



Ms. Mary Neumayr, Chief of Staff
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Neomi Rao, OIRA Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

RE: Advance Notice of Proposed Rulemaking
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508
[Docket No. CEQ-2018-0001]

Dear Ms. Neumayr and Ms. Rao:

The Natural Resources Defense Council (NRDC) is a national, not-for-profit environmental advocacy organization whose purpose is to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends. NRDC has hundreds of thousands of members, all of whom depend on the Council on Environmental Quality (CEQ) to assure that the aims and goals of the National Environmental Policy Act are fulfilled. These comments on the Advanced Notice of Proposed Rulemaking of June 20, 2018, are in addition to comments submitted by the Partnership Project. We support all the comments in that document. These additional views intended to assist CEQ in meeting the stated goals of having a more efficient NEPA process. The first comment addresses whether CEQ has met the test to do a regulation. The second is a recommendation to speed up the process before any regulatory process is completed by immediately reinstating the climate guidance. Because these comments question CEQ compliance with Executive Orders under the responsibility of the Office of Information and Regulatory Affairs (OIRA), these comments are also addressed to that office.

1. Concerns with the ANPRM Process

We believe the ANPRM was premature. Section 1 of Executive Order 12,866, a popular executive order that the House of Representatives have often tried to make statutory, requires in Section 1:

“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, **including the alternative of not regulating**. Costs

and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

Instead of this analysis, the only rationale given for opening up these rules is that it has been a long time since the rules were amended.

The Agency has failed to show that amending these regulations are helpful or necessary or will have a positive benefit. There is little or no research on delays caused by the regulatory process of environmental reviews, just questionable anecdotes. [see Appendix A for a fact check of those anecdotes <https://www.nrdc.org/experts/scott-slesinger/course-its-ok-we-are-only-lying-about-nepa>]

Rewriting the NEPA regulations will unsettle a very settled area of the law, causing industry to have to deal with uncertainty and possibly new processes. The process alone could be disruptive, not only to project sponsors, states and NEPA officials but will inevitably lead to more litigation as settled areas of the law become unsettled.

This disruption is similar to the experience with Executive Order 13,766, “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects”, issued on January 24, 2017. It caused more delays in the NEPA process according to a letter from Senator Portman and Senator McCaskill [see Appendix B for full letter <https://www.portman.senate.gov/public/index.cfm/2017/6/portman-mccaskill-urge-trump-administration-to-use-permitting-reforms-recently-enacted-into-law>] Part of the August 15, 2018, Executive Order 13,807, “Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure” undid some of the damage and delays caused by 13,766. But EO 13,807 directed CEQ to consider changes in guidance as well as regulations.

A key question under Office of Management and Budget policy is whether guidance would be preferable to new rulemaking. There has been no discussion or analysis of that. We ask that OIRA require CEQ to make the case why changes in regulations are necessary before a decision is made on going forward with a proposal. We believe that the existing regulations establish an efficient and legally solid foundation for NEPA reviews; what is lacking is adequate resources for staff to comply with the legal requirements in a more efficient timeline. OIRA should use its authority to judge whether our argument is correct and proceed accordingly.

In addition, with the drastic reductions of the CEQ staff over the past years, new rulemaking will require detailees from agencies to complete the regulatory process. Ironically, this undoubtedly will require detailees to be pulled off environmental reviews, slowing down projects already in the pipeline – the exact opposite policy outcome enunciated by President Trump.

Although this rule is listed on the Unified Agenda and the Office of OIRA has met with interested groups before the ANPRM, CEQ so far seems to have ignore the policy of EO 12,866 in justifying re-writing these rules. We urge OIRA to require the analysis in EO 12,866 and successor polices before letting this wasteful process go forward.

Climate Guidance

The NEPA process is governed not only by regulations but by statutes, court decisions and agency guidance and Presidential Orders. [Executive Order 13,783](#) withdrew the climate guidance and required agencies to remove any of its agency actions that implemented that guidance.

Another section of 13,783, requires CEQ to:

“review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.” Section 2.

As part of its actions, under Section 2, the Administration should reinstitute the climate guidance. The rescinding of the climate guidance and the directive to remove all agency implementation of that guidance contradicts the Section 1 requirement because its removal will “burden the development or use of domestically produced energy resources” by slowing down the NEPA process and provide ample grounds for litigation.

That revoked guidance on measuring climate guidance did not establish any new requirements. The product of broad comment and review, the guidance provided a useful roadmap for agencies whose actions would directly or indirectly impact the climate. [See Appendix C for the blog to these comments <https://www.nrdc.org/experts/sharon-buccino/trumps-bad-bet-2-rescinding-wh-climate-guidance>]

The revocation conflicts with the proclaimed aim of the ANPRM to make environmental reviews more efficient. Courts have made it clear¹ that agencies **are required by law** to consider the environmental impact of a project or policy, which must also consider climate-related environmental impacts when you are evaluating environmental impacts. Undertaking analysis of a project or policy’s impact on climate change, or of the impact of climate change on the viability of a project, is complex. CEQ’s guidance was tremendously helpful in guiding project sponsors, contractors, federal permitting and environmental review personnel on the issues that

¹ *Center for Biological Diversity v. NHTSA*, 508 F.3d 508, 556, 37 ELR 20281 (9th Cir. 2007); []; *Western Organization of Resource Councils et al v. U.S. Bureau of Land Management et al*, No. 4:2016cv00021 - Document 34 (D. Mont. 2017); *High Country Conservation Advocates v. United States Forest Service*, Civil Action No. 13-cv-01723-RBJ (D. Colo. June 27, 2014).

an adequate environmental impact analysis will have to address. By setting forth the relevant issues, the guidance sped up the process, sets clear parameters for the review, and reduces the risk that the analysis will be found deficient by a reviewing court. The Executive Order revoking the guidance and requiring agencies to remove any of its agency actions that implemented that guidance, may have been to throw a bone to climate deniers. Its impact has been to make the NEPA process more difficult, and more prone to successful challenges. As a result, it will cause the very project delays it was intended to avoid.

For these reasons, the climate guidance should be immediately restored (before the regulatory process is completed). Whatever the senior-most officials in this administration may believe about climate science, the fact remains that analysis of climate impacts is legally required under NEPA. Restoring the guidance will enhance the NEPA process, and it will properly and efficiently assist in achieving the President's other objective of shortening permitting and environmental reviews and decreasing unnecessary litigation.

The climate guidance should remain as guidance. Analysis of climate impacts is often undergoing refinement; the guidance should remain as guidance so that the most up to date science can be more quickly implemented.

Thank you for considering our views.

s/ Scott Slesinger

Scott Slesinger
Senior Advisor for Governmental Affairs
Natural Resources Defense Council
sslesinger@nrdc.org

CC: Ted Boling, Council of Environmental Quality

Chad S. Whiteman, Office of Information and Regulatory Affairs

Appendix A

<https://www.nrdc.org/experts/scott-slesinger/course-its-ok-we-are-only-lying-about-nepa>

Of Course, It's OK, We Are Only Lying About NEPA

June 06, 2018 [Scott Slesinger](#)

There are few principles as basic to Americans as the right to participate in decisions when the federal government is going to affect the environment or economy of a community. Because this is inconvenient for developers they have enlisted the Congress and the White House in trying to cripple that right that is enshrined in the National Environmental Policy Act (NEPA). There have been over 60 separate bills introduced this year to scale it back NEPA and on June 6, 2018, another hearing on weakening NEPA is scheduled. This hearing is based on the theory that oil and gas drilling and fracking on public lands would never have a more than insignificant impact on the environment, ever.

Over the past several months, the propaganda about the required environmental reviews that agencies conduct before projects has been overwhelming. I wrote a blog on one of those misrepresentations [here](#). The major theme of the critics of environmental reviews is that despite its almost 50-year history, government projects, private fossil fuel development, and infrastructure has been stymied, mainly because of the National Environmental Policy Act. This is obviously untrue, based on the growth of our economy that included becoming a net exporter of energy during President Obama's term. I will use this blog to critique several recent poster children of NEPA and note the misstatements. (Or, if you prefer, "lies.")

Poster Child #1 Bayonne Bridge

CNBC did a story about the delays President Trump cited for road and highway projects, and, at the behest of the White House, spotlighted the case of the Bayonne Bridge raising, which critics said was slowed because of permitting and environmental reviews. The CNBC investigative tory, if you watch the short clip [here](#), found that weather and continuing the use of the bridge during construction were the drivers of the delays. The claims of a "10-year" review, were off base: It only took 26 months.

Poster Child #2 Anderson Bridge

On February 13, in conjunction with its federal infrastructure plan rollout, the White House published a blog post titled "[Washington Will No Longer be a Roadblock to Rebuilding America](#)." The blog uses the long delay of the Anderson Memorial Bridge project in Boston as an example of how federal environmental reviews and federal permitting is hindering infrastructure development across the country. **The problem, once again, is that federal environmental permitting had nothing to do with this project.** The Anderson Memorial Bridge project was funded completely by the State of Massachusetts and did not alter the existing waterway along the Charles River, **so at no point was federal-level environmental permitting needed** for this project. The implication is clear: While the White House has come

up with a mythical conclusion, it failed to find an example of even one project that fit that conclusion.

Poster Child #3: Dredging the Port of Corpus Christi

This is a typical scapegoating NEPA story. Politicians often get authorization for projects (and local press about the project) but fail to get the Congress to “appropriate” money to build them. Authorizations mean nothing without appropriations. Often, rather than admit they were unable to get real money, members will put the blame on environmental reviews. On March 6, 2018, according to the [Corpus Christi Business News](#), officials representing the Port of Corpus Christi met with their former governor and now Secretary of Energy Rick Perry about the need for federal **funding** for the dredging of the Port of Corpus Christi. The environmental reviews for this project weren’t mentioned.

However, the following week, Perry testified before the Senate Commerce Committee about the president’s infrastructure package loaded with anti-NEPA provisions. He didn’t urge lawmakers to fund the dredging project, as the port officials had requested. Instead, he claimed the reason the project failed to go forward wasn’t money, but bureaucrats:

“This isn’t a matter of we’re coming up here, or they’re coming up here, and asking for more money, they’re asking for federal agencies to basically get out of the way, to give them approval, so I think that’s one of the things that the president is talking about.”

This will be sad news to the Port which said the problem wasn’t NEPA, but the need for 225 million *federal* dollars.

Stories like this can be repeated a million times, or rather 97 billion times. [A Republican memo](#) to the Transportation and Infrastructure committee about funding of Army Corps of Engineers projects, noted that there are \$97 billion of projects ready to go, but the Corps’ construction budget is only \$5 billion a year. The problem isn’t NEPA; it’s where is the \$92 billion.

NRDC is working to protect NEPA, one of the landmark environmental statutes. The main goal of NEPA is assuring that the federal government looks before it leaps. It requires the federal government, when it is doing something to your community, to allow the public and local officials a chance to comment and these comments often lead to better projects. It should not be gutted as a diversion from the real problem addressing our infrastructure.

I recently was on a [podcast](#) with a Nick Goldstein, Vice President of Regulatory & Legal Issues of the American Road & Transportation Builders Association. I was well armed to defend NEPA from attacks by the road builders, but instead found myself nodding along while Goldstein made the same point I did: The real problem with infrastructure is the lack of federal financing.

Appendix B

<https://www.portman.senate.gov/public/index.cfm/2017/6/portman-mccaskill-urge-trump-administration-to-use-permitting-reforms-recently-enacted-into-law>

June 8, 2017

President Donald J. Trump

The White House

1600 Pennsylvania Ave, NW

Washington, D.C. 20500

Dear President Trump:

We were pleased that your Administration's recently released budget proposal recognized the need to improve the permitting process for major infrastructure projects. As the co-sponsors of the Federal Permitting Improvement Act, which was enacted into law last Congress as Title 41 of the Fixing America's Surface Transportation Act (FAST-41), however, we are concerned that your Administration is not making use of important tools Congress has given it to accomplish this goal.

The budget correctly notes that "*the legal requirements and processes for the permitting and review of major infrastructure projects have developed in a siloed and ad-hoc way, creating complex processes that in some cases take multiple years to complete.*" And, furthermore, that "[d]elays and uncertainty in project review timelines can affect critical financing and siting decisions [and] postpone needed upgrades, replacements, or new development." We could not agree more strongly that the federal government needs to make timely and coordinated decisions regarding permits, and those same concerns drove us to author FAST-41. This bipartisan effort gave the federal government tools to streamline and improve the federal permitting process, which, as you have noted, is laden with uncertainty that hinders investment, economic growth, and job creation.

Through FAST-41, we sought to improve the permitting process for major capital projects across all sectors in three ways: better coordination and deadline-setting for permitting decisions; enhanced transparency; and reduced litigation delays. Despite deep divisions in other areas, we were able to come together to create a smarter, more transparent, better-managed process while not altering substantive public input or safeguards that exist in the review process.

Since Congress enacted FAST-41, however, neither the past Administration nor your Administration has realized the Federal Permitting Improvement Steering Council's (FPISC) potential. It took President Obama seven months to appoint an Executive Director, and FPISC barely got off the ground before the election. And now, given the Administration's stated interest in facilitating the permitting process and infrastructure development, it is perplexing that the Administration has not taken full advantage of the powerful tools Congress gave it in FAST-41 to accomplish those goals. Moreover, Executive Order 13,766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, issued on January 24, 2017, appears to duplicate or conflict with many of the permit streamlining provisions in FAST-41. That executive order directs the Chairman of the Council on Environmental Quality (CEQ)—a position that has not yet been filled—to identify "High Priority Infrastructure Projects" and to coordinate with the appropriate agency heads to clarify

deadlines for such projects. While these are important tasks, FAST-41 already requires FPISC and its Executive Director to identify similar covered projects and to then work across all government agencies to set timetables and to ensure that they are met. We have heard from numerous stakeholders that the executive order is confusing and makes the permitting process even more complex—the exact opposite result of what seems to have been intended.

Moreover, we are increasingly concerned that the Administration's failure to appoint a permanent Executive Director is significantly impairing the ability of FPISC to achieve its mission of greater coordination across government. We have heard from a number of entities involved in FIPSC-designated covered projects that a lack of clear leadership from the top has hampered cross-agency efforts and allowed permit siloing to continue.

Therefore, we ask that you expeditiously fill the role of FPISC Executive Director and clarify how CEQ's role can complement rather than conflict with FPISC's statutorily-mandated responsibilities.

We thank you for your attention to this critical issue and look forward to working with you on efforts to improve the federal permitting process so that we can deliver a smarter, faster, and more responsive government to the American people.

Sincerely,

Appendix C

<https://www.nrdc.org/experts/sharon-buccino/trumps-bad-bet-2-rescinding-wh-climate-guidance>

Trump's Bad Bet #2 – Rescinding WH Climate Guidance

April 05, 2017 [Sharon Buccino](#)

Houses flooded. Trees and power lines down. Wildfires. Drought. Climate chaos is disrupting our lives and destroying our homes. Last year, the White House Council on Environmental Quality (CEQ) took action to do something about the damage. The White House issued guidance to help agencies include climate change in their environmental reviews. The agencies have a legal obligation under the National Environmental Policy Act (NEPA) to do so. The guidance provided consistency and tools to help.

On March 28, President Trump rescinded this guidance.

President Trump has run casinos. You'd think he would know a good bet when he sees one. Rescinding Obama's climate guidance isn't. Here's why:

1. ***Taxpayers lose.*** Courts have already said that federal agencies must consider climate in their environmental analysis. Trump's action doesn't get rid of this legal obligation. Now each agency will be left on its own to determine how best to do the analysis. Without the guidance, agencies will waste time and taxpayer money.
2. ***Companies lose.*** The guidance provided consistency. Whether dealing with the Bureau of Land Management to lease coal, the Army Corps of Engineers to build a pipeline or the Department of Transportation to build a highway, a company would know what kind of climate analysis was needed. Now they won't. The lack of guidance will trigger more litigation and delay.
3. ***Our lands and waters lose.*** From our coastal waters to the canyons of Utah, our public lands and waters are priceless assets belonging to each one of us. The guidance provided tools to assess the climate consequences of actions like drilling for oil and gas or mining for coal. It did not prohibit these actions; instead the guidance helped us make smart decisions about our energy choices for today and tomorrow.
4. ***Cities like Miami Beach lose.*** Miami Beach is spending \$500 million to keep rising sea levels from destroying the hotels, restaurants and shops that provide its glamor and glitz. The city needs information to spend this money wisely. How is climate change affecting sea level rise? How are government actions and taxpayer dollars affecting climate change? The guidance helped provide answers. Trump's action leaves cities like Miami Beach in the dark.
5. ***Our pocketbooks lose.*** Smart investment today will save billions tomorrow. Hurricane Sandy caused billions of dollars of damage. New York is working to rebuild in a way that limits future damage. The guidance helped federal agencies respond in similar ways—

making smarter decisions and investments in response to our changing climate. Trump's action denies us the information we need to invest wisely.

6. ***Communities lose.*** Working with local and state governments, the federal government invests billions of dollars in our communities. The guidance was designed to help communities build roads, seawalls, sewer systems and other investment that lasts. We don't want to build something that will get washed away in a year or two. Trump's action leaves cities and states in the dark.
7. ***Democracy loses.*** The federal government is spending our hard-earned dollars. Decisions to mine more coal or drill offshore affect the public lands and waters that belong to all of us. We have a right to a say in those decisions. We have a right to expect decisions informed by the best science available. The guidance helped deliver on these rights. Trump's action has taken them away.
8. ***Nature loses.*** Protecting nature helps us save ourselves. Fish, wildlife and plants provide jobs, food and clean water that sustain people, communities and economies across the nation. Information and action is needed now to ensure that we continue to have these natural resources tomorrow. The guidance helped agencies develop adaptation strategies to our changing climate. Trump's action ignores that our climate is changing.
9. ***Our health loses.*** Today's scientists point to climate change as "the biggest global health threat of the 21st century." As temperatures spike, so does the incidence of illness, emergency room visits, and death. Climate change makes us sick, hurting the most vulnerable like the young and the old the most.
10. ***Our children lose.*** Numerous tools now exist to estimate greenhouse gas emissions. Numerous solutions exist to reduce emissions and respond to climate change. We stumble blindly into the future if we fail to use them. The guidance helped provide them. Trump's action takes them away.