

**September 29, 2023**

**Docket ID: CEQ–2023–0003**

**National Environmental Policy Act Implementing Regulations Revisions Phase 2**

*Comments Prepared by James Broughel, Competitive Enterprise Institute*

To Brenda Mallory, Chair of the Council on Environmental Quality:

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization committed to advancing the principles of free markets and limited government. CEI has a longstanding interest in applying these principles to the rulemaking process and has frequently commented on issues related to oversight of rulemaking and the regulatory process. On behalf of CEI, I am pleased to provide comments to the Council on Environmental Quality (CEQ) on its Phase 2 Revisions to the National Environmental Policy Act (NEPA) Implementing Regulations.<sup>1</sup>

**Introduction and Historical Context**

NEPA was first enacted in 1970 and has been a cornerstone of environmental policy in the United States for over 50 years.<sup>2</sup> The Fiscal Responsibility Act (FRA) of 2023 raised the U.S. debt limit and included the most significant revisions to NEPA in its history.<sup>3</sup> The FRA revisions aim to provide for a more efficient environmental review process by, among other things, concentrating accountability within a single lead agency and streamlining paperwork and timeline requirements for permits.<sup>4</sup> These changes should help promote better decision-making and support innovation and economic growth.

The proposed rulemaking by the Council on Environmental Quality (CEQ) is Phase 2 of the agency's amendments to NEPA regulations, following the Phase 1 final rule issued on April 20, 2022.<sup>5</sup> The proposed Phase 2 revisions are out of sync with the FRA and its goals, and also with rhetoric in the Biden administration's press release asserting that the proposed rule "improves efficiency and certainty for projects and stakeholders."<sup>6</sup>

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<sup>1</sup> Council on Environmental Quality. "National Environmental Policy Act Implementing Regulations Revisions Phase 2." 88 Fed. Reg. 49924 (July 31, 2023). <https://www.federalregister.gov/documents/2023/07/31/2023-15405/national-environmental-policy-act-implementing-regulations-revisions-phase-2>.

<sup>2</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321-4347.

<sup>3</sup> Pub. L. 118-5, 137 Stat. 10 (2023).

<sup>4</sup> Mario Loyola. "Permitting Reforms, Finally." *Competitive Enterprise Institute*, June 15, 2023. <https://cei.org/studies/permitting-reforms-finally/>.

<sup>5</sup> Council on Environmental Quality. "National Environmental Policy Act Implementing Regulations Revisions." 87 Fed. Reg. 23453 (April 20, 2022). <https://www.federalregister.gov/documents/2022/04/20/2022-08288/national-environmental-policy-act-implementing-regulations-revisions>.

<sup>6</sup> The White House. "Biden-Harris Administration Proposes Reforms to Modernize Environmental Reviews, Accelerate America's Clean Energy Future, and Strengthen Public Input." *Press Release*, July 28, 2023. <https://www.whitehouse.gov/ceq/news-updates/2023/07/28/biden-harris-administration-proposes-reforms-to-modernize-environmental-reviews-accelerate-americas-clean-energy-future-and-strengthen-public-input/>.

Contrary to claims otherwise, the Phase 2 rulemaking adds new mandates and ambiguities into the environmental permitting process, thereby increasing litigation risk and uncertainty for stakeholders. The remainder of this comment will outline the specific ways in which the proposed rule is out of step with both the FRA and the NEPA statute itself.

### **Increased Ambiguity and Subjectivity Risks Politicizing the Permitting Process**

The proposed rule incorporates a number of vague terms that lack clear definitions, injecting unpredictability into the permitting process and opening up new avenues for litigation.

- The integration of the nebulous concept of “**environmental justice**” into NEPA regulations provides project opponents with expansive grounds to argue that agencies inadequately addressed their concerns and, similarly, failed to ensure “**meaningful**” engagement, another ill-defined term. These concepts lack clear standards and open the door to endless project delays as agencies evaluate vague social justice criteria and engage in continuous rounds of public participation to ward off lawsuits.
- A requirement in the proposed rule to consider “**global**” climate impacts could paralyze projects as reviews chase analytical abstractions. As most individual projects have no discernible effect on global climate,<sup>7</sup> requiring agencies to analyze global climate impacts is generally beyond the scope of project-specific reviews. Agencies would be forced to merely speculate about these impacts.
- The proposed rule’s preferential treatment toward “**environmentally preferable**” alternatives risks tipping the scales toward politically-favored projects. The lack of a precise definition around what constitutes an “environmentally preferable” alternative raises concerns about impartiality and potential favoritism toward certain projects, while simultaneously imposing undefined and potentially limitless burdens on others (due to the criteria above).
- While the proposal does introduce provisions for an expansion of categorical exclusions (CEs), potentially allowing certain projects to bypass extensive NEPA review, it simultaneously introduces the possibility of retracting these exclusions based on an ill-defined concept of “**extraordinary circumstances**.” This inconsistency undermines the goal of streamlining in the FRA and introduces the risk of subjective interpretation of CEs in order to block disfavored projects.

In sum, the integration of new vague terminology in NEPA implementing regulations will exacerbate an already lengthy and complex NEPA process. Such ambiguity lays fertile ground for an increase in litigation, putting the viability of major projects in jeopardy. This heightens the risk of extensive delays in critical infrastructure permitting, and injects unnecessary subjectivity into the permitting process.

### **Mitigation Measures Are Beyond NEPA’s Scope**

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<sup>7</sup> Marlo Lewis. “Examining Systemic Government Overreach at CEQ.” Testimony before the Natural Resources Subcommittee on Oversight and Investigations U.S. House of Representatives, September 14, 2023. [https://cei.org/congressional\\_testim/ceis-marlo-lewis-testifies-before-natural-resources-subcommittee-on-examining-systemic-government-overreach-at-ceq/](https://cei.org/congressional_testim/ceis-marlo-lewis-testifies-before-natural-resources-subcommittee-on-examining-systemic-government-overreach-at-ceq/).

The proposed rule introduces alterations that seemingly diverge from NEPA's original procedural nature. NEPA was established as a procedural statute requiring federal agencies to consider environmental impacts prior to making permitting decisions.<sup>8</sup> NEPA was not meant to mandate specific environmental outcomes, but rather to ensure environmental concerns are evaluated at some point during the permitting review process. The Supreme Court has consistently recognized that NEPA does not prioritize environmental considerations over other policy objectives.<sup>9</sup>

However, the proposed rule signals a change of course, potentially leading to enforceable and ongoing mitigation measures. This would signal a significant shift, departing from NEPA's original scope. The imposition of such requirements would considerably expand the power of permitting agencies, and it may be construed by courts as unlawful, ultimately putting the proposed rule at odds with the NEPA statute that grants CEQ authority in this area.

### **Recommendation: Revise the Phase 2 Rulemaking & Work with Congress to Facilitate further Bipartisan Reforms**

It is imperative that CEQ thoroughly revises the Phase 2 proposed rule to align with the spirit and intent of NEPA's original enactment in 1970 and the subsequent bipartisan efforts toward reform in the FRA. Eliminating ambiguity, subjectivity, and unnecessary agency power grabs will be crucial to ensuring the goals of the FRA are met and a lawful approach to energy and infrastructure permitting is followed.

### **Conclusion**

The Phase 2 proposal's disregard for the bipartisan Fiscal Responsibility Act of 2023 illustrates a clear deviation from congressional intent. Contrary to the press release's assertions, the proposed rule does not align with the goal of accelerating environmental reviews and, instead, appears to slow them down. Beyond undermining the established agreement on NEPA streamlining reforms in the FRA, the proposed rule compromises the potential for further bipartisan reforms to permitting procedures.

I implore the Council on Environmental Quality to consider these points and act in the best interest of all stakeholders involved, ensuring that revised NEPA regulations are clear, fair, and aligned with the original intent and scope of both NEPA and the FRA.

Thank you for considering this comment.

Sincerely,

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<sup>8</sup> Eli Dourado. "Much more than you ever wanted to know about NEPA." Utah State Center for Growth and Opportunity, October 20, 2022. <https://www.thecgo.org/benchmark/much-more-than-you-ever-wanted-to-know-about-nepa/>.

<sup>9</sup> *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Baltimore G. & E. Co. v. NRDC*, 462 U.S. 87 (1983).