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RE: Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154, June 29, 2021, [Docket No. CEQ-2021-0001]

Ms. Coyle:

Please see the below comments from the America First Policy Institute and the Life:Powered project Re: Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures, Docket No. CEQ–2021–0001. Thank you for the opportunity to comment.

I. INTRODUCTION

In an effort to nullify a valid regulation without proceeding through the appropriate notice and comment process, the Council on Environmental Quality (CEQ) has taken an action with potential procedural and substantive legal defects that will thwart the implementation of a major reform action that CEQ took only 1 year ago. On June 29, 2021, CEQ published an "interim final rule" in the Federal Register (the Delay Rule). The Delay Rule extends by 2 years (from September 2021 to September 2023), a deadline in CEQ's 2020 Reform Rule. The deadline is for agencies to propose new regulations to implement reforms to their functions under the National Environmental Policy Act (NEPA) to correspond to the reforms made by CEQ in the Reform Rule. In using the "interim final rule" mechanism, CEQ did not provide the public with notice or an opportunity to comment before it extended this deadline. In the same notice announcing the extension, however, it also solicited comment from the public after the fact. It appears this deadline delay is simply an attempt to gut the implementation of the Reform Rule, buying CEQ time to change it through a forthcoming new rulemaking process while in the meantime preventing the Reform Rule's reforms from fully taking place. By eliminating the need for the various federal agencies promptly to conform to the Reform rule, CEQ is depriving Americans of the benefit of these crucial reform regulations without engaging in notice and comment before doing so and without providing a reasoned basis for doing so.

The Biden Administration is free to put its own gloss on the regulations implementing NEPA. To do so, it can attempt to revise or repeal the existing Reform Rule. But any Administration must observe the legal requirements for doing so, it must give adequate explanations for doing so, and while that Rule remains on the books, it must abide by it.

CEQ has delayed by 2 years a deadline for a key step in implementing the Rule's reforms. The NEPA Reform Rule's 1-year deadline for agencies to begin their part in the reform process was adopted through full notice-and-comment rulemaking procedures, with ample opportunity for public input and policy deliberation. The Biden Administration's Delay Rule kicks this deadline out another 2 years, without notice or comment, and with no valid reason given.

The Delay Rule harms the people of the United States by depriving them of needed infrastructure reforms and erodes the rule of law by altering a duly promulgated regulation in an arbitrary and capricious manner and without observing procedures required by law. CEQ must reverse course, abandon its illegal Delay Rule, and in the future only pursue whatever policy changes it may wish through the appropriate and required procedures. Until and unless CEQ alters the Reform Rule through proceedings that are both rationally grounded and legally compliant, it and the Administration as a whole must abide by that Rule and its binding and badly needed reform provisions and procedures.

Section II of these comments explains who we, the commenters, are and our interest in NEPA reform. Section III provides background concerning the Reform and Delay Rules and the policy problems that the Reform Rule addressed. Section IV analyzes the Delay Rule's deficiencies, both (A) procedural (failure to take notice and comment before acting) and (B) (arbitrary and capricious).

II. AFPI AND LIFE:POWERED

The America First Policy Institute (AFPI) is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.

One of AFPI's core priorities is ensuring that America is a nation that can build and prosper. That's AFPI's public policy interest in CEQ's 2020 NEPA Reform Rule, which is instrumental to a prosperous America. These comments explain why that Rule's reforms are needed and why CEQ's "interim final rule" delaying a key part of the Reform Rule is problematic as a matter of law and policy. AFPI supports the implementation of the Reform Rule as it was originally issued, including its carefully chosen 12-month deadline for other agencies to propose their corresponding reforms.

The Life:Powered project is a national initiative of the Texas Public Policy Foundation, a 501(c)(3) non-profit and non-partisan research institute, to raise America's energy IQ. Our primary objective is to advocate for energy and environmental policies that promote economic freedom and advance the human condition.

The growing abuse of NEPA to arbitrarily restrict infrastructure development and promote anti-growth agendas is why the 2020 NEPA Reform Rule was a significant advance in this policy arena. Environmental laws should exist to serve humanity, not the other way around. Delaying the implementation of the Reform Rule will delay the benefits the rule can provide while serving no objective other than giving the new administration time to figure out how to change it. This delay is illegal as implemented because it is arbitrary and capricious, and procedurally deficient, and it should not stand.

III. Background: 2020 Reform Rule and 2021 Delay Rule

A. 2020 Reform Rule Background

NEPA of 1969, 42 U.S.C. § 4342 *et seq.*, requires federal agencies to consider whether their major actions will have significant environmental impacts. If they will, the agency must conduct a study of those impacts. As CEQ observed in proposing and finalizing the Reform Rule, over the half-century since NEPA was enacted, and the more than 40 years since CEQ first issued implementing regulations, "the NEPA process has become increasingly complicated and can involve excessive paperwork and lengthy delays." 85 Fed. Reg. 43,304, 43,305/2 (July 16, 2020) (final Reform Rule); *see also id.* at 43,305/2-3; 85 Fed. Reg. 1,684, 1,687/3 (Jan. 10, 2020) (proposed Reform Rule) ("[T]he process for preparing [Environmental Impact Statements] is taking much longer than CEQ advised, and . . . the documents are far longer than the [prior] CEQ regulations and guidance recommended.") (citing CEQ studies demonstrating that only a quarter of NEPA analyses take less than 2.2 years and 25 percent take more than 6 years, contrasted to CEQ's expectation in 1981 that even complex projects should not require more than 1 year for NEPA analysis).

In 2009, then-Vice President Biden visited a bridge in Middletown, Pennsylvania, for a groundbreaking ceremony to promote federal funding from the American Recovery and Reinvestment Act. He discovered that the bridge was not "shovel ready" due to issues with the permits. This problem of continuing delays for infrastructure projects would endure for another decade.

In the final Reform Rule, CEQ concluded that "[a]lthough other factors may contribute to project delays, the frequency and consistency of multi-year review processes [under NEPA] for projects across the Federal Government leaves no doubt that NEPA implementation and related litigation is a significant factor." 85 Fed Reg. at 43,305/3. CEQ noted that the average NEPA environmental analysis is now some 660 pages in length, with a 25 percent of analyses 748 pages or longer, contrasting this with CEQ's expectations in its original implementing regulations, which anticipated that the typical analysis would be 150 pages long. *Id.* at 43,305/3-43,306/1. CEQ diagnosed a key aspect of the problem: agencies over the decades had responded to litigation risk "by generating voluminous studies analyzing impacts and alternatives well beyond the point where useful information is being produced and utilized by decision makers." *Id.* at 43,305/3.

To address these issues, in 2020, CEQ proposed the first comprehensive update to its regulations implementing NEPA since those regulations were initially promulgated in 1978. CEQ received more than a million comments on its proposed regulations. Later in 2020, CEQ finalized the rule, incorporating the feedback from comments, and revised its implementing regulations to better implement NEPA, serve more faithfully the original purpose of the 1978 regulations, and bring increased rationality and reduce unnecessary complexity in the thicket of complications that had accrued over the decades. Among other reforms, the Reform Rule revised CEQ's NEPA implementing regulations to establish presumptive time and page limits to the review process, enhance interagency cooperation and avoid unneeded reduplication of effort, and set a 2-year goal for completion of environmental review. *See* 85 Fed. Reg. at 43,313/2 *et seq.* CEQ also eliminated from its regulations terms (such as "indirect" and "cumulative" effects) that do not appear in the NEPA statute and that CEQ determined had contributed to "confusion and unnecessary litigation," *see id.* at 43,343/2. Its policy goal was "to focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect." *Id.* at 43,343/3.

CEQ's regulations provide the framework for every other agency's own procedures to govern their implementation of NEPA. The Reform Rule included a requirement for each agency to "develop or revise, as necessary, proposed procedures to implement" CEQ's NEPA regulations, "including to eliminate any inconsistencies" therewith. 85 Fed. Reg. at 43,372/2 (codified at 40 CFR 1507.3(b)). The Reform Rule set a deadline for these proposals of September 14, 2021 (a year after the effective date of the Reform Rule), or 9 months after the creation of a new agency, whichever comes later. (These comments will refer to this as "the deadline" or "the 12-month deadline".)

Of the multiple legal challenges to the rule, the most significant was in the United States District Court for the Western District of Virginia. The Court denied the plaintiffs' motion for a preliminary injunction on September 11, 2020, and the Rule took effect three days later. On June 21, 2021, the court dismissed the suit for lack of jurisdiction. *Wild Virginia v. CEQ*, No. 20-45 (W.D. Va. filed July 29, 2020), ECF Nos. 92, 155.

B. Current Administration and 2021 Delay Rule Background

The Biden Administration has sent multiple signals that it does not support the Reform Rule and intends significantly to revise or repeal it. As the Delay Rule recites, a "White House Fact Sheet" officially issued on the Biden Administration's first day flagged the Reform Rule for review, *see* 86 Fed. Reg. at 34,155/2 & n.9. (Notably, the Biden transition had flagged the Reform Rule, among other actions, even before the Administration officially began.) In a declaration submitted to support its motion for remand of the Reform Rule without vacatur, CEQ told the district court that it "has substantial concerns" about the Reform Rule and its effects and that it "has commenced a comprehensive reconsideration" of the Rule. Declaration of Matthew Lee-Ashley, *Wild Virginia v. CEQ*, No. 20-45 (W.D. Va. filed Mar. 17, 2021), ECF No. 145-1, at 3, 5.

On April 16, 2021, Interior Secretary Deb Haaland issued Secretarial Order No. 3399, *Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process*, § 5(a) ("Bureaus/Offices will not apply the 2020 Rule in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020. . . . If Bureaus/Offices believe that the Department's NEPA regulations irreconcilably conflict with the 2020 Rule, they will elevate issues to the relevant Assistant Secretary and to CEQ."). This approach at Interior is directly contrary to that taken in the Reform Rule, which the Delay Rule did not alter: "Where existing agency NEPA procedures are inconsistent with the regulations in this subchapter, the regulations in this subchapter shall apply . . . unless there is a clear and fundamental conflict with the requirements of another statute." 40 CFR 1507.3(a). (Tellingly, avoiding or eliminating this type of confusion and conflict between CEQ's regulations and other agencies' was a key aim of the Reform Rule's inclusion of the requirement that other agencies revise their NEPA procedures.)

On June 11, 2021, the Biden Administration released its Spring 2021 Unified Regulatory Agenda. This projected three actions relevant to the Reform Rule: the Delay Rule (which would be issued at the end of that month); a "Phase I" rulemaking to propose "narrow" changes to the Reform Rule (proposal projected for July 2021); and a "Phase II" rulemaking to propose "broader" changes (proposal projected for November 2021).

On June 29, 2021, CEQ published an "interim final rule" in the *Federal Register*. *Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures*, 86 Fed. Reg. at 34,154 (June 29, 2021) (the Delay Rule). This action extended the deadline for agencies to propose NEPA reforms to implement NEPA and the Reform Rule from 12 months following the effectiveness of the Reform Rule (or September 14, 2021) to 3 years after that date (or September 14, 2023). *See id.* at 34,154/2, 34,158/2. The action was not preceded by public notice and opportunity for comment, although CEQ did solicit comment after the fact, *id.* at 34,154/2.

IV. Analysis of the Delay Rule

The Delay Rule does not even acknowledge the Reform Rule's primary motivation: to remove unneeded delays, complexities, and burdens associated with the NEPA process. The Delay Rule does not on its face depart from the Reform Rule's view of the world or from its reasoning for choosing a new policy approach to NEPA implementation. While the Delay Rule raises many doubts and concerns, it makes no definitive statements in this regard; it does not explain whether it disagrees with the Reform Rule's view that the pre-2020 NEPA process had become in many instances unduly complex and burdensome; it shows no substance of what CEQ's preferred alternative approach to NEPA implementation now is. All the Delay Rule does is delay the timeline under which the benefits of the Reform Rule would more fully flow to the American people through its implementation by other agencies.

As discussed below, CEQ's failure to conduct any substantive analysis specifically regarding the 12-month deadline is a major legal defect in the Delay Rule. But the Delay Rule's broader silence on the Reform Rule's policy goals illustrates how the Delay Rule replaces a carefully calibrated policy structure with one that only causes further delay and confusion. Under the Reform Rule, other agencies were required to propose their corresponding NEPA reforms no later than September 2021. CEQ selected this deadline, as discussed below in more detail, to balance avoiding disrupting and overburdening agency activities against the need to expeditiously achieve consistency in implementing NEPA reforms across the executive branch.

Now, with the deadline abruptly extended to September 2023 alongside indications that CEQ intends (unspecified) changes to the underlying Reform Rule, project proponents, and acting agencies are left uncertain as to what regulation or regulations govern and will govern review of key infrastructure projects and other major federal actions. This will deter American companies, American investors, and local American governments from planning, building, and repairing in this country. It will stifle American employment and hurt the competitiveness of American industry to the extent NEPA review is necessary before key authorizations or funding can issue. It leaves the Reform Rule's work unfinished, while CEQ "embarks on [a] multiyear voyage of discovery" in its intended attempts to revise that Rule. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014). And it does this without enunciating any clear policy reason for doing so, let alone for ignoring the policy problem that led to the Reform Rule in the first place.

As an initial matter, the Delay Rule does not cite any statutory authority. It implicitly depends on the same authority that CEQ used to issue the Reform Rule in the first instance, and it is bound by all the same procedural and substantive legal requirements. *See, e.g.*, *Clean Air Act Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017) ("Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the Administrative Procedure Act . . . .").

The Delay Rule violates the requirements of the Administrative Procedure Act (APA) in two main respects: (A) it was not preceded by public notice and solicitation of comment, and (B) it is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (D) (courts shall hold unlawful and set aside agency action that is arbitrary and capricious or "without observance of procedure required by law").

A. The Delay Rule Violates the APA's Notice and Comment Requirement

CEQ offers two justifications for not soliciting public comment before issuing the Delay Rule. *First*, CEQ claims the Delay Rule is exempt from the APA's and comment requirements because it is a rule "of agency organization, procedure, or practice," 86 Fed. Reg. at 34,156/1; *see* 5 U.S.C. § 553(b)(A). *Second*, in the alternative, CEQ purports to find "good cause" for issuing the Delay Rule without first taking comment, 86 Fed. Reg. at 34,156/2; *see* 5 U.S.C. § 553(b)(B). CEQ is wrong on both points.

(i) The Delay Rule Is Not Merely an Internal Rule

CEQ characterizes the Delay Rule and the underlying deadline in the Reform Rule that it extends as "procedural"; "purely procedural,"; of "no substantive effect,"; and "merely establish[ing] an internal deadline." 86 Fed. Reg. at 34,156/1-2. It is on this basis that CEQ asserts that "amending that deadline fits within the category of procedural rules exempted from notice-and-comment rulemaking." *Id.* at 34,156/2. CEQ's kaleidoscope of characterizations cannot obscure the fact that the Delay Rule is not subject to this exception from the notice and comment requirement. The Delay Rule (and the deadline it delays) does impact parties outside the federal government, and it disturbs a specific policy and value judgment that the Reform Rule made, and CEQ's invocation of this exemption is improper.

Without other agencies revising their NEPA regulations where necessary to ensure conformity with the Reform Rule and the underlying statute, outside parties who need a major federal action to undertake or carry out a project will be left in confusion as to what regulations will govern NEPA analysis in their situation—the Reform Rule? The other agency's regulations? This confusion is exacerbated by moves such as the Interior Secretary's Order discussed above. Such confusion is one reason why CEQ's Reform Rule required agencies to undertake revisions to their NEPA procedures and gave them a deadline to do so. Eliminating this confusion is necessary to realize the full benefits of the Reform Rule. Until such time as CEQ may depart from the Reform Rule in a legally sound way, it remains the binding policy of the federal government.

CEQ further asserts in this context that delaying the deadline "does not encode a substantive value judgment . . . but rather merely avoids . . . wasted resources," 86 Fed. Reg. at 34,156/1 (internal quotation marks and alteration omitted) (citing *Public Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002)). Not so. As discussed in more detail below in the *Fox* analysis, the Reform Rule selected a 12-month deadline through an express balancing of competing values, considering the burden on and disruption to agencies but also the need for consistency in the performance of their duties under NEPA. *See* 86 Fed. Reg. at 43,340/2 (final rule) ("a balance between minimizing the disruption to ongoing environmental reviews while also requiring agencies to revise their procedures in a timely manner to ensure future reviews are consistent with the final [Reform] rule."). That is CEQ exercising judgment, and it can't be separated from the policy choices and value judgments of the Reform Rule as a whole, of which this deadline was a functional part. The 12-month deadline is not a meaningless floating target with no real-world impact and no underlying policy choice. That is why CEQ must observe notice-and-comment requirements before altering it.

(ii) CEQ Has Not Shown "Good Cause" for Not Taking Comment Before Acting

Perhaps signaling a lack of faith in its argument that the Delay Rule is merely an internal procedural rule, CEQ makes a fallback argument: it claims to have had "good cause" to have forgone notice and comment before issuing this 2-year delay. 86 Fed. Reg. at 34,156/2. The APA provides that an agency may be exempt from notice and comment requirements if it "for good cause finds . . . that notice and

public procedure . . . are [1] impracticable, [2] unnecessary, or [3] contrary to the public interest." 5 U.S.C. § 553(b)(B). CEQ invokes all three prongs of this "good cause" exception. None of them apply here.

As a threshold matter, courts "have repeatedly made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). "The exception excuses notice and comment in emergency situations, or where delay could result in serious harm. . . . [T]he exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations . . . ."). *Id.* (second alteration in original) (internal quotation marks omitted) (citing *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004); *Am. Fed. of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). "Notice and comment can only be avoided in truly exceptional emergency situations, which notably, *cannot arise as a result of the agency's own delay*." *Washington Alliance of Technology Workers v. U.S. Dep't of Homeland Security*, 202 F. Supp. 3d 20, 26 (D.D.C. 2016) (emphasis added) (citing *Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983) ("[T]he imminence of the deadline permits an agency to avoid APA procedures only in exceptional circumstances. Otherwise, an agency could simply wait until the eve of an administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures. That is what happened in this case, and the agency's action, therefore, falls outside the scope of the good cause exception.") (internal quotation marks and alterations omitted). For the reasons discussed below, CEQ's invocation of "good cause" here is the paradigm of an "arbitrar[y] . . . whim." *Mack Trucks*, 682 F.3d at 93.

(a) CEQ Has Not Shown Complying with the Notice and Comment Requirement Would Have Been "Impracticable"

Turning to CEQ's invocation of the prongs of the "good cause" exception: *First*, CEQ claims that it would be "impracticable" to take comment before delaying the deadline. Specifically, CEQ argues that observing "an ordinary [i.e., the legally required] notice and comment process" to delay the deadline "is impracticable . . . because there is not enough time to conduct an adequate public comment process and complete the rulemaking before the September 14, 2021 deadline." 86 Fed. Reg. at 34,156/2-3. And *second*, CEQ argues as a fallback that, even if this were not so, agency revisions to their NEPA procedures "*may* be substantial and require significant lead time for agencies to complete before September 14, 2021"; because developing agency NEPA procedures "*typically* involves significant coordination." *Id.* at 34,156/3 (emphases added).

As an initial matter, CEQ provides only a conclusory assertion that "there is not enough time" between June 2021 (the date of the signature and publication of the Delay Rule, as discussed in more detail below) and September 2021 to follow the law. Without any explanation of why this is so, CEQ has not shown impracticability. But even accepting for the sake of argument that this is not enough time, CEQ simply cannot cite tight timing as "good cause" here because that situation "ar[ose] as a result of the agency's own delay." *Washington Alliance of Technology Workers*, 202 F. Supp. at 2016.

The latest date of the occurrences that CEQ cites in its explanation of why it is reviewing the Reform Rule is January 27, 2021, the date of Executive Order 14,008. *See* 86 Fed. Reg. at 34,155/2 (reciting fact and date of that Order); *id.* at 34,156/3 (stating that an earlier Executive Order, Number 13,990, was the instrument that "directed CEQ to commence a review of the [Reform] Rule"). CEQ describes President Biden's Executive Orders 13,990 and 14,008 collectively as having "initiated CEQ's comprehensive review of the [Reform] Rule," 86 Fed. Reg. at 34,156/2. But CEQ's Chair did not sign the Delay Rule until June 22, 2021, and it was not published in the *Federal Register* until June 29, 2021. *See* 86 Fed. Reg. 34,154, 34,158/2 (June 29, 2021). That is, CEQ waited *5 months* after beginning its review of the Reform Rule before delaying without prior comment a key feature of that Rule. CEQ does not provide any reason for this delay, nor does it assert that 8 months (between January and September) would have been insufficient time to obey the law. Any impracticability here is entirely of CEQ's own making, and as such, cannot constitute "good cause" to evade required notice and comment.

(b) CEQ Has Not Shown Complying with the Notice and Comment Requirement Was "Unnecessary"

CEQ argues that taking comments before delaying the deadline is "unnecessary" for three reasons: (1) doing so "will have no impact on the public"; (2) CEQ already took comment on the deadline in the notice-and-comment process that led to the Reform Rule; and (3) the Office of Management And Budget (OMB) has concluded that requiring agencies to report on their progress towards meeting the September 14, 2021 deadline "would be inconsistent with the [Biden] Administration's policies." 86 Fed. Reg. at 34,1563-34,157/1. Reason (1) is incorrect. Reason (2) actually highlights why the Delay Rule is illegal. Reason (3) is irrelevant.

First, in addition to the analysis above explaining why the Delay Rule is not merely internal in nature, it is not the case that the Delay Rule has "no impact on the public": it delays by years, tripling the length selected (through notice and comment) by the Reform Rule, the deadline for agencies beyond CEQ to begin to do their part in NEPA reforms. The Reform Rule affects what information a project proponent must provide a federal agency, what analysis the agency will perform, and how long the analysis will take before the project proponent receives a decision from the agency with respect to necessary permits, funding, and the like. CEQ determined through the Reform Rule rulemaking process that these NEPA reforms were appropriate and necessary. While CEQ is free to attempt to depart from that determination in a rational and procedurally compliant way, major changes to the implementation structure it established presumptively impact the public. It must only be carried out after notice and comment.

CEQ here cites *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012). But that opinion actually held that EPA *did not* have good cause to forego notice and comment, and it stresses that this prong of the "good cause" exception "is 'confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and the public.'" *Id.* (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.34d 749, 754 (D.C.

Cir. 2001). *Tripling* the length of a deadline is not "insignificant in nature" and indeed is not the sort of thing that CEQ or any other agency would do "routine[ly]."

Second, the Delay Rule rightly notes that "CEQ accepted public comment on this 12-month deadline before promulgating the [Reform] rule," 86 Fed. Reg. at 34,156/3. But that is all the more reason why it is improper for CEQ to alter that deadline without observing procedural rulemaking requirements. As explained below in the discussion of the *Fox v. FCC* standard, CEQ in the Reform Rule selected the deadline by balancing various policy considerations and after giving public notice and receiving comment. This was a substantive aspect of the Reform Rule. CEQ has now executed a significant change of this aspect, significantly departing from the outcome of the prior, comment-informed rulemaking process. The thorough consideration that CEQ gave this issue in the Reform Rule is yet another reason why further comment was required before taking that step. And the authority CEQ cites cannot help it, *see Priests for Life v. HHS*, 772 F.3d 229, 276 (D.C. Cir 2014). Not only was *Priests for Life* vacated by the Supreme Court, but it only upheld a failure to take comment before acting where "the modifications made in the interim final regulations [were] minor, meant only to augment current regulations in light of the Supreme Court's interim order in connection with an application for an injunction in [another case]." *Id.* (internal quotation marks omitted). Again, tripling the length of the deadline for a key element of the Reform Rule cannot fairly be characterized as "minor," nor did CEQ take this step to respond to an act of a coordinate branch of government.

Third, that OMB revoked a memorandum in which it had set deadlines for agencies to report to it on their progress towards meeting the Reform Rule's deadline has no bearing on whether CEQ needs to take comment before delaying that deadline. OMB is not the agency that oversees the executive branch's implementation of NEPA. OMB did not issue the Reform Rule. OMB's revocation memorandum says nothing of substance about the Reform Rule at all, let alone that Rule's proposal deadline. The revocation memorandum merely says that OMB's earlier memorandum "is *or may be* inconsistent with, or present obstacles to, the [Biden] Administration's policies." Shalanda D. Young, Acting Director, OMB, OMB Memorandum M-21-23: Revocation of OMB Memorandum M-21-01 (Apr. 26, 2021) (emphasis added). (Notably, CEQ's Delay Rule mischaracterizes OMB as affirmatively "hav[ing] *reached the conclusion* that [the prior memorandum] *would be* inconsistent with" those policies. 86 Fed. Reg. at 34,157/1 (emphases added).) Executive Orders cannot override regulations adopted through notice and comment; broad conclusory musing that those Orders *might* be in tension with regulations cannot obviate the need to take comment before changing them.

In a similar vein, the Delay Rule repeatedly notes that the Department of Transportation (DOT) was the only agency that had published its own proposed NEPA reforms prior to the beginning of the Biden Administration, 86 Fed. Reg. at 34,156/2-3; *see* 85 Fed. Reg. 74,640 (Nov. 23, 2020) (DOT proposal). Although the Delay Rule asserts that this "evidences the significant investment of time and resources required for agencies to develop proposed implementing procedures," *id.*, it is unclear how CEQ thinks that this justifies the Delay Rule as a policy matter, let alone

how it justifies revising the deadline without first taking comment. That one agency had beat the 12-month deadline by many months is not evidence that other agencies would fail to meet the deadline, let alone a refutation of the reasons given by CEQ in the Reform Rule for selecting that deadline in the first place, as discussed below. This is, at best, another *non sequitur*. If anything, it shows that CEQ acted wisely when the Reform Rule set a proposal deadline of September 2021 and illustrates the risk of confusion on the part of all stakeholders that could arise from CEQ interrupting the implementation process rather than allowing it to proceed as required by the Reform Rule.

(c) CEQ Has Not Shown Complying with the Notice and Comment Requirement Would Have Been "Contrary to the Public Interest"

CEQ asserts that "keeping the September 14, 2021 deadline without immediate action [i.e., without observing the legally required notice and comment process prior to taking final action] is contrary to the public interest." 86 Fed. Reg. at 34,156/3. CEQ's sole attempt to substantiate this assertion is to claim that observing notice and comment procedures before delaying the deadline "would result in Federal agencies' wasteful expenditure of their resources and personnel to develop proposed procedures to implement a rule that CEQ is reviewing and intends to revise." *Id.*

As an initial matter, CEQ acknowledges that this argument is entirely duplicative of its argument on the "impracticable" prong, *id.* ("*For this same reason* . . . [taking comment before acting] is contrary to the public interest . . . .") (emphasis added). But addressing this "public interest" assertion on its own terms, for the reasons explained both in the "impracticable" prong analysis above, as well as below in the section of these comments explaining why the Delay Rule is arbitrary and capricious, CEQ has not shown that it meets this prong of the APA's notice-and-comment exception. The proposition that delaying a rule is justified due to conclusory assertions of concern that compliance with that rule may be "wasteful" because the agency that issued the rule "is reviewing and intends to revise it" has been rejected by the overwhelming weight of judicial authority. *A fortiori*, such assertions of concern cannot possibly justify foregoing APA notice and comment requirements. Otherwise, any agency could justify delaying any date in any rule, *without taking comment beforehand*, merely by stating that it "intends" to change the rule. Nothing would be left of the notice and comment requirement.

This brief and conclusory assertion of the "public interest" is not an adequate engagement with that crucial concept. Rather, the public interest continues to lie where CEQ determined it lay when CEQ promulgated the Reform Rule in observance with applicable procedural requirements. That is, the public interest lies with other agencies proposing their NEPA reforms by September 14, 2021, a year after CEQ issued the Reform Rule.

Finally, that the United States Supreme Court has recently rejected a challenge to an agency's use of an interim final rule mechanism in another context does not immunize CEQ's Delay Rule. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), stands for the proposition that an

agency document styled as an "interim final rule" rather than a "proposal" may under some circumstances not be procedurally defective. But the Court noted in there that the rule in question "explained its position in fulsome detail," *id.* at 2385. As explained below, that is far from the case here. *Little Sisters* did not nullify the APA's notice and comment requirement. It did not give agencies *carte blanche* to shoot first and ask for comment later, and CEQ's attempt to do so here is lawless.

(B) The Delay Rule Is Arbitrary and Capricious

Even assuming for the sake of argument that CEQ had properly invoked an exemption that allowed it to avoid taking comment before issuing the Delay Rule, the Rule is not legal if it is arbitrary and capricious. It is just that. *Cf. Little Sisters*, 140 S. Ct. at 2398 & n.2 (Kagan, J., concurring) (agreeing with the Court on the procedural question but noting question, whether the rule was arbitrary and capricious, is "unaffected by" the Court's decision).

CEQ's justifications for delaying the deadline are sparse and vague. The agency says that it "has substantial concerns about the legality of the [Reform] Rule, the process that produced it, and whether [it] meets the nation's needs and priorities, including the priorities set forth in [Executive Order] 13990 and [Executive Order] 14008." 86 Fed. Reg. at 34,155/3. CEQ includes a conclusory list of headlines of these ostensible concerns: "confusion with respect to NEPA implementation"; "break from longstanding caselaw"; and that it "*may* have the have the purpose or effect of improperly limiting relevant NEPA analysis." *Id.* (emphasis added). CEQ also asserts without details that "[f]ederal agencies have raised concerns to CEQ about developing revised procedures" due to the Reform Rule's (unspecified) "inconsistency with" Executive Orders 13990 and 14008, as well as with CEQ's ongoing review of the Rule. On this basis, CEQ asserts that the deadline delay "will address these concerns and allow Federal agencies to avoid wasting resources developing procedures based upon regulations that CEQ *may* repeal or substantially amend." *Id.*

The dates contained within a rule are a substantive aspect of that rule; changing them is a rulemaking subject to the same procedural and substantive requirements that applied to the underlying rule, and it is not permissible for an agency to delay a rule's dates simply because it is contemplating revising or repealing the rule or because it articulates concerns about the rule's soundness (without actually changing the rule or departing from its findings through the required procedures). *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); *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1066-67 (D.C. Cir. 2018) ("EPA repeatedly justifies the 20-month delay as providing time for taking and considering public comment on the [underlying] Rule and any potential revisions or rescission thereof. . . . [But] the mere fact of reconsideration, alone, is not a sufficient basis to delay promulgated effective dates specifically chosen by [an agency] on the basis of public input and reasoned explanation . . . .").

The Delay Rule flies directly in the face of these legal restrictions. CEQ expressly justifies its chosen policy of delay based on the fact that it is taking another

look at the Reform Rule and *may* at some point revise it and by a conclusory recitation of *potential* flaws in the Reform Rule. These ostensible flaws *could*, if determined in a final manner by CEQ through the required procedures and with a properly articulated reasoned basis, potentially constitute a legally valid basis for altering the Reform Rule. CEQ is far from reaching that point, and courts have roundly and reliably rejected attempts such as this one to short-circuit the process.

CEQ's dilemma is quite simple. It has not begun the process of attempting a valid change to the Reform Rule. It has not validly departed from any of the policy views and provisions embodied in that Rule. It needs to buy time; it wants to halt implementation of the Reform Rule without having to provide the needed rationale and without having to observe the required procedures. But this is not an acceptable method of proceeding.

(i) The Delay Rule Violates the Standard Governing Changes in Agency Position

The Delay Rule's issues are compounded by its failure to meaningfully engage with the Reform Rule's establishment of the 12-month deadline. The governing standard applying the general arbitrary-and-capricious standard to cases where an agency changes position is well established: "As the Supreme Court has explained, an agency must change its policy position but must 'display awareness that it *is* changing position' and 'show that there are good reasons for the new policy.'" *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 539 (D.C. Cir. 2020) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). CEQ violated this standard in the Delay Rule.

The Reform Rule explains that its selection of a 12-month deadline for agencies to propose their own NEPA reforms "strikes a balance between minimizing the disruption to ongoing environmental reviews while also requiring agencies to revise their procedures in a timely manner to ensure future reviews are consistent with the final rule." 86 Fed. Reg. at 43,340/2 (final rule). And in the Response to Comments accompanying the final Reform Rule, CEQ addressed comments that argued 12 months was too short, as well as comments that argued that 12 months was too long. Among other things, CEQ here noted that the time frame provided was "comparable to the amount of time the 1978 regulations allowed in 40 CFR 1507.3 for agencies to adopt procedures"; determined that "[t]he final [Reform] rule contains critical improvements to the NEPA process, and each agency should expeditiously review and propose revisions to their procedures to eliminate inconsistencies in the implementation of the final [Reform] rule"; and expressed the expectations "that agencies will allocate the necessary resources to propose agency NEPA procedures or revisions, as necessary, before the applicable deadline in the final rule" and "that agency NEPA procedures will be tailored to the final [Reform] rule and specific agency programs and circumstances, and focused on adding efficiencies." CEQ, Final [Reform] Rule Response to Comments (June 30, 2020), at 440-42. In sum, when it crafted the Reform Rule and its 12-month deadline, CEQ engaged in careful analysis of that deadline, balanced multiple considerations, and explained to the public its final choice and the reasons for that choice.

The Delay Rule *does not even acknowledge* this prior analysis, let alone acknowledge that CEQ is changing course from that analysis or provide the public with any explanation for its selection of a new, 36-month deadline. *Cf. Air Alliance Houston*, 906 F.3d at 1067 ("[N]othing in the Delay Rule explains [the agency's] departure from its stated reasoning in setting the original effective date and compliance dates."). This is particularly glaring here because CEQ's "interim final" Delay Rule expresses concern that the burden on agencies in developing proposed rules "may be substantial and require significant lead time," 86 Fed. Reg. 34,156/3—an issue, as set forth above, that was expressly considered by CEQ when it set the 12-month deadline in the first place. Separate and apart from the other defects discussed in these comments, the Delay Rule's violation of the *Fox* standard is by itself a fatal legal flaw.

The contrast between the Delay Rule's unreasoned extension of the deadline on the one hand, and the Reform Rule's reasoned establishment of the deadline on the other, makes one aspect of the Delay Rule all the more obvious: Nowhere does it explain *why* it selects a new deadline of 36 months (rather than the original 12) from the Reform Rule's effective date. Even its after-the-fact solicitation of comment gives the public no reasoning on which to comment. This is a hole at the center of the Delay Rule, but the delay's real purpose is patently obvious behind the Rule's pretext. The Biden Administration has no intention of implementing the Reform Rule, and so it has simply pushed the deadline out to a point far enough in the future that it thinks it will by then be done with whatever revisions or repeal efforts it may attempt to effect. This cynical end-run around a duly promulgated and binding regulation cannot stand.