

A Hard Look at CEQ's Hard Luck: North Dakota Court Decision Accelerates NEPA Regulations' Rapid Fall

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This past Monday, the U.S. District Court for the District of North Dakota issued its ruling in the closely watched case of *Iowa v. Council on Env'tl. Quality*, 1:24-cv-089 (D.N.D. Feb. 3, 2025), vacating the Biden administration's Phase 2 National Environmental Policy Act (NEPA) rule on the grounds that the Council on Environmental Quality (CEQ) overstepped its authority when it first promulgated NEPA regulations in 1978. This decision was just the latest in a series of falling dominos over the past three months that have completely upended NEPA practice both inside and outside of the federal government.

A Series of Jolts to the NEPA System

Until very recently, it was almost universally accepted that CEQ, a division of the Executive Office of the President, had the authority to issue NEPA regulations as a result of an executive order (EO) issued by President Jimmy Carter in 1977. CEQ's regulations remained relatively static from 1978 until the first Trump administration overhauled them in 2020.^[1] Under the Biden administration, CEQ first undid most of these 2020 changes in its 2022 "Phase 1" rulemaking,^[2] and then issued a "Phase 2" NEPA regulation in May 2024 that (as we [discussed last year](#)) implemented new statutory amendments to NEPA adopted in the 2023 Fiscal Responsibility Act and added new requirements for agencies to conduct environmental justice and climate analyses.^[3] A consortium of Republican states quickly sued to challenge the Phase 2 rules.^[4]

While that challenge was being briefed, the D.C. Circuit shocked observers last November when a divided panel held in *Marin Audubon v. Federal Aviation Administration*, No. 23-1067 (D.C. Cir. 2024) that Congress had never actually granted CEQ rulemaking authority. Notably, the majority raised the issue *sua sponte*; the parties in the case had not even briefed it. The lame-duck Biden administration and various environmental groups sought *en banc* review of *Marin Audubon*, which the D.C. Circuit declined on January 31 while suggesting that the Circuit panel's opinion regarding the CEQ's lack of regulatory authority constituted nonbinding *dicta*.

This guidance from the D.C. Circuit clarified little, given that one of President Donald J. Trump's "day one" executive orders the previous week rescinded the aforementioned Carter EO that had long been viewed as the basis for CEQ's regulatory authority and gave CEQ just 30 days to propose rescission of its NEPA regulations and coordinate with agencies to develop a new set of implementing regulations.^[5] Given Trump's longstanding criticism of federal environmental reviews, it was perhaps unsurprising that he embraced the disruption of *Marin Audubon* right out of the gates.

Iowa v. CEQ: NEPA Entropy Continues

In *Iowa v. CEQ*, the North Dakota District Court fully embraced the D.C. Circuit's holding in *Marin Audubon*. Relying on strict statutory interpretation and NEPA case law predating the 1977 EO, the court found that NEPA only authorizes the CEQ to make recommendations to the president, not promulgate binding regulations.^[6] Although Carter granted authority to CEQ, the *Iowa* court saw this as implicating separation of power issues and emphasized that agency power comes from statutes issued specifically by Congress. Although the court acknowledged that numerous cases have interpreted and applied CEQ regulations, it noted that until *Marin Audubon*, none of them directly addressed CEQ's authority to issue those regulations in the first place.^[7]

The court then went a step further, striking down certain aspects of the rule on other grounds “in the event another court decides CEQ has valid rule-making authority.”^[8] First, the court made clear that CEQ was not owed deference under *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), and that the court would be the judge of whether CEQ engaged in “reasoned decisionmaking” within the limits of its authority.^[9] Under this rubric, the court made several findings, including:

- It was inappropriate for the Phase 2 rule to adopt the term “action forcing” to interpret a purely procedural statute.^[10]
- Mandating policy priorities such as “consideration of environmental justice, climate change, indigenous knowledge, and worldwide effects” overstepped Congressional direction.^[11]

While the court found that some challenged provisions of the Phase 2 rule would have been reasonable if CEQ had the authority to make binding rules, the decision overall appears to curtail CEQ's latitude to set interpretive policies.

Finally, the court made clear that it was vacating the CEQ Phase 2 NEPA regulations in their entirety — and that its ruling applies to “everyone.”^[12]

Do Agencies Still Have Agency?

The implications of *Iowa v. Council on Env'tl. Quality*, in tandem with the D.C. Circuit's *Marin Audubon* decision and Trump's EOs, are significant for federal agencies and project proponents alike:

- With no CEQ regulations to anchor their environmental reviews, federal agencies processing major permit applications are left with little to no guidance regarding what level of analysis is sufficient under the statute. Given that no CEQ director has yet been announced, this state of uncertainty could last for some time.
- Until new guidance is issued, we could see wide variations in the quality and quantity of NEPA analysis from agency to agency and bureau to bureau — to the extent agencies are even allowed to review projects while the Trump administration develops new guidance.
- It remains to be seen how courts will evaluate pending challenges to NEPA analyses that agencies have conducted in reliance on regulations that multiple courts have now found to be void *ab initio*. Most NEPA case law has developed in the context of CEQ's regulatory framework. It is unclear whether that case law will continue to serve as precedent in light of the Trump administration's order that future guidance be consistent with the statutory language (which itself was recently amended in 2023).
- This uncertainty could create new opportunities for project proponents to defeat NEPA citizen suits. For instance, because an agency's cumulative impacts analysis is a creature of CEQ regulations and not NEPA itself, one may argue that the analysis was altogether optional and therefore not subject to legal challenge.

Troutman Pepper Locke will continue to monitor the rapidly changing NEPA landscape as further regulations, guidance, and court decisions are issued. For questions or to discuss how these developments may impact your projects, please contact the authors.

[1] 85 Fed. Reg. 1684 (Jan. 10, 2020).

[2] NEPA Implementing Regulations Revisions, 87 Fed. Reg. 23453, 23453 (Apr. 20, 2022) (the “Phase 1 Rule”).

[3] *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 89 FR 35,442, 35,490 (May 1, 2024) (“NEPA Phase 2 Rule”).

[4] *Iowa v. Council on Env'tl. Quality*, 1:24-cv-089 (D.N.D. May 21, 2024); 89 FR 35442.

[5] EO 14154, Unleashing American Energy, at Sec. 5.

[6] *Iowa* at 18.

[7] *Id.* at 14.

[8] *Id.* at 24.

[9] *Id.* at 26.

[10] *Id.* at 26-27.

[11] *Id.* at 27-28.

[12] *Id.* at 43-44. There is a split in authority regarding whether and in what circumstances trial courts are allowed to impose nationwide injunctions, although they appear to generally be allowed in the 8th Circuit. See, e.g., *Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022). We anticipate that environmental groups could seek to limit the geographic scope of this ruling on appeal.

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