Written Answers to Questions for the Record
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for U.S. House of Representatives, Committee on Natural Resources,
Subcommittee on Oversight and Investigations
Oversight Hearing Titled, "*The Biden Administration's Executive Overreach and Its Impact on American Energy Independence*"

May 30, 2023

Questions from Chairman Bruce Westerman:

1. **Can you explain how Congress can modernize and clarify the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies by simplifying regulatory requirements, codifying certain guidance and caselaw relevant to those proposed regulations, revising the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations?**

There has been intense focus on revising CEQ's NEPA regulations and codifying certain changes to NEPA in order to improve decisionmaking timelines. In addition to CEQ's ongoing efforts to revise its NEPA implementing regulations,[1] each agency also has its own implementing regulations tailored to the practices and challenges of implementing NEPA within the context of work accomplished by each agency.[2] While there may be some regulatory provisions that merit revision, research suggests that the regulatory requirements of NEPA are only a small factor in the variation between decisionmaking times. External factors such as agency capacity, budgets, technology, project management, compliance with other laws, changes to the scope of the project, and litigation aversion appear to have a heavier influence on efficient and timely NEPA reviews.[3]

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[1]Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Regulations); Council on Environmental Quality, National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) ("Phase 1 Final Rule"); Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, RIN 0331-AA07 (describing scope of Phase 2 revisions to NEPA implementing regulations). *See also*, John Ruple et al., *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 46 Columbia J. Envt'l L. 274, 283-284 (2022) [*hereinafter* Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation*] (explaining regulatory structure and procedural history of amendments to NEPA's implementing regulations)

[2] 40 C.F.R. 1507.3 (2020) (instructing agencies to develop or revise procedures to implement NEPA); Council on Environmental Quality, Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021) (extending deadline for agencies to revise NEPA regulations); U.S. Forest Service, National Environmental Policy Act (NEPA) Compliance 85 Fed. Reg. 73,620 (Nov. 19, 2020) (finalizing updates to Forest Service Regulations implementing NEPA); Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 286-287 (describing potential conflict where the Forest Service had already initiated a procedure for updating its implementing regulations for NEPA prior to the issuance of the 2020 Rule).

[3] Gov't Accountability Off., GAO-14-370, National Environmental Policy Act: Little Information Exists on NEPA Analyses 1, 15 (2014) [*hereinafter* GAO, NEPA: Little Information Exists] (noting that for non-federal projects

Rather than focusing on regulatory changes that reduce analytical rigor and environmental protections without offering a substantive benefit, a more productive approach to improving NEPA efficiency would focus on improving agency capacity, promoting strategically-sized analyses for long-term efficiency, using NEPA as a framework for structured inter-agency (and inter-governmental) collaboration, and utilizing the NEPA process to develop consensus.[4] The procedures adopted through FAST-41 appear to improve predictability, transparency and timeliness for complex projects.[5]

Additional promising practices have been publicized in the annual Best Practices Reports issued by the Federal Permitting Improvement Steering Council.[6] The early iterations of these reports (2017 & 2018) were particularly creative and identified specific practices that had been implemented by different agencies with positive results for efficiency. Many of the best practices identified in these reports could be replicated to improve efficiency across agencies. For example, the Army Corps of Engineers improved its web-based application for a general permit, including creating an online permit application, with a video tutorial on how to fill it out, and specific contact information for assistance. This reduced the frequency of incomplete or inaccurate applications, which reduced processing times. It also freed up staff members to focus on more complex permits.[7] These reports identify manageable, affordable, and replicable practices that improve efficiency. Unfortunately, later iterations of the best practices report focus less on success stories. In particular, the format adopted in 2022, which requires a Quarterly Agency Performance Report, imposes an additional workload on the Permitting Council and agencies without providing the same overview of creative measures adopted by different agencies that test improved practices and assess their value.

2. **Yes or No – the study on NEPA implementation you co-authored, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, only analyzed NEPA decisions completed by the U.S. Forest Service. If yes, please explain the limits of extrapolating data and conclusions from a study on one government agency and applying those conclusions to other government agencies.**

Yes. The article, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, used a database of NEPA decisions issued by the U.S. Forest Service. To our knowledge, the Multi-Year Trend Report database compiled by the Forest Service is the most comprehensive, detailed, and reliable set of data regarding NEPA decisions gathered by any agency.[8] It would be valuable for other agencies to develop similar databases in order to compare

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requiring a federal permit, delays in obtaining project funding, changes to a proposal that occur during the NEPA process, and non-federal approvals all may delay a NEPA analysis); Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 299, 327-333).

[4] *Id*. at 335-340.

[5] Jamie Pleune & Edward Boling, *This Permit Reform Already Works. Why Aren't More Mining Projects Using It?* 53 Env. L. Rep. 10463, 10468 (June 2023) [*hereinafter* Pleune & Boling, *This Permit Reform Already Works*].

[6] https://www.permits.performance.gov/fpisc-content/reports-and-publications#annualreporttocongress

[7] Federal Permitting Improvement Steering Council, Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018 (Dec. 2017).

[8] Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 288, 333.

practices.[9] The MYTR database also has limitations. It was designed as a tracking system to facilitate compliance with public disclosure duties.[10] The information that it contains is specific to NEPA decision documents, which are distinct from the time required to implement a project following its approval. Additionally, the database does not track when work on a NEPA decision document is paused due to changes in the scope of the project, political priorities, or budgetary limitations. Finally, the MYTR database offers information regarding decisionmaking times, but it does not provide a way to test whether the NEPA process produces better projects through the twin aims of meaningful public engagement and careful consideration of environmental impacts. Valuable information about avoided impacts, improved time to implementation, and reduction of community opposition to a project are not visible in this database.

Despite these limitations, there are two reasons to believe that the information we obtained regarding Forest Service NEPA practice is informative for the practices of other agencies. First, the Forest Service conducts more EISs than any other agency.[11] Second, when we turned our attention to the mine permitting process, multiple reports identified the same underlying causes of delay in the mine permitting process that we observed in the Forest Service's NEPA practices.[12] For these reasons, we believe that the information regarding Forest Service practice is informative, even if it is not perfect.

3. **The study you co-authored on NEPA implementation in the U.S. Forest Service, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, found that the administrative region had a "significant influence" on decision-making times. Can you explain the regional differences that affected the variation in completion times and why further research is necessary to explain the regional differences in decision-making times?**

The regression model revealed that the Forest Service administrative region responsible for overseeing a NEPA analysis has a significant influence on decisionmaking times. This finding surprised use because each Forest Service region is implementing the same laws, subject to the same regulations, pursuant to the same administrative guidance, involving the same activities. If delays in decisionmaking times were caused solely by the NEPA process, we would expect similar mean completion times across regions. The regional variation suggests that factors external to the NEPA process was affecting decisionmaking times. We posited some potential influences including ecological differences, cultural differences, and different budgetary structures. However, these were simply ideas. We have no way to test these hypotheses, which is why further research is necessary. Understanding why some regions complete the NEPA process more quickly may reveal administrative and management efficiencies that could be replicated. Conversely, understanding why some regions tend toward slower decisions could identify barriers to efficiency that can be eliminated.

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[9] *Id*. at 333.
[10] *Id*. at 289.
[11] Executive Office of the President, Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018).
[12] Jamie Pleune, *Playing the Long Game: Expediting Permitting Without Compromising Protections*, 52 Env. L. Rep. 10893 (Nov. 2022)

4. **Regarding the study you co-authored on NEPA implementation in the U.S. Forest Service, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, can you explain the correlation between regional decision-making time and wildfire suppression costs?**

Throughout our study period, fire borrowing affected the staff and resources available to complete NEPA projects and thereby increased NEPA compliance times.[13] Additionally, the uncertainty caused by wildfire suppression activities was identified by Forest Service staff and stakeholders as a cause of delay that complicated NEPA compliance.[14] Sources of delay included unstable budgets as well as staff reductions and shifting staff from project management to wildfire duties.[15] Additionally, according to a 2006 report by the Office of Inspector General, some regions bore an "inequitable wildfire protection burden" because wildland fire protection agreements between the Forest Service and other agencies had not been renegotiated to reflect appropriate WUI protection responsibilities.[16] Finally, due to ecological differences, some regions have higher wildfire hazards than others. There appeared to be some correlation between regions with longer decisionmaking times and those with greater wildfire burdens. However, other than observing the overlap, we had no way to test the relationship. It is worth noting Congress stabilized funding for wildfire suppression costs in 2018. However, the effect of this legislation was not visible during the period of study for our research.[17] This could be a productive area of study.

5. **Would additional resources for wildfire management help reduce NEPA decision-making times [for] areas with higher wildfire suppression costs?**

According to a 2019 report from the Congressional Research Service, "Fire expenditures continue to climb, affecting the implementation of other programs . . . through personnel and funds transferred to fire control."[18] A series of roundtables conducted with stakeholders engaged with the Forest Service NEPA process also described how the high priority of wildfire suppression activities affect decisionmaking times. "Budget shortfalls and statutory mandates on funding for fire response, combined with a shortage of trained employees in areas other than fire and/or a frequent diversion of staff to emergency response or shifting priorities, hamper the ability of the Agency to make progress on other important forest and grassland resource management efforts." They also noted that "staffing levels are not adequate to mee the current

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[13] Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 328-29.
[14] *Id*. at 329-330.
[15] *Id*. at 330.
[16] Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 326.
[17] *Id*. at 327-328.
[18] Kate Hoover & Anne A. Riddle, Cong. Res. Serv., R43872, National Forest System Management: Overview, Appropriations, and Issues for Congress (2019)

demand" and that "timelines are often lengthened due to the need for hiring or onboarding additional staff, including 'holes' in interdisciplinary team specialist representation"[19] Based on these reports, it appears likely that stabilizing budgets and bolstering agency capacity in non-fire suppression roles would improve decisionmaking times and efficiency in the NEPA process.

6. **Can you provide more information on how America needs permitting reform for transmission lines?**

A recent study by the Lawrence Berkeley National Laboratory found that there are over 2,000 GW of total generation and storage capacity waiting for approval to connect to the grid, 95 percent of which are solar, wind, or battery storage.[20] However, these projects face long wait times and uncertainty when attempting to connect to the grid. Between 2000-2007, the time between an initial connection request and a fully built, operational plant was typically less than two years. Between 2018-2022, that timeframe doubled to an average of almost 4 years, with an increasing trend. By 2022, the median between an interconnection request to commercial operations date reached almost 5 years. The increased volume of proposed renewable projects sitting in the queue promises to amplify this problem. For example, at least two regional transmission organizations, the entities responsible for approving requests to connect to the grid, have announced pauses on accepting new projects until they can process their backlogs. The nation's largest electric grid operator, PJM Interconnection, coordinates electricity movement in 13 states and the District of Columbia.[21] It has announced that it will not process any new applications until the end of 2025.[22] Similarly, CAISO,[23] a California grid operator, declined to accept any new projects in 2022 while they processed their backlog. Both entities are looking for systemic solutions to improve the grid connection process. In addition to these challenges, transmission lines also face siting challenges, especially within communities that do not benefit from the power line. The interconnect queue, regional control of transmission, and siting high power transmission lines are serious problems that deserve a national strategy and are worthy of permit reform.

7. **How would having a lead federal agency for permitting benefit getting more energy projects up and running.**

Experience within the FAST-41 program demonstrates that identifying a lead federal agency and tasking it with the responsibility to convene stakeholders early in the permitting process can

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[19] Nat'l Forest Found., EADM, Environmental Analysis and Decisionmaking, Regional Partner Roundtables: National Findings and Leverage Points 18 (2018) https://www.nationalforests.org/assets/pdfs/National-EADM-Report.pdf

[20] Berkeley Lab, Energy Technologies Area, *Grid Connection Requests grow by 40% in 2022 As Clean Energy Surges, Despite Backlogs and Uncertainty* (Apr. 6, 2023) https://energy.lbl.gov/news/grid-connection-requests-grow-40-2022

[21] Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia. https://pjm.com/about-pjm/who-we-are/territory-served (last visited Apr. 24, 2023).

[22] Institute for Energy Research, PJM Plans for a Two-Year Pause on Reviewing Project Applications (Feb. 22, 2022). https://www.instituteforenergyresearch.org/the-grid/pjm-plans-for-a-two-year-pause-on-reviewing-project-applications/#:~:text=To%20implement%20it%2C%20PJM%20is%20proposing%20an%20interim,on%20those%20coming%20at%20the%20end%20of%202027.

[23] California Independent System Operator https://www.caiso.com/Pages/default.aspx

improve the transparency, predictability, and timeliness of permitting.[24] Tasking a lead agency with the responsibility for coordinating multiple different permitting authorities, sequencing permitting decisions, identifying information that must be gathered, developing data management protocols, and coordinating stakeholder engagement can promote efficiency. For example, the Federal Railroad Administration (FRA) utilized the NEPA process to overcome the challenge of inter-agency variance in decisionmaking for multiple federal, state, and local entities affected by a proposal to improve intercity passenger rail service in the Northeast Corridor.[25] By engaging multiple agencies early, and identifying points of contact within each agency, the FRA ensured that partner agencies could provide timely information that the technical team utilized, avoiding conflict down the road. Communication protocols enabled the creation of an interactive dataset encompassing multiple local and state jurisdictions, transportation authorities and watersheds that could be used for subsequent environmental analyses. This created a framework for collaboration that would foster continued efficiencies beyond project implementation because future projects can utilize the established inter-jurisdictional database and communication protocols.

8. Can you further explain permitting delays caused by litigation aversion of agency staff?

In 2018, the Forest Service launched an agency-wide effort to improve processes related to Environmental Analysis and Decision Making (EADM).[26] The acronym EADM includes the NEPA processes, as well as underlying environmental decisions such as forest planning, issuance of special use permits, implementation of forest management activities, and fulfilment of other statutory obligations, including compliance with the Clean Water Act, the Endangered Species Act, and the National Historic Preservation Act. As part of that effort, the Forest Service asked the National Forest Foundation to assist in hosting ten regional partner roundtables across the country with the objective of collecting diverse feedback to inform ways to improve decisionmaking processes. During the roundtables, concern over litigation aversion featured prominently in every region.[27] According to participants in the roundtables, Forest Service staff avoid making controversial decisions for fear of affecting opportunities for promotion.[28] A controversial decision may sit on the back of someone's desk until that person is promoted or sent on detail, leaving someone else to bear the political or professional backlash of signing a decision that gets litigated. Additionally, litigation aversion leads to unwieldy, bulky, time-consuming documents. Participants in the roundtables explained, "Risk aversion and a history of legal challenges to USFS decisions have led to the 'bullet-proofing of environmental analysis documents and specialist reports" resulting in documents where "the complexity and size of

[24] Pleune & Boling, *This Permit Reform Already Works supra* note 5 at 1046-1047.
[25] Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 337-338.
[26] https://www.nationalforests.org/collaboration-resources/environmental-analysis-and-decision-making-roundtables.
[27] Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 330.
[28] *Id*. at 331.

analysis is often inconsistent with the complexity and size of the project."[29] These observations are consistent with external research on Forest Service NEPA practice, which found that the threat of litigation had more influence on the decision to prepare an EIS or an EA than the degree of environmental impacts.[30] Practitioners also recognize the problem. As one observed, "[i]t has been the author's frequent experience that BLM and Forest Service delay decision-making in order to prepare more and lengthier documents in an effort to bulletproof their decisions from appeal. As a result, the diversion of agency resources and attention to the preparation of up-front disclosures under NEPA means less attention and resources are devoted to on the ground efforts such as monitoring the effects of agency decisions."[31] Helen Leanne Serassio, a lawyer with more than fourteen years in the Department of Transportation, suggested that "the most effective action agencies can take to increase efficiencies in the NEPA review process is to get back to the basics with NEPA and halt efforts to make NEPA documents litigation-proof."[32]

Litigation aversion, which is a cultural problem that affects an untold number of decisions, is different from delays caused by actual litigation. Government-wide, only about two-tenths of one percent of more than 50,000 NEPA decisions that are documented each year result in litigation.[33] An investigation by the GAO regarding Forest Service fuel reduction projects from fiscal years 2006-2008 revealed that only 29 out of 1,415 decisions were litigated and the litigation impacted only 1% of lands slated for fuel reduction projects.[34] In summary, the fear of litigation appears to create far more delay than litigation itself.

9. How can litigation reform reduce delays caused by litigation aversion by agency staff?

According to participants in the EADM roundtable discussions, Forest Service staff fear that their opportunities for promotion will be reduced if they sign a NEPA decision that is litigated.[35] Assuming the accuracy of these reports, the best way to reduce delays caused by litigation aversion is to reward agency officials who make prompt, well-supported decisions, regardless of whether the decision is litigated. This shift in focus would enable agencies like the Forest Service to encourage field officers to act decisively and exercise discretion to focus the NEPA analysis on significant issues identified during the scoping process.[36] As Helen Leanne Serassio observed, "Agencies must recognize and use their discretion to determine the necessary length of their NEPA documents, the methodologies to use, and the depth of the analysis necessary to make an

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[29] *Id*. (quoting Michael J. Mortimer et al., *Environmental and Social Risks : Defensive National Environmental Policy Act in the US Forest Service*, 109 J. Forestry 27, 29-30 (2011).
[30] *Id*.
[31] *Id*. at 332 (quoting Laura Lindley, *NEPA Streamlining: Some Observations on Its Use in the Context of BLM and Forest Service Oil and Gas Program, in* Rocky Mt. Min. L. Found, Natural Resources and Environmental Administrative Land and Procedure II (2004).
[32] Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 Tex. Envtl. L.J. 317, 333 (2015).
[33] *Id*. at 333-334.
[34] Gov. Accountability Off., GAO-10-337, Forest Service: Information on Appeals, Objections, and Litigation Involving Fuel Reduction Activities, Fiscal Year 2006 through 2008 1 (2010).
[35] Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 330.
[36] *Id*. at 342.

informed decision. . . . If the agency's decision is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' it will withstand judicial review."[37] It is also worth noting that the NEPA process itself can help an agency avoid litigation by addressing stakeholder concerns through impact avoidance, reduction or mitigation.[38] It can also help ensure that a contentious agency decision is defensible. Through NEPA's public participation procedures, the agency has an early opportunity to identify issues that may be litigated and justify its decisions regarding those issues. "Courts do not typically overturn NEPA decisions when the administrative record demonstrates that the agency has followed NEPA's procedural steps, when there are minor deficiencies in the NEPA document, or when an agency documents why it has chosen to exclude information."[39] Without the public participation process afforded through NEPA, an agency may not understand the weaknesses in its decision until it is too late. Finally, eliminating a cause of action under NEPA will not protect a weak or unjustified agency decision from litigation. A study analyzing twenty years of Forest Service land management litigation recognized that most lawsuits involve multiple claims arising under different statutes.[40] In cases involving multiple statutes, the majority of the time, the Forest Service would have lost even if NEPA did not exist.[41] The importance of this observation comes into sharper focus when one considers the proliferation of local, regional, and state regulations that can also provide a cause of action to challenge a controversial action.

10. Yes or no—do you agree that the Biden Administration push to electric vehicles, and other so-called "clean energy" technologies, will require an increase in mineral production, i.e. mining?

Yes. According to the Biden Administration's Report, Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth, demand for critical minerals and materials "is projected to surge over the next two decades, particularly as the world moves to eliminate net carbon emissions by 2050."[42] The report provided the following examples, "global demand for lithium and graphite, two of the most important materials for electric vehicle batteries, is estimated to grow by more than 4000 percent by 2040 in a scenario where the world achieves its climate goals."

11. Yes or no—Do you agree that the United States is currently reliant on foreign countries for critical minerals needed to transition to electric vehicles?

Yes. According to the Biden Administration's Report, Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth, "Global production

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[37] Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 Tex. Envtl. L.J. 317, 334 & 335-341 (2015).
[38] *Id*. at 340-341.
[39] *Id*. at 335; Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 342-343.
[40] Amanda M.A. Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112 J. Forestry 32, 36 (2014).
[41] *Id*.; Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation supra* note 1 at 319.
[42] The White House, Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews Under Executive Order 14017, 9 (June 2021).

for lithium, cobalt, and graphite are primarily dependent on a single nation . . . for each of these materials, a single country controls over 60 percent of the global production."[43]

12. **Yes or No—Are there steps we can take to mine and process more critical minerals in America?**

Yes. On May 10, 2023, the Biden Administration identified several steps "to expand and accelerate responsible domestic production of critical minerals in a manner that upholds strong environmental, labor, safety, Tribal consultation, and community engagement standards."[44] Promising reforms include updating the General Mining Law and providing legal clarification for laws affecting re-mining and remediation projects. These are two examples of arenas where legal ambiguities caused by complexities in the law create delay.[45]

13. **Yes or no—the main producers of critical minerals—such as China, Congo, and Indonesia—don't have nearly the same environmental standards on mining as the United States, correct?**

I am not an expert on international environmental law. Based on my limited knowledge, it appears that China, Congo, and Indonesia have lower environmental standards. Other main producers, including Canada and Australia, appear to have comparable environmental regulatory regimes.

14. **Yes or no—the main producers of critical minerals—such as China, Congo, and Indonesia—do not have as many protections for human rights or labor as the United States, correct?**

I am not an expert in international human rights or labor practices. Based on my limited knowledge, it appears that China, Congo, and Indonesia have fewer human rights protections. Other main producers, including Canada and Australia, appear to have comparable human rights and labor regimes.

Questions from Rep. Raúl Grijalva:

1. **Republicans are demanding 22% across-the-board cuts to annual appropriations. How would cuts like those affect the speed of permit processing, which they claim they are trying to improve?**

Common causes of delay in the permitting process can be summarised into three categories: (1) a lack of agency capacity, which includes insufficient allocation of resources (e.g., number of staff, staff expertise, funding, infrastructure, training, and or computer technology); (2) waiting for

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[43] *Id*. at 120.

[44] White House, Fact Sheet: Biden-Harris Administration Outlines Priorities for Building America's Energy Infrastructure Faster, Safer, and Cleaner (May 10, 2023) https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/10/fact-sheet-biden-harris-administration-outlines-priorities-for-building-americas-energy-infrastructure-faster-safer-and-cleaner/.

[45] Pleune, *Playing the Long Game supra* note 12 at 10901-10905.

information from an applicant, particularly following a permit application that was vague or incomplete, or following a change to a proposed plan; (3) compliance with other legal requirements and/or ineffective agency coordination or collaboration during the permitting process.[46] Notably, these three categories are not independent. The first category—agency capacity—affects the other two. Without sufficient staff or expertise, an agency cannot provide support or training to assist operators in submitting complete applications with the required information. It is also unlikely that they will effectively engage in proactive coordination. Thus, a lack of agency capacity exacerbates the other two causes of delay.

2. **What impact does Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All, have on energy independence?**

Executive Order 14096 reduces the risk that we will repeat mistakes of the past by failing to account for the disproportionate impacts that often fall to minority, underrepresented, and socially or economically deprived communities.

3. **Would extending or even expanding the use of fossil fuels make us more competitive or less competitive when compared to countries that are racing toward a renewable energy economy?**

This is outside my area of expertise.

4. **Would extending or even expanding the use of fossil fuels increase our national security or weaken it?**

According to the Secretary of Defense, "No country can find lasting security without tackling the climate crisis."[47] Expanding the use of fossil fuels will exacerbate the climate crisis and consequently weaken our national security.

5. **What is the connection between NEPA and energy independence?**

One way to achieve energy independence is transitioning to a renewable energy economy, which means building massive infrastructure. It also will require cooperation between agencies with different jurisdictional duties, states, local communities, and tribes. Without a framework for coordinating analysis, considering stakeholder input, identifying potential hazards, and avoiding, reducing, or mitigating those impacts, this build out of infrastructure would be practically impossible. One barrier to the deployment of renewable energy projects is opposition from affected landowners due to real or perceived harms that the project would bring, and inconsistency between local, state, tribal, and federal laws.[48] A research team from MIT concluded "incorporating all stakeholder perspectives from the outset of a siting process will probably save time and money" by addressing concerns early and avoiding sustained political

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[46] Pleune, *Playing the Long Game supra* note 12 at 10475.

[47] Department of Defense, Office of the Undersecretary of Defense (Acquisition and Sustainment), Department of Defense Climate Adaptation Plan 2022 Progress Report. Report Submitted to National Climate Task Force and Federal Chief Sustainability Officer (Oct. 2022).

[48] Lawrence Susskind et al., *Sources of Opposition to Renewable Energy Projects in the United States*, 165 Energy Policy 112922 (2022).

opposition. The NEPA process is a familiar tool that can be used to engage stakeholders early and streamline renewable energy deployment. The NEPA process also serves as a tool for decisionmakers to defend justified decisions. It offers a public process for deliberation. It helps decisionmakers identify issues of concern. It provides a forum to justify use of agency discretion. It provides a preview potential sources of conflict and a mechanism for avoiding, reducing, or mitigating impacts. And it helps agencies understand legal vulnerabilities of a decision before it's made.

6. What would weakening NEPA mean for frontline communities, communities that have historically borne a disproportionate burden of environmental harms?

Weakening NEPA would harm these communities. NEPA's "look before you leap" mandate requires agencies to disclose environmental impacts, weigh alternatives, and consider public comment before committing public resources to a course of action. [49] Looking to the past is highly relevant to the future. Prior to NEPA's enactment, agencies were free to implement decisions without regard to the collateral damage on communities or natural resources. For example, the Federal Highway Act of 1956 initiated construction of the interstate highway system.[50] Focused on speedy implementation, the Department of Transportation routed highways through low cost, low opposition lands, which tended to be parks, historic sites, recreation areas, and working class or low-income neighborhoods. As a result, low-income communities were disproportionately harmed during the build out of the interstate highway system. One example is a segment of I-95 that cut through an innercity community outside of Miami, Florida. Overtown, known at the time as the "Harlem of the South," was a thriving black community. The selected route for I-95 cut straight through the community, even though a less destructive route along a nearby abandoned railroad corridor was available.[51] In a 2009 report, the Federal Highway Administration acknowledged that the selected route "had a disastrous impact on the economic and social structure of the community" with lingering effects that to this day fuel anger, resentment, and distrust toward the Department of Transportation.[52] Many other communities suffered similar fates due to one-sided planning focused on finding the cheapest route, without regard to the collateral impacts. As one group of scholars described, "Take any major American city, and you're likely to find a historically Black neighborhood demolished, gashed in two, or

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[49] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's 'action-forcing purpose in two important respects. It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." (internal citations and quotations omitted)); *Baltimore Gas & Elec. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) ("NEPA has twin aims. First it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." (internal citations and quotations omitted)).

[50] LINDA LUTHER, CONG. RES. SERV., THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES 6-7 (Apr. 2012).

[51] Hillary Simmons, *The Heart of "Harlem of the South*, The Beacon (Dec. 28, 2020) *available at* https://mastthebeacon.wordpress.com/2020/12/28/the-heart-of-harlem-of-the-south/ (last visited May 17, 2023).

[52] LINDA LUTHER, CONG. RES. SERV., THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES 6-7 (Apr. 2012).

cut off from the rest of the city by a highway." [53] The disclosure requirements imposed through NEPA were intended to avoid similar ill-advised and harmful uses of federal power and funding. As the nation considers how to build a new interstate energy infrastructure system, the lessons of the past should serve as a cautionary tale.

7. **Under the Trump Administration, the Bureau of Land Management lost significant numbers of experienced staff when they tried to move the agency's headquarters out of D.C. While the Biden Administration has taken important steps to address the bureau's workforce challenges. Based on your research, would you please explain the expected impact of the Trump BLM relocation on permitting times, and why it is important to provide sufficient and stable funding.**

The Bureau of Land Management is one of several agencies that suffered extreme losses of staff under the prior administration.[54] Since 2011, it has been on the GAO's list of programs at high risk and vulnerable to waste, fraud and abuse due in part to a lack of staff. This problem was further exacerbated in July 2020, when the Trump Administration abruptly decided relocate BLM's headquarters from Washington D.C. to Grand Junction, Colorado. The Headquarters Office, which develops guidance and regulations, should be staffed by 311 career positions. However, it was already severely understaffed with 132 vacant positions before the relocation announcement. In response to the relocation announcement, 81 more staff left, leaving the leadership at 31 percent capacity. The remaining leadership team were dispersed among multiple offices.

Numbers do not tell the whole story. The BLM also suffered a loss of experienced staff. Every BLM staff member interviewed reported that the loss of experienced staff negatively affected their offices' ability to conduct its duties. For example, the loss of institutional knowledge about laws and regulations meant that the BLM could not provide knowledgeable input on proposed rules and legislation. Other staff admitted that the rapid loss of experienced staff hindered knowledge transfer. In a follow-up report, a year later, all BLM staff interviewed by the GAO reported challenges in completing their duties due to headquarters vacancies. As a result of delays in creating or clarifying guidance or policies, some staff relied on outdated policy guidance to make decisions. Other staff reported delays implementing upgrades to information technology systems, which GAO had previously recommended be updated. Obviously these institutional challenges would affect permitting times. Applicants could not receive good guidance from experienced staff, and staff members processing permits had little instruction on how to proceed effectively. The BLM is not alone. Multiple agencies with permitting or infrastructure responsibilities, are short-staffed and underfunded.

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[53] Rachael Dottle, Laura Bliss, and Pablo Robles, *What It Looks Like to Reconnect Black Communities Torn Apart by Highways*, Bloomberg (July 28, 2021).

[54] Pleune & Boling, *This Permit Reform Works supra* note 5 at 10476; *see also* GOV'T ACCOUNTABILITY OFF., GAO-20-379R, BUREAU OF LAND MANAGEMENT: AGENCY REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS (Mar. 6, 2020) and GOV'T ACCOUNTABILITY OFF., GAO-22-104247, BLM, BETTER WORKFORCE PLANNING AND DATA WOULD HELP MITIGATE THE EFFECTS OF RECENT STAFF VACANCIES (Nov. 2021).

When the GAO investigated the BLM's workforce planning in 2020, it found that the BLM had no way of tracking vacancies and no recruitment plan for filling vacancies.[55] When asking for data on the total number of positions and vacancies agency wide, the GAO was told that BLM does not maintain a list of vacancies for state offices. As a result, it was not possible to determine the proportion of positions that are vacant at any given time or the specific positions that are vacant. This lack of information obviously creates a problem for improving capacity in a way that results in improved efficiency.

In order to resolve workforce challenges, agencies require stable funding that will enable strategic workforce development. Additionally, agencies must be confident that the funding will not disappear. Unstable budgets do not build durable workforces. Shortchanging agencies of staff and funding will cause delays in the permitting process.

8. You've talked about the importance of staff but have emphasized that certain staff attributes are important as well. What do we need to see in those staff, and how can we make that happen?

Strategic workforce planning is critical to ensuring that agencies spend wisely and build a workforce capable of fulfilling agency missions. The Army Corps of Engineers developed a comprehensive strategic workforce plan in 2017 that demonstrates how this type of planning can achieve long-term efficiencies at all levels of agency operations.[56] The Corps developed planning strategies to align human capital with changing workloads and missions using real-time workforce data for decision-making.[57] For example, they initiated a Workload to Workforce Assessment, which is an annual planning activity conducted by workforce managers agency-wide to assess the capacity, competency, and balance of the workforce to meet the projected workload in the next 1 to 3 years.[58] Based on the results, managers prepare action plans to address any potential workforce capacity, competency, or balance gaps. They also created Civilian Workforce Dashboards, which are an interactive online display that provide workforce managers at all levels of the organization with direct access to the most current human capital information for planning purposes.

The Corps also created a strategy to address all four stages of the human capital lifecycle. The recruiting stage involves sourcing and acquiring top talent to accomplish current and future missions, shaping the workforce to meet mission needs, and marketing missions to attract the workforce of the future.[59] The Corps human resources managers created a talent acquisition team to support the recruitment program. They also utilized tools to attract talent including direct-hire authorities. Use of direct hire authorities reduced vacancy fill time and allowed managers to quickly hire top talent.[60] Additional tools included policy guidance for managers to offer

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[55] GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF LAND MANAGEMENT: AGENCY REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS GAO-20-379R, 10 (Mar. 6, 2020).
[56] Government Accountability Office, Army Corps of Engineers: Workforce Planning Follows Most Leading Practices but Could Be Enhanced with Additional Actions GAO-22-104053 (Dec. 2021).
[57] *Id*. at 9.
[58] *Id*. at 10.
[59] *Id*. at 11.
[60] *Id*. at 12.

monetary and non-monetary incentives as tools to attrack and retain personnel. Incentives include student loan repayment; recruitment, relocation, retention, and enhanced retention incentives; credit for prior non-federal work experience and certain military experience for determining annual leave accrual rate; and superior qualifications appointment and special needs pay-setting authority.[61]

The second stage of the workforce lifecycle is the developing stage, which focuses on ensuring a culture of continuous skill improvement throughout the organization and fostering technical and leader development.[62] To address career development challenges, the Corps provides career specific training, development, and mentoring activities to its workforce. This includes job-related training, an Emerging Leaders Program, and a Senior Leader Academy.[63] In addition to training new staff, the mentoring and leadership training programs have the added benefit of preserving and passing along institutional knowledge within the agency.

The final stage is the sustaining, or retention stage, which focuses on preventing critical talent loss and improving organizational performance by valuing and engaging employees at all levels. Some strategies utilized at this stage include an online exit survey tool for departing employees to capture the underlying causes of talent loss. Some offices also implemented a "stay survey" to measure employee engagement during their tenure as a proactive alternative to surveying staff that are leaving. The Corps also utilizes the annual Federal Employee Viewpoint Survey as a tool to make improvements. The Federal Employee Viewpoint Survey is an existing tool with valuable information about workforce problems. The Corp directs managers at all levels to analyze the annual survey results for their workforce and develop action plans to address areas of concerns. Since adopting this strategy, survey response rates and scores have steadily risen. For example, employees satisfied with the organization rose from 55 percent in 2013 to 71 percent in 2019.

Using these strategies, the Corps has been able to determine critical skills and competencies needed, and align its workforce to those needs. One strategy is through employee performance reviews. The missions of the Army and the Corps are incorporated into each employee's performance plan and evaluation. Employee progress reviews link back to the mission and goals of the organization. Managers provide feedback and recommend training to assist the employee in reaching individual goals.[64]

Another strategy is agency-wide Workload to Workforce Assessments, which assess the status of the workforce—such as vacancy fill rates—to forecast the ability to meet the future workload and the type and experience level of employees that will be needed.[65] Use of the Federal Employee Viewpoint Surveys provide further insight into areas for improvement in employee engagement and working groups focus on ways to use the information to make the Corps a better

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[61] *Id*. at 13.
[62] *Id.*
[63] *Id*. at 14-15.
[64] *Id*. at 31.
[65] *Id*. at 31.

place to work. Finally, the Corps utilizes ongoing real-time data to evaluate the effectiveness of these strategies.[66]

In summary, each agency will have different staffing needs. Strategic workforce planning is an existing tool that agencies can use to ensure sufficient staff, expertise, and capacity to achieve the agency's mission.

9. What is the biggest barrier to renewable energy transmission projects, and what is the evidence for that conclusion?

A recent study by the Lawrence Berkeley National Laboratory found that there are over 2,000 GW of total generation and storage capacity waiting for approval to connect to the grid, 95 percent of which are solar, wind, or battery storage.[67] However, these projects face long wait times and uncertainty when attempting to connect to the grid. Between 2000-2007, the time between an initial connection request and a fully built, operational plant was typically less than two years. Between 2018-2022, that timeframe doubled to an average of almost 4 years, with an increasing trend. By 2022, the median between an interconnection request to commercial operations date reached almost 5 years. This is a major barrier to energy transmission. Additional hurdles include siting challenges, and cost-benefit allocation for transmission lines that pass through communities without offering a benefit.

10. My friends on the other side of the aisle have claimed that litigation slows energy projects. What effect does NEPA have on litigation of major energy projects?

The NEPA process creates an opportunity to discover and mitigate concerns with a proposed project before finalizing an action, which can often avoid litigation that could delay implementation of an action.[68] The NEPA process can also reduce costs by identifying design problems before implementation of a project begins. A study prepared for the Transportation Research Board emphasized this potential benefit. "Spending more monies during planning and design will reduce the time and cost required for construction by avoiding unforeseen conditions, reducing to a minimum design errors and omissions, and developing schemes that will support the most efficient approach to construction."[69]

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[66] *Id*. at 33.

[67] Berkeley Lab, Energy Technologies Area, *Grid Connection Requests grow by 40% in 2022 As Clean Energy Surges, Despite Backlogs and Uncertainty* (Apr. 6, 2023) https://energy.lbl.gov/news/grid-connection-requests-grow-40-2022

[68] *Id*. at 340-341; Pleune, *Playing the Long Game*, 52 Env. L. Rep. at 10905-10904 ("without providing an opportunity to raise concerns during the [NEPA] scoping process, stakeholders may raise concerns late in the process or through litigation . . . [and] some of those concerns may require collecting additional baseline data that may have been easily collected at the beginning of the permitting process").

[69] Linda Luther, Cong. Res. Serv. R.42479, The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress 36 (Apr. 2012) (citing H.R. Thomas and R.D. Ellis, *Avoiding Delays During the Construction Phase of Highway Projects,* Transportation Research Board, National Research Council, NCHRP 20-24 (Oct. 2001).

For example, the NEXUS Gas Transmission Project, was a 250-mile natural gas pipeline traversing Pennsylvania, West Virginia, Ohio, and Michigan.[70] During the pre-application process, which included extensive public participation, the project sponsors incorporated 239 route alternatives and variations in the pipeline design to address landowner requests, avoid sensitive resources, or respond to engineering restraints. This feedback resulted in a 91 percent change from the original proposed route design—a number of modifications that would have been prohibitively expensive at the end of the review process. Using this information at the beginning of the process improved efficiency and arguably resulted in a better end-result and a final application that was processed more expeditiously.[71] Similar efficiencies could be achieved with other major energy projects.

The NEPA process can also provide a mechanism to build consensus, which can reduce the risk of litigation. For example, in 2012, the Forest Service completed the 4FRI EIS. The project goal was to restore the ponderosa pine forest stretching across northern Arizona, while reducing communities' exposure to wildfire threats, rehabilitating ecosystems, and sustaining the forest industry operating in local communities.[72] The EIS analyzed the largest number of acres in Forest Service history, stretching across four different national forests, for restoration-based mechanical forest treatments. Despite its ambitious scale, the EIS was completed more quickly than the average timeframe for EISs completed that year, and when it came time for implementation, the Forest Service was not delayed by litigation. Using the NEPA process as an opportunity for collaborative decisionmaking developed consensus among diverse stakeholders that had long-term benefits and ultimately sped up implementation of the project.

This brings up another important distinction. Although NEPA's detractors often blame litigation for delay, the evidence shows that litigation is rare. Government-wide, only an estimated 0.22% of NEPA decisions are litigated.[73] An investigation by the Government Accountability Office regarding Forest Service fuel reduction projects from fiscal years 2006-2008 revealed that only 29 out of 1,415 decisions were litigated, and litigation impacted only 1% of lands slated for fuel

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[70] OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR PROJECT REVIEW AND PERMITTING FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2018, at 17 (2017).

[71] This is not to say that early engagement eliminated local opposition in every community. *See* Heidi Gorovitz Robertson, *Home Rule Symposium: Cities and Citizens Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions*, 122 W. VA. L. REV. 881, 907-934 (Spring 2020) [*hereinafter* Gorovitz, *Cities and Towns Seethe*] (describing FERC's extensive public engagement and local opposition in three Ohio towns).

[72] *Ruple et al.*, *Evidence-Based Recommendations for Improving Implementation of NEPA supra* note 20 at 338.

[73] John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 Envtl. L. 479, 497-99 (2020); David Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 3, 7 (2018) (conducting an empirical study of NEPA litigation during the presidencies of George W. Bush and Barack Obama and observing, "[w]e find little evidence that litigation under NEPA is out of control or that NEPA's processes are overly burdensome"); John C. Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 Nat. Res. & Env't 14, 15 (2020); Forrest Fleischman et al., *U.S. Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining*, 118 J. Forestry 403, 404 (2020).

reduction projects.[74] In other words, used properly, the NEPA process is more likely to avoid potential litigation than cause it. Proposed reforms like short deadlines and page limits threaten to undermine NEPA's capacity to serve as a flexible tool for structured and transparent deliberation.

[74] Gov't Accountability Off., GAO 10-227, Forest Service, Information on Appeals, Objections, and Litigation Involving Fuel Reduction Activities, Fiscal Years 2006 through 2008 1 (2010).