

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

October 31, 2022

The Honorable Brenda Mallory
Chair
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Dear Chair Mallory:

I write to bring to your attention *West Virginia v. EPA*, a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,² the Biden administration has largely relied on executive action to advance its radical agenda. For example, in his first year, President Biden issued more executive orders³ and approved more major rules⁴ than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not unaccountable bureaucrats. Given this administration’s track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the Environmental Protection Agency (EPA) to exceed its statutory authority.⁵ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁶ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁷ However, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but

¹ *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022).

² U.S. Const. art. I, § 1.

³ Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>

⁴ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg Law (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>

⁵ *West Virginia*, 597 U.S. at 5-6.

⁶ *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁷ *West Virginia*, 597 at 4.

rarely used, statute designed as a gap filler.”⁸ Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”⁹ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s attempt to invent new authorities is not unusual for the Biden administration. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹⁰ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹¹ Thankfully, in *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹² In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹³

The Council for Environmental Quality’s (CEQ) proposals impact the decision-making processes at agencies within the House Committee on Natural Resources’ (Committee) jurisdiction. As a result, significant concerns are raised about CEQ’s decisions leading agencies to exceed their congressional authority.

To begin with, CEQ opted to return to a cumbersome National Environmental Policy Act (NEPA) regulatory regime, rather than embrace the streamlining efforts implemented by the Trump administration.¹⁴ Committee Republicans adamantly opposed CEQ’s reversal of the 2020 NEPA updates.¹⁵ The Biden administration’s insistence on returning to a status quo that supports weaponization of the NEPA process and associated litigation will continue to delay critical energy projects, at a time when our nation should be pursuing energy independence.

For example, the Biden administration used the NEPA process as a crux to delay domestic energy development. Under the Mineral Leasing Act, the Bureau of Land Management (BLM) is required to hold quarterly onshore lease sales.¹⁶ The NEPA process, however, played a

⁸ *Id.* at 5.

⁹ *Id.* at 5.

¹⁰ *Alabama Assn. of Relators v. Department of Health and Human Servs*, 594 U.S. ___ (2021).

¹¹ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ___ (2022).

¹² *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹³ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

¹⁴ See Alex Guillén, *Biden Administration Reverses Trump-era Rule Limiting Scrutiny of Environmental Impacts*, POLITICO, Apr. 19, 2022, <https://www.politico.com/news/2022/04/19/biden-reverses-trump-rule-limiting-scrutiny-environmental-impacts-00026207>.

¹⁵ See Letter from Rep. Bruce Westerman, Ranking Member, H. Comm. on Nat. Res, et. al, to the Honorable Brenda Mallory, Chair, Council for Environmental Quality (Dec. 10, 2021) (on file with Comm.); Letter from Rep. Bruce Westerman, Ranking Member, H. Comm. on Nat. Res, et. al, to the Honorable Brenda Mallory, Chair, Council for Environmental Quality (June 17, 2022) (on file with Comm.).

¹⁶ See 30 U.S.C. § 226.

significant role in delaying onshore lease sales for 18 months.¹⁷ This egregious delay in onshore lease sales hampered our nation's ability to develop oil and gas resources as we face an energy crisis.

Delays associated with NEPA, however, are not limited to oil and gas development. Renewable energy industries also face lengthy delays and unnecessary costs associated with NEPA compliance and litigation.¹⁸ In 2021, 42 percent of the projects under NEPA review at the Department of Energy (DOE) were related to renewable energy, transmission, or environmental protection.¹⁹ CEQ's return to burdensome NEPA regulations will further delay the domestic renewable energy development as Americans continue to suffer the consequences of President Biden's energy crisis.

Additionally, CEQ continues to pursue the implementation of the vaguely defined "America the Beautiful Challenge." This rebranding of the "30 by 30" initiative – the Biden administration's goal of preserving 30 percent of lands and waters by 2030 – raises serious questions about CEQ's authority to fund this program.²⁰ Despite inquiries from Committee Republicans,²¹ CEQ has failed to provide the statutory authorizations relied upon to facilitate the America the Beautiful Challenge's initial \$440 million expenditure, the sources of federal funds that will support the new initiative, nor how those funds will be expended.

CEQ is also playing a significant role in implementing President Biden's "Justice40" initiative.²² The environmental justice community designations under this initiative, however, raise significant concerns about its impact for funds overseen by the Committee. For example, both the Abandoned Mine Land Program and the Orphan Well Program received funding through the Infrastructure Investment and Jobs Act.²³ It is unclear for the states responsible for distributing this funding, however, how to best comply with executing the programs and Justice40 guidance. It is unclear whether the Justice40 initiative will prevent states from prioritizing projects of greatest need within both these programs.

¹⁷ See e.g. Thomas Cantenacci, *Biden Administration Delays Oil and Gas Lease Sales Again Amid Environmental Protest*, FOX BUSINESS, June 21, 2022, <https://www.foxbusiness.com/politics/joe-biden-oil-gas-lease-sales-delay-energy-environmental-protest>.

¹⁸ *Want Green Energy? Cut Red Tape*, BLOOMBERG, Apr. 21, 2022, <https://www.bloomberg.com/opinion/articles/2022-04-21/want-green-energy-cut-red-tape?leadSource=verify%20wall>.

¹⁹ *Id.*

²⁰ See Letter from Rep. Bruce Westerman, Ranking Member, H. Comm. on Nat. Res, et. al, to the Honorable Brenda Mallory, Chair, Council for Environmental Quality (May 12, 2022) (on file with Comm.).

²¹ *Id.*

²² See Press Release, THE WHITE HOUSE, CEQ Publishes Draft Climate and Economic Justice Screening Tool, Key Component in the Implementation of President Biden's Justice40 Initiative, (Feb. 18, 2022), <https://www.whitehouse.gov/ceq/news-updates/2022/02/18/ceq-publishes-draft-climate-and-economic-justice-screening-tool-key-component-in-the-implementation-of-president-bidens-justice40-initiative/>.

²³ Pub. L. 117-58.

As a committee of jurisdiction overseeing CEQ, I assure you I will exercise our robust investigative and legislative powers to not only forcefully reassert our Article I responsibilities, but to ensure the Biden administration does not continue to exceed Congressional authorizations. Accordingly, to assist in this effort, please answer the following no later than November 14, 2022:

1. As it relates to your agency, please provide the following:
 - a. A list of all pending rulemakings and the specific Congressional authority for each rulemaking.
 - b. A list of all expected rulemakings and the specific Congressional authority for each rulemaking.

Sincerely,



Bruce Westerman
Ranking Republican
Committee on Natural Resources