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Adding Fuel to the Fires Calling for Permitting Reform: D.C. Circuit Decides Long-Lingering Issue of Council on Environmental Quality's Rulemaking Authority

Jason A. Hill, Jim Noe, Rafe Petersen, Jennifer L. Hernandez, Alexandra E. Ward, and Kamran Mohiuddin*

The U.S. Court of Appeals for the District of Columbia Circuit recently ruled that the Council on Environmental Quality lacks statutory authority to issue binding regulations under the National Environmental Policy Act. The authors of this article discuss the decision and its implications.

In a surprise decision likely to add further fuel to the fires calling for permitting reform and uncertainty to the environmental review process for federal funding and approval, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Council on Environmental Quality (CEQ) lacks statutory authority to issue binding regulations under the National Environmental Policy Act (NEPA). CEQ's "regulations" have formed the cornerstone of NEPA interpretation and implementation almost since its enactment more than a half-century ago.

Many of the familiar concepts to NEPA practitioners—such as the basic structure of environmental reviews through environmental impact statements (EIS), environmental assessments (EA), and categorical exemptions (CatEx), as well as the analysis of direct, indirect and cumulative impacts—all began as creatures of CEQ's earliest forays into promulgating NEPA regulations rather than from the original underlying statute. And while questions about CEQ's rulemaking authority have lingered in the background since NEPA's earliest days, only occasioning passing references from various courts, no court has sought to tackle that thorny issue directly

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until now, leaving many to question why now, since neither party to the case raised this issue in briefing.

Why Does This Decision Matter?

The short answer is that this major decision will impact anyone needing an environmental review for federal approvals or funding. NEPA practitioners are still pondering the consequences of this decision, and how it will impact recipients of federal funding and project proponents needing environmental reviews has yet to be fully determined. While each of the agencies has its own NEPA regulations, the CEQ rules have been the cornerstone of all NEPA review for decades. Clients with recently completed approvals that are likely to be challenged, those wanting to challenge recent agency decisions, or those that are currently going through environmental reviews should consult and work closely with attorneys focused on NEPA about the potential fallout from this decision.

Contextual Background

When President Richard M. Nixon signed NEPA into law in 1970, no one anticipated it would play such an outpaced role in the federal decision-making process or become the most litigated environmental statute in the nation.[1] The statute itself, as originally enacted, consisted of a few short pages, the thrust of which imposed an obligation on all federal agencies to prepare a "detailed statement" for "major Federal actions significantly affecting the quality of the human environment,"[2] and created CEQ in the Executive Office of the President of the United States.[3]

Notably absent from CEQ's statutory duties and functions was any mention of authority to issue regulations.[4] Instead, the U.S. Congress explicitly envisioned an advisory role for CEQ while directing each agency to develop its own regulations to comply with NEPA.[5] This statutory framework closely paralleled the Council of Economic Advisers (CEA) model—another executive office entity created to advise the president without regulatory authority.

Early judicial decisions acknowledged CEQ's limited advisory role. In fact, during U.S. Supreme Court litigation in the 1970s, the solicitor general explicitly advised the Court that CEQ's guidelines were not mandatory and "do not bind agencies of the Executive

branch."[6] This position reflected in *Kleppe v. Sierra Club* resulted in the Court making no mention of CEQ or its guidelines in its opinion.[7]

The transformation of CEQ from advisory body to regulatory agency occurred through two pivotal executive orders. First, President Nixon's Executive Order 11514 authorized CEQ to issue "guidelines" to assist agencies in preparing EISs. These guidelines focused on making the EIS process more useful to decision-makers and the public by reducing paperwork and emphasizing real environmental issues.[8] Importantly, these guidelines were explicitly nonbinding.

The watershed moment came with President Jimmy Carter's Executive Order 11991 in 1977,[9] which directed CEQ to issue regulations that would be binding on federal agencies. This led to CEQ's promulgation of the 1978 regulations—a massive new body of law that claimed to be "binding on all Federal agencies."[10] The regulations replaced "some seventy different sets of agency regulations" with a unified framework that created many of the familiar NEPA concepts in use today.[11]

Although the Supreme Court has noted that CEQ's 1978 regulations are entitled to "substantial deference," it has never squarely addressed CEQ's authority to issue binding regulations.[12] Over the decades, various courts have questioned this authority but always stopped short of directly addressing it. As the D.C. Circuit observed in its recent ruling, "it is quite remarkable that this issue has remained largely undetected and undecided for so many years in so many cases."

Recent History of NEPA Regulations

Upon the issuance of the 1978 regulations and until 2020, the regulatory landscape remained largely unchanged, with notable exceptions such as the removal of the "worst case analysis" requirement following the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*.[13] Although the Supreme Court acknowledged that the CEQ regulations were entitled to "substantial deference," it never fully embraced or addressed CEQ's authority to issue binding regulations.[14] What developed over these decades was a steady expansion of environmental review scope and documentation that diverged significantly from early CEQ guidance

suggesting EAs could be completed in three months, with a suggested page length of 10 to 15 pages, and that even complex EISs could be completed within 12 months.[15] A 2020 CEQ review of EIS timelines from 2010 to 2018 found that across all federal agencies, the average completion time for 1,276 EISs took 4.5 years, with 25 percent taking more than six years to complete.[16]

The 2020 regulations marked the first comprehensive revision of CEQ's NEPA implementation framework since 1978. These regulations sought to establish a ceiling for NEPA requirements, requiring agencies to adjust their regulations accordingly. The revisions aimed to streamline the process by incorporating decades of judicial interpretation into regulatory text.

The Biden administration's response came in two phases. Phase 1 regulations made targeted amendments to the 2020 rules rather than wholesale revisions. Key changes included converting CEQ's regulations from a ceiling to a floor for agency NEPA requirements and reverting to the 1978 definition of environmental "effects" and "impacts."

Before CEQ could release its anticipated Phase 2 regulations, Congress intervened with the first substantial amendments to NEPA since its enactment. The federal Fiscal Responsibility Act (FRA) significantly codified several key provisions from the 2020 regulations into statute, including the basic framework of EIS, EA, and CatEx reviews—marking the first time Congress had explicitly recognized these long-standing administrative creations in the statute itself.[17] In addition, Congress codified timelines for completion of EISs (two years) and EAs (one year) and incorporated an entirely new cause of action under NEPA to allow for project proponents to enforce these timelines. It also set page limits—150 pages for EISs, 300 pages for EISs with extraordinary complexity, and 75 pages for EAs.

Eventually, the final Phase 2 proposal, issued earlier this year, highlighted CEQ's continued expansion of authority, incorporating substantive requirements for environmental justice and climate change into what had historically been recognized as a procedural statute. Several comments on this effort specifically challenged CEQ's regulatory authority. As captured in comments submitted by the Center for Environmental Accountability: "At the center of this procedural hypertrophy lay the Council on Environmental Quality.... NEPA did not delegate regulatory authority to CEQ—but CEQ, citing Executive Orders, purported to exercise it anyway."

CEQ's response to these authority challenges relied heavily on judicial precedent, citing eight circuit court decisions describing its regulations as "binding" or "mandatory." However, as the D.C. Circuit would later observe, none of these decisions had squarely addressed the fundamental question of CEQ's authority to issue binding regulations in the first place. Ultimately, CEQ concluded in its response to these comments that it disagreed with the assertions that it lacked regulatory authority.

The Current Case

Therefore, while the issue of CEQ's rulemaking authority has lingered for decades, the D.C. Circuit's recent ruling on CEQ's authority emerged unexpectedly from a challenge to air tour management over national parks in the San Francisco Bay Area. Although the case ostensibly centered on whether agencies could use existing interim flight operations as an environmental baseline, the court seized the opportunity to address what it called the "quite remarkable" fact that CEQ's regulatory authority had "remained largely undetected and undecided for so many years."[18]

Writing for the majority, Judge A. Raymond Randolph held that "the CEQ regulations, which purport to govern how all federal agencies must comply with [NEPA], are ultra vires."[19] The court's analysis rested on three key foundations:

1. The court found no statutory basis for CEQ's regulatory authority. "The provisions of NEPA provide no support for CEQ's authority to issue binding regulations," the court explained.[20] "No statutory language states or suggests that Congress empowered CEQ to issue rules binding on other agencies—that is, to act as a regulatory agency rather than as an advisory agency."[21] Instead, NEPA envisioned CEQ playing a role similar to the CEA—advising the president but not issuing binding regulations.
2. The court rejected the argument that presidential executive orders could create such authority. President Carter's Executive Order 11991 represented, in the court's view, "the most ambitious presidential foray into the nation's environmental protection effort: the transformation of the CEQ from an advisory entity into a regulatory agency."[22] The court found this transformation fundamentally

incompatible with separation of powers principles, citing *Youngstown Sheet & Tube Co. v. Sawyer* for the proposition that the U.S. Constitution does not permit the president to seize for himself the "law-making power of Congress."[23]

3. The court addressed the decades of judicial decisions according "substantial deference" to CEQ regulations. The majority noted that while courts had routinely cited and applied CEQ regulations, none had actually analyzed CEQ's authority to issue them. As the court observed, "publication in the C.F.R. is no measure of an agency's authority to issue rules that appear there."[24] Further, the decision questions whether the Supreme Court's prior "*Chevron*-like statement" on the "substantial deference" entitled to CEQ's regulations remains credible in light of the *Loper Bright Enterprises v. Raimondo* ruling.[25]

The court emphasized that its ruling does not undermine NEPA's environmental protections. Individual agencies retain their statutory authority to implement NEPA through their own regulations, and courts will continue to enforce NEPA's requirements. What changes is CEQ's role—returning to its original congressional design as an advisory body rather than a regulatory agency.

Impacts

The D.C. Circuit's ruling adds significant uncertainty to environmental reviews and federal approvals while raising fundamental questions about the future of NEPA implementation. The impacts of this decision will reverberate through several key areas.

Marin Audubon's Future in the Courts

Many expect a petition for rehearing en banc to be filed by either the environmental plaintiffs or the federal government, or both parties to the case, but whether the full circuit takes up the matter, as well as how other courts will respond, remains an open question. However, the D.C. Circuit may not have to wait for a request for rehearing in *Marin Audubon* to decide the issue, given that parties in *City of Port Isabel v. FERC* already filed a letter under Federal Rules of Appellate Procedure 28(j) citing the decision in support of a petition for rehearing in that case.[26]

In addition, a federal judge already granted a request for leave to file a notice of supplemental authority with regard to the *Marin Audubon* decision in a case brought by several states challenging the Phase 2 regulations.[27]

The fight may ultimately be decided by the Supreme Court sooner rather than later, with several amicus briefs raising the issue of CEQ's rulemaking authority in the *Seven County Infrastructure Coalition v. Eagle County*, a NEPA case currently slated on its docket in the current term.[28]

Immediate Effects on Environmental Reviews

The question of CEQ's regulatory authority creates uncertainty for projects currently undergoing NEPA review. Although the FRA amendments might have codified the basic framework of EIS, EA, and CatEx, many long-standing procedural details previously governed by CEQ regulations now lack clear authority. This includes:

- Scoping procedures,
- Public participation processes,
- Key definitions,
- Environmental justice considerations, and
- Climate change analysis requirements.

The need for federal agencies and project proponents to grapple with these issues in ongoing environmental reviews is not diminished by the *Marin Audubon* decision, and environmental reviews for permitting decisions could be delayed as agencies develop solutions in real time while struggling to keep the new statutory deadlines for completion. Further, agencies that have relied on CEQ's regulations and subsequent revisions to complete environmental reviews may need to revisit their decisions and review their own NEPA regulations. It is unclear if such agency-specific regulations can even stand on their own, as many are limited in scope.

Agency NEPA Regulations

The decision comes at a time when administrations will be changing in the new year, along with changes to policy focus. Although many anticipated another round of potential changes to CEQ's regulations with the subsequent administration, how this

decision impacts the options available to the new administration remains uncertain and provides new options. A new administration may still try to coordinate NEPA regulations through the CEQ, or it could simply bypass relying on CEQ and focus efforts at the departmental level for each federal agency.

The relationships between individual agency NEPA regulations and CEQ's now-invalidated regulations also presents complex questions. As noted in the *Marin Audubon* decision, a "wrinkle remains"—many agencies incorporated or adopted CEQ's regulations by reference but not necessarily the subsequent revisions. Thus, a question remains on whether an agency adopting CEQ's regulations would be a permissible exercise of its own rulemaking authority, since it has been held in other contexts that an agency cannot outsource its rulemaking authority to another entity that lacks that authority.[29] And, even if an agency has adopted the CEQ regulations in the past, would that extend to any revision of the CEQ regulations?

In the future, federal agencies may diverge significantly in their NEPA implementation, as each department could theoretically select from CEQ's various regulatory approaches or choose to chart its own course. Regardless, new regulations should be anticipated, and interested parties will want to track and comment upon future NEPA rulemakings coming out of the agencies.

CEQ's Future Role

The ruling fundamentally alters CEQ's role in NEPA implementation. As an advisory body, CEQ may continue to advise the president on environmental policy, which could include providing guidance and recommendations on NEPA implementation, as well as coordination among agencies. In fact, the FRA amendments now provide a role for CEQ in designating a lead agency for NEPA reviews.[30] However, CEQ's ability to issue binding regulations—either setting a floor or ceiling for agencies or to require that agencies follow specific procedures—and its authority to impose substantive requirements for analytical approaches of impacts or alternatives must now be questioned. It also remains to be seen whether Congress will tackle permitting reform with further amendments to NEPA and if any statutory changes would address CEQ's rulemaking authority.

This shift raises uncertainty about CEQ's ability to ensure consistent NEPA implementation across agencies and its role in addressing emerging environmental challenges, particularly when it comes to the new regulatory provisions surrounding analysis of impacts concerning climate change and environmental justice.

Practical Considerations for Project Proponents

Project proponents face several immediate challenges:

1. *Projects with Pending Reviews*
   - Reviews substantially completed under existing procedures will likely proceed toward meeting the new statutory deadlines.
   - Agencies may need to supplement documentation to rely more heavily on their own NEPA regulations.
   - Timeline uncertainties may increase for environmental reviews initiated under the current CEQ regulations as agencies wrestle with adjusting their procedures to account for this court decision.
2. *Future Projects*
   - Increased emphasis on agency-specific NEPA procedures should be expected.
   - Projects may face different requirements depending on the lead agency.
   - Future projects may need to navigate inconsistent approaches among cooperating agencies.
3. *Legal Strategy*
   - There will need to be an increased importance placed on understanding individual agency NEPA regulations and baseline statutory authority.
   - The need to track agency-specific guidance and precedent should be carefully considered.
   - There may be a potential for new litigation over agency-specific NEPA procedures.

Conclusion

The D.C. Circuit's ruling fundamentally alters the landscape of federal environmental reviews and creates significant uncertainty

for project proponents. Companies and organizations navigating federal approvals or funding will need experienced counsel to help them adapt to this rapidly evolving situation.

Notes

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1. Holland & Knight attorneys recently collaborated with the Breakthrough Institute to compile and analyze 387 NEPA cases brought in federal appellate courts over a 10-year period, indicating that NEPA litigation overwhelmingly functions as a form of delay, as most cases take years before courts ultimately rule in favor of the defending federal agency.
2. 42 U.S.C. § 4332(2)(C).
3. 42 U.S.C. § 4342.
4. 42 U.S.C. § 4344.
5. 42 U.S.C. §§ 4333, 4344.
6. See Marin Audubon Soc'y v. Fed. Aviation Admin., No. 23-1067, 2024 WL 4745044, at *5 (D.C. Cir. Nov. 12, 2024) citing to Brief for the Petitioners at 31 n.24, Kleppe v. Sierra Club, 427 U.S. 390 (1976) (Nos. 75-552 & 75-561.
7. See id.
8. See Scott C. Whitney, The Role of the President's Council on Environmental Quality in the 1990s and Beyond, 6 J. Envtl. L. & Litig. 81, 91 (1991).
9. Executive Order 11991 was recently revoked in Section 5 of the "Unleashing America's Energy" Executive Order signed by President Trump on January 20, 2025. Among other NEPA-related matters in President Trump's January 2025 Executive Orders, this revocation further calls into question CEQ's role and authority under NEPA.
10. See id. at 86-87.
11. See Marin Audubon Soc'y, 2024 WL 4745044, at *8.
12. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
13. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354 (1989).
14. See Andrus, 442 U.S. at 358.
15. See CEQ's Forty Most Asked Questions (March 23, 1981) at 35 (time required for NEPA process) and 36a (page guidelines), https://www .energy.gov/nepa/articles/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.
16. See CEQ's Report on EIS Timelines (2010-2018) (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report _2020-6-12.pdf.

17. See "Council on Environmental Quality Substantially Rewrites NEPA Regulations," The Journal of Federal Agency Action, September-October 2024.
18. See Marin Audubon Soc'y, 2024 WL 4745044, at *7.
19. See id. at *4.
20. See id. at *7.
21. See id.
22. See id. at *5.
23. See id. at *4.
24. See id. at *7.
25. See id. at *17.
26. See City of Port Isabel et al. v. FERC, case number 23-1174, in D.C. Circuit.
27. See State of Iowa et al. v. CEQ, case number 24-0089, in District of North Dakota.
28. See Seven Cnty. Infrastructure Coal. v. Eagle Cnty., No. 23-975 (U.S. cert. granted June 24, 2024).
29. See Marin Audubon Soc'y at *20.
30. 42 U.S.C. § 4336a(a)(4), (5).