In Monday's post, I praised the CEQ's proposed new NEPA regulations. They should streamline the process without compromising protection of the environment or environmental justice. I do have some suggestions for improvement, however, which are detailed below.

Beyond my specific suggestions, I also hope that CEQ would view the new NEPA regulations as the beginning rather than the end of its efforts. Agencies have made their own attempts to streamline their processes, partly under statutory mandates applying to specific types of government projects. Agencies will also be experimenting with different ways to streamline other parts of their process. CEQ should develop guidance about best practices from those agency experiences, maybe teaming up with the Administrative Conference on the research.

One important question is whether the process of producing environmental reviews could be made more useful to agency decision making . Greater use of programmatic impact statements could be a useful tool for agencies to think more strategically about their programs. Ideally, the NEPA process could also serve as a hub for project decisions, coordinating application of other environmental statutes to a -project and helping to develop better project designs. In that way, agencies could use a streamlined NEPA process to help streamline the decision process as a whole.

With that, let me turn to a detailed list of suggestions about improvements in the proposed regulations. These suggestions do not call for dramatic changes. Agencies generally aren't supposed to make unexpected changes in regulations without providing additional opportunity for comment. For that reasons, any changes in the proposal would probably have to be incremental at this point.

Specific Comments on the Proposed Regulation

These comments focus on the way that the proposal deals with the recent amendments to NEPA in the BUILDER Act, which was part of the debt ceiling law.

The prologue to the regulations.

There are three general matters that CEQ might want to address in the prologue.

> ***Continuity.*** At least from the portions of the legislative history that I have read, supporters of the BUILDER Act insisted that it was meant to streamline the process rather than to diminish the protection for the environment provided by NEPA. Much of the language of section 102(2(D) itself was reenacted, presumably carrying with it

settled interpretation of terms such as “significant”. “environmental,” and “proposal.” NEPA’s goals and policies are reaffirmed in section 105. It is worth making this point since some advocates will no doubt claim that the revisions were more radical than they really were.

Textualism. Given the Supreme Court’s embrace of textualism, wherever possible CEQ should tie its views to the precise language of the current version of NEPA. Recourse to dictionaries would not be amiss. This may seem like a lame, formulaic approach to interpreting a law, but it’s the one the Justices have adopted.

Deference Factors. Finally, the Court’s view about deference to agency interpretations of statutes is in flux. It is not clear to me whether CEQ regulations qualify for *Chevron* deference under *Mead*, because Congress did not delegate the power to make rules with the force of law. Be that as it may, *Chevron*’s future is in doubt. CEQ should therefore orient itself toward the *Skidmore* factors for deference, which emphasize the degree of the agency’s care; the agency’s consistency, formality, and relative expertise; and the persuasiveness of the agency’s position. Timing is another relevant factor: long-standing agency interpretations get more deference, as do interpretations made soon after the passage of a statute. That argues for extra deference toward CEQ’s interpretation of the new language added to NEPA this year.

NEPA Section 101.

The proposal’s inclusion of environmental justice concerns in its analysis will undoubtedly be challenged. In defending the relevance of those concerns to NEPA, CEQ may want to reference § 101(c). That subsection says that “Congress recognizes that each person should enjoy a healthful environment.” That principle clearly does not create any enforceable rights but it does provide support for the view that special attention to groups with the least healthy environments would be appropriate.

NEPA Section 102.

Section 102(2)(D) says that an agency must “ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document.” Scientific integrity was a real problem in the last Administration. It could also be a real problem if agencies take advantage of the option of delegating much of the task of writing review documents to project applicants. The Biden Administration has featured executive orders and an EPA policy elaborating on the concept of scientific integrity and ways of protecting it. It would be useful if the regulation

adopted relevant language from those documents or at least referenced them.

Section 102(2)(E) also says that the agency must "make use of reliable data and resources." There are bound to be efforts to exploit this language to require an unrealistic level of reliability, which could then be used as a basis for excluding important environmental issues where the scientific basis is less well developed. There may be limits, for example, on information or available modeling about ecological issues, such as impacts on rare species. CEQ may want to borrow language from cases involving statutes requiring the use of the best available science, where courts have recognized that sometimes that best available evidence may still be less than ideal.

NEPA Section 105.

Despite broad language in some Supreme Court opinions that NEPA is purely procedural, this section codifies CEQ's longstanding position that NEPA's environmental policies supplement an agency's statutory authority. This is a point worth making. The implication is that agencies have authority to consider environmental factors except where clearly precluded from doing so by their governing statutes. Failure to consider those factors into account could be considered arbitrary and capricious.

NEPA Section 106.

106(a)(4). This subsection exempts agencies from doing environmental reviews for "a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action." This exemption reinforces what I think is the correct interpretation of section 105, which makes environmental factors relevant to agency decisions except when the agency's governing statute clearly precludes doing so.

106(b)(2) says that an environmental impact statement is not required when the significance of any environmental impacts is unknown. CEQ should make it clear that "unknown" is not the same as "uncertain," and applies only when uncertainty is so profound that the agency is unable to make a reasoned professional judgment about the significance of foreseeable impacts and when new obtaining new information to resolve the uncertainty is not feasible.

106(b)(3) limits the obligation of the agency to obtain new information when making

threshold determinations under NEPA to situations where doing is needed for a reasoned choice between alternatives, unless the costs of doing so would be unreasonable. OIRA's proposed revisions of circular A-4 address how agencies can determine the value of new information. It might be useful to cross-reference that. Also, agencies should keep in mind that under the APA, the proponent of an agency rule or order has the burden of proof. If the agency cannot make a reasoned determination that the proposed action is better than the alternatives, it may be required to reject the proposal. placing an obligation on project applicants to develop relevant information.

NEPA Section 107.

Earlier statutes. This section is designed to make the NEPA process faster and more efficient. There are already statutes doing so in specific areas such as transportation, water projects, and transmission lines in national interest zones. CEQ may want to give its view, at least in the prologue, about whether new section 107 affects agency obligation under those other laws. The answer is probably no, because there are presumptions that a later statute does not repeal an earlier one and that more specific statutes prevail as against more general ones. This should be clarified.

Section 107(f). This statute allows agencies to delegate the drafting environmental documents to project applicants. There is an obvious -potential for conflicts of interest. It would be helpful to place some guardrails in place, or at least to elaborate some general principles to observed. The prologue suggests that it is up to agencies to establish regulations in this area, not CEQ. CEQ should at least address the agency's process for creating such regulations — for instance, by ensuring that CEQ has the opportunity to review such proposed regulations. I am not altogether convinced by the argument that CEQ's role is limited because Congress gave rule-making power to agencies. Congress generally gives rule-making power to agencies, but that has not prevented OIRA from exercising oversight over the process and providing detailed guidance. Perhaps CEQ should issue a separate guidance document about agency implementation of section 107(f).