust existing processes under the National Environmental Policy Act that already require federal agencies to consider the environmental and related social and economic effects of their proposed actions while providing opportunities for public review and comment on those evaluations." They also "should seek to address significant concerns surrounding the EPA's prior

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[6] Environmental Protection Agency, "An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska," January 2014, https://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=253500.
[7] Major Projects Major Problems, p. 7.
[8] Clean Water Act, Section 101(b).
[9] Environmental Protection Agency, Spruce No. 1 Surface Mine, https://www.epa.gov/cwa-404/spruce-no-1-surface-mine.
[10] E. Scott Pruitt, Administrator, Environmental Protection Agency, Memorandum, "Updating the EPA's Regulations Implementing Clean Water Act Section 404(c)," June 26, 2018, https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf.

use of its veto authority before a permit application has been filed or after a permit has been issued."[11]

CEQ should do the same in its revised NEPA implementing regulations. It would be valuable for CEQ to clarify the specific requirements and timetables for the Army Corps of Engineers and the EPA regarding the section 404 permits under the CWA. This should be done with the ultimate goal of creating "one federal program," with each participating agency providing input in a coordinated and concurrent fashion. At the very least, CEQ should delineate that the EPA can commence a section 404(c) veto only as part of the NEPA process, not before or after it.

CEQ's current implementing regulations for NEPA strongly suggest but do not specify that the actions of coordinating agencies relating to permits should be conducted in concert with the development of the EIS.[12] Given the EPA's problematic precedent of initiating prospective and retrospective permit denials under section 404(c), we respectfully request that the implementing regulations make explicit that such actions be required to be conducted as part of the NEPA process. Thank you.

Respectfully Submitted,

Ben Lieberman
Senior Fellow
Competitive Enterprise Institute
1310 L Street, NW 7th Floor
Washington, DC 20005
Ben.Lieberman@cei.org

[11] Ibid.
[12] Council on Environmental Quality, "Regulations For Implementing the Procedural Provisions of the National Environmental Policy Act," 2005, https://www.energy.gov/sites/prod/files/NEPA-40CFR1500_1508.pdf.