

Congress of the United States
Washington, DC 20515

November 8, 2023

The Honorable Brenda Mallory
Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20006

Dear Chair Mallory:

The Subcommittee on the Administrative State, Regulatory Reform, and Antitrust of the Committee on the Judiciary is conducting oversight of the Council on Environmental Quality (CEQ) and its approach to environmental litigation relating to the Lower Snake River dams. The Biden Administration CEQ may have acted unlawfully in its approach to mediation and settlement negotiations.¹ We write to request relevant documents and communications.

Congress created CEQ within the Executive Office of the President through the National Environmental Policy Act (NEPA).² NEPA itself is a “a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process.”³ In turn, NEPA makes it “the duty and function” of CEQ to act in ways that center on advising the President on environmental policy.⁴ Under the Biden Administration, however, CEQ appears bent on a more activist and partisan agenda—including through involvement in settlement negotiations designed to favor special interests and avoid transparency.⁵

In particular, in litigation over the Lower Snake River dams, CEQ has allegedly taken advantage of and guided settlement discussions to favor certain parties and views at the exclusion of others.⁶ As background, environmental and other groups have renewed their litigation efforts against the U.S. government over its dam operations plan for the Lower Snake River.⁷ The court stayed the litigation to permit mediation.⁸ During the CEQ-led mediation,

¹ See generally *Examining Systemic Government Overreach by CEQ: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Natural Resources*, 118th Cong. (2023) (written statement of Scott Simms, CEO & Executive Director, Public Power Council); Matthew Weaver, *Stay Extension Gives Snake River Dam Mediation Another 60 days*, CAPITAL PRESS (Sept. 1, 2023).

² 42 U.S.C. § 4342.

³ 40 C.F.R. § 1500.1; see generally Linda Luther, *The National Environmental Policy Act (NEPA): Background and Implementation*, RL33152, CONG. RESEARCH SERV. (Jan. 10, 2011).

⁴ See 42 U.S.C. § 4344; see also Luther, *id.* at 5.

⁵ See, e.g., Simms, *supra* note 1 at 1-2.

⁶ *Id.* at 2.

⁷ Weaver, *supra* note 1.

⁸ *Id.*

however, certain parties have been excluded from key discussions, while “plaintiffs and the U.S. government have been talking.”⁹ This means important stakeholders have been “walled off from the conversations between CEQ and plaintiffs,” which include environmental non-governmental organizations.¹⁰ CEQ’s alleged approach of “putting its thumb squarely on the scale for certain parties” during the negotiations may go beyond CEQ’s discrete authorities and limitations under NEPA.¹¹ CEQ’s advocacy behind closed doors also raises transparency and process concerns similar to those that arise when non-profit plaintiffs and agencies use sue-and-settle tactics.¹² Depending on the terms of the settlement, CEQ’s potentially unlawful conduct could lead to lopsided outcomes that results in higher energy costs for the American people.¹³

The Subcommittee is investigating whether CEQ’s approach exceeds the scope of Congressional authorization and runs afoul of the Administrative Procedure Act.¹⁴ To allow us to conduct oversight of CEQ’s conduct, please provide the following information from January 20, 2021 to the present:

1. All documents and communications referring or relating to CEQ’s role, function, or activity in mediation and settlement discussions.
2. All documents and communications referring or relating to which parties could take part in any particular settlement discussions or meetings with CEQ, including any documents and communications referring or relating to any of the intervenor defendants.
3. All documents and communications CEQ provided or sent to any participant in the mediation and settlement discussions.

Please provide this information as soon as possible but no later than 5:00 p.m. on November 22, 2023.

⁹ *Id.* (internal quotation marks omitted).

¹⁰ Simms, *supra* note 1 at 2; *see also* Matthew Weaver, *Ag Stakeholders Say They’re Shut Out of Federal Snake River Dam Mediation*, CAPITAL PRESS (Aug. 17, 2023).

¹¹ *See* Simms, *supra* note 1 at 2-3; 42 U.S.C. § 4344.

¹² *See generally* *Government Litigation and the Need for Reform*, Hearing Before the H. Comm. on the Judiciary, 118th Cong. (2023) (testimony of Andrew Grossman, Partner, Baker Hostetler).

¹³ *See* Simms, *supra* note 1 at 3; *cf.* Faith Bottum, *Biden’s Fishy Plan to Breach the Snake River Dams: It Would Make Electricity Far Costlier and Harm Local Residents, and the Salmon Would See Little Benefit.*, WALL ST. J. (June 16, 2023).

¹⁴ 5 U.S.C. § 706(2)(A), (C).

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The Judiciary Committee is authorized to conduct such oversight of matters involving administrative practice and procedure pursuant to Rule X of the Rules of the House of Representatives. If you have any questions about this matter, please ask your staff to contact Judiciary Committee staff at (202) 225-6906. Thank you for your attention to this matter.

Sincerely,



Cliff Bentz
Chairman
Subcommittee on Water, Wildlife
and Fisheries
Committee on Natural Resources



Thomas Massie
Chairman
Subcommittee on the Administrative State,
Regulatory Reform, and Antitrust
Committee on the Judiciary

cc: The Honorable Jared Huffman, Ranking Member
Subcommittee on Water, Wildlife, and Fisheries
Committee on Natural Resources

The Honorable Lou Correa, Ranking Member
Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
Committee on the Judiciary