



July 29, 2021

Brenda Mallory, Chair
Council on Environmental Quality
730 Jackson Place, NW
Washington, D.C. 20503

ELECTRONIC FILING

Re: Comment regarding *Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures*, 86 Fed. Reg. 34,154 (June 29, 2021)
[Docket No. CEQ-2021-0001]

Dear Ms. Mallory:

I write to demand that you withdraw your unlawful, reckless, and job-killing “delay” of the landmark 2020 NEPA modernization and reform rules. See *Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures* (“2021 NEPA Delay Rule”), 86 Fed. Reg. 34,154 (June 29, 2021) (to be codified at 40 C.F.R. 1507).

There is bipartisan consensus in Washington, D.C. that more investment in American infrastructure is needed. The modernized NEPA process you inherited from President Trump’s Council on Environmental Quality (CEQ) would encourage this additional investment. The new streamlined process (“2020 NEPA Reform Rule”) would safeguard against environmental harms [outlined by statute] while eliminating needless red tape, enabling much-needed projects to move forward—including those spearheaded by state and local governments and the private sector.¹ Instead of embracing and continuing that progress, the Biden administration is attempting to turn back the clock and choke off infrastructure investment.

¹ See *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 (July 16, 2020) (formerly codified at 40 C.F.R. § 1507.3 (2020)).

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

In its first seven months, this administration has attempted to kill the Keystone XL pipeline project (which may now cost taxpayers \$15 billion), flouted immigration law by suspending deportations, and instituted a de facto ban on new federal energy leases. All these actions violated the law, and some have already been enjoined by the courts.

Your 2021 NEPA “Delay” Rule is yet another cursory infrastructure-killing action by the Biden administration. It scraps a duly considered and promulgated regulation without reasonable justification, public notice, or input from the people it will harm. Worse, it does so by disingenuously couching the substantive repeal of the 2020 NEPA Reform Rule, which was properly promulgated after notice and comment from stakeholders, as a mere delay of implementation.

This clumsy bureaucratic sleight-of-hand is obvious and insulting. This surreptitious attempt to stop NEPA modernization through a “delay” is unlawful and one more example of this administration cutting corners, undermining Montana jobs and infrastructure, and shamelessly pandering to the radical left.

CEQ’s 2021 NEPA Delay Rule suffers from manifold procedural and substantive defects. Among other problems, it violates the APA’s notice-and-comment requirement and is arbitrary and capricious.

1. The 2021 NEPA Delay Rule violates the APA’s notice and comment requirement.

“Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the Administrative Procedure Act[.]” *Clean Air Act Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017). CEQ in this instance has tried to cut corners and avoid traditional notice-and-comment rulemaking by claiming that the 2021 NEPA Delay Rule is a rule of “agency organization, procedure, or practice.”

But the 2021 NEPA Delay Rule is not a rule of “agency organization, procedure, or practice.” To the contrary, the 2021 NEPA Delay Rule is a substantive rule that affects external parties, delays implementation of President Trump’s 2020 NEPA Reform Rule for a significant length of time, and is plainly designed to forever prevent implementation of President Trump’s NEPA reforms. The delay is of course designed to allow the administration to complete new rulemaking that will repeal or replace the 2020 NEPA Reform Rule before it ever takes effect. That will undoubtedly leave external parties confused as to what law applies to the NEPA analyses governing their projects—the 2020 NEPA Reform Rule exists but CEQ has now indefinitely delayed the provisions of that Rule that would have made it operational.

The 2021 NEPA Delay Rule conveniently describes itself as “purely procedural”

because it purports to extend only the deadlines by which agencies must “propose procedural revisions” of their respective NEPA processes to CEQ. But this characterization ignores the fact that this reporting deadline will correspondingly delay practical implementation of the 2020 NEPA Reform Rule itself. Indeed, the implementation deadlines the 2021 NEPA Delay Rule affects are precisely the vehicles through which CEQ decided to implement the 2020 NEPA Reform Rule. That means those now-delayed dates are essentially the Rule’s effective dates, making their delay plainly substantive and not covered by the “agency organization, procedure, or practice” exception. Indeed, this delay is tantamount to a repeal of the 2020 NEPA Rule for that period of time, to the public’s detriment. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) (“[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards.”). And that is especially true where, as here, the agency has already admitted that it will be using the delay to rewrite the underlying Rule.² The purpose of the 2021 NEPA Delay Rule is plain: to permanently scuttle the 2020 NEPA Reform Rule—a rule that passed through proper notice-and-comment procedures.

Contrary to CEQ’s claim, there is no “good cause” supporting the decision to skip notice-and-comment rulemaking requirements before issuing the 2021 NEPA Delay Rule. “Good cause” is narrowly construed and CEQ has not presented it. *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). CEQ invokes all three “good cause” grounds—that notice-and-comment is impracticable, unnecessary, or contrary to public interest—but none apply here. As to impracticability, CEQ doesn’t adequately explain why it needed to forego notice-and-comment rulemaking procedures, particularly when the 2020 NEPA Reform Rule went through the proper notice-and-comment procedures. CEQ admits that it began reviewing the 2020 NEPA Reform Rule in January but fails to explain why it waited until the end of June to issue the 2021 NEPA Delay Rule—time that could have accommodated traditional notice-and-comment rulemaking. At best, any logistical challenges are self-imposed, and that cannot be grounds for “good cause.” *See, e.g., Washington Alliance of Technology Workers v. U.S. Dep’t of Homeland Security*, 202 F. Supp. 3d 20, 26 (D.D.C. 2016). CEQ unsurprisingly offered no additional support for its “good cause” omission of normal rulemaking procedures. It can’t seriously argue that suspension of normal procedures serves the public interest. And as stated above, CEQ can’t plausibly argue that notice-and-comment was unnecessary because the 2021 NEPA Delay Rule effectively repeals the 2020 NEPA Reform Rule, which—again—was adopted after normal

² “Following this rulemaking, CEQ will initiate further rulemaking to propose amendments to the 2020 Rule to revise the NEPA implementing regulations to comply with the statute’s text and goals; provide regulatory certainty to stakeholders; promote better decision making consistent with NEPA’s statutory requirements; ensure appropriate coordination among Federal agencies, and State, Tribal, and local governments during the environmental review process.” 86 Fed. Reg. 34,156.

notice-and-comment procedures. That makes it highly substantive and not routine, insignificant, or inconsequential. *See, e.g., Mack Trucks*, 682 F.3d at 94.

CEQ short-circuited the process and issued the immediately effective 2021 NEPA Delay Rule while denying the public any meaningful opportunity to comment. No authority supports that decision.

2. The 2021 NEPA Delay Rule is arbitrary and capricious under the APA and contrary to established case law.

The 2021 NEPA Delay Rule is arbitrary and capricious under the APA because it fails to consider all aspects of its decision—to delay the dates that mechanize implementation of the 2020 NEPA Reform Rule. “An agency’s view ... may change But an agency changing its course must supply a reasoned analysis.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). The great weight of caselaw is clear: dates like those at issue are substantive parts of a rule; they cannot be changed merely because an agency harbors nebulous concerns about the underlying rule and *might* attempt to amend or jettison it. *See, e.g., S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 965–66 & n.2 (D.S.C. 2018) (collecting cases); *see Air All. Houston v. EPA*, 906 F.3d 1049, 1065–67 (D.C. Cir. 2018) (“The overarching statutory purpose and design of the [Clean Air Act], as well as the statutory context ... reject an interpretation that EPA can further delay a final rule for reconsideration when it has neither explained it has reached a different conclusion about preventing accidental releases nor offered new evidence to support a different conclusion, but has delayed a final rule based on speculation about future amendments.”). Yet that is exactly what CEQ did here.

CEQ’s suspension of the implementation mechanisms for the 2020 NEPA Reform Rule is tantamount to a repeal of the Rule—at least for the duration of the “extensions.” *See Abraham*, 355 F.3d at 194. Yet the Agency failed to analyze how this effective repeal will impact stakeholders, given that it discards the many benefits that would—according to CEQ—flow from the 2020 NEPA Reform Rule. “Without considering both the costs *and* the benefits of postponement of the compliance dates, the [Agency’s] decision failed to take this ‘important aspect’ of the problem into account and [is] therefore arbitrary.” *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017). “[CEQ] may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits.” *Air All. Houston*, 906 F.3d at 1065.

Again, CEQ itself deliberately established the implementation dates for the 2020 NEPA Reform Rule. Yet in its 2021 NEPA Delay Rule, it didn’t address the reasons for that earlier choice, why those reasons were now less compelling, or why a two-year delay—as opposed to a more modest delay—was most appropriate. *See Air All. Houston*, 906 F.3d at 1067 (“[N]othing in the Delay Rule explains EPA’s departure

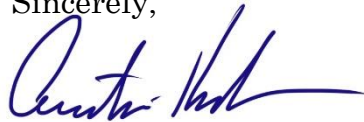
from its stated reasoning in setting the original effective date and compliance dates.”).

CEQ also failed to explain why it’s better for the preexisting NEPA requirements to apply for two additional years instead of the requirements set forth in the 2020 NEPA Reform Rule. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (where “new policy rests upon factual findings that contradict those which underlay its prior policy,” agency must provide “a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.”). CEQ further ran afoul of *FCC v. Fox Television Stations* because it refused to acknowledge that the 2021 NEPA Delay Rule reflects a substantive change in policy.

For procedural and substantive reasons, CEQ 2021 NEPA Delay Rule is legally defective.

The President’s “Build Back Better” campaign slogan rings hollow when his administration seems intent on ensuring that we don’t build at all. Instead of updating our Nation’s infrastructure, promoting job growth, and revitalizing communities, the Biden administration is opting for crumbling roads and bridges and jobs for federal paper pushers while the blue-collar workers who would build these projects remain unemployed. Unfortunately, a hallmark of this administration has been job destruction and a lack of respect for legal rules and requirements. The 2021 NEPA Delay Rule is another facet of an out-of-touch agenda that prioritizes appeasing radical constituencies over the interests of all Americans.

Sincerely,



Austin Knudsen
Montana Attorney General

Cc: Amy B. Coyle, Deputy General Counsel
Council on Environmental Quality
Amy.B.Coyle@ceq.eop.gov