

NEPA Regulations Unravel

by Michael Drysdale and Alyssa Florack-Hess

The National Environmental Policy Act, or NEPA,^[1] is in the midst of a major judicial and regulatory shakeup. In the past three months, four major events have thrown the validity of NEPA regulations into doubt:

1. On November 12, 2024, a panel at the D.C. Circuit Court of Appeals issued a bombshell ruling in *Marin Audubon Society v. Federal Aviation Authority*.^[2] The majority opined that the regulations implementing NEPA -- first issued by the Council on Environmental Quality (CEQ) in the 1970s and the subject of thousands of cases of NEPA precedent -- are void in their entirety because the CEQ does not have rulemaking authority. This opinion was sufficiently alarming that all parties to the litigation sought panel reconsideration through en banc review;
2. On January 20, 2025, the Trump Administration issued Executive Order 14154 "Unleashing American Energy," which among other things directed the CEQ to evaluate rescinding the CEQ's NEPA regulations;^[3]
3. On January 31, 2025, the D.C. Circuit denied en banc review of the *Marin Audubon Society* decision, with a majority of the judges reasoning that the portion of the opinion holding that CEQ regulations were void was likely dicta; and,
4. On February 3, 2025, the District Court for the District of North Dakota adopted the reasoning of *Marin Audubon Society* and concluded that the CEQ NEPA regulations are invalid for "everyone" in *Iowa v. CEQ*.^[4]

NEPA in a Nutshell

NEPA was the first major federal environmental statute and requires federal agencies to consider the environmental impacts of their proposed actions. Nearly all federal decisions that have the potential for physical impacts on the environment must satisfy NEPA requirements, which may come in the form of an environmental impact statement, an environmental assessment, or a determination that the action qualifies for a "categorical exclusion." NEPA compliance can add years to project timelines and is a potent source of litigation risk.

Related People

- Michael Drysdale
- Alyssa Florack-Hess

Related Capabilities

- Environmental
- Environmental, Social, Governance (ESG)
- Energy & Natural Resources
- Executive Actions Resources
- Executive Actions Tracker

The D.C. Circuit's Decision in *Marin Audubon Society*

Marin Audubon Society involved a routine NEPA dispute, where environmental groups argued that federal agencies had been lax in regulating tour flights over national parks. The case seemed an unlikely one to result in a significant curtailment of the NEPA regulations. A key part of the parties' disagreement was whether the agencies had complied with CEQ regulations, and while the court unanimously held the agencies had failed to meet NEPA's requirements on other grounds, two of the three judges hearing the case went far beyond the arguments made by either side and ruled that CEQ never had the authority to issue binding regulations in the first place.

In doing so, the two judges, both appointed during the George H.W. Bush's Administration,^[5] answered a question neither side had asked or argued. The majority reasoned that a federal agency does not have the authority to issue binding law unless Congress explicitly delegates its legislative power, and while Congress has done so for many agencies, the majority determined that Congress merely intended for the CEQ to be an advisory committee. While several other circuit courts made similar holdings during the 1970s, this line of holdings ended with the Supreme Court's 1979 ruling that CEQ's NEPA regulations are "entitled to substantial deference" in *Andrus v. Sierra Club*,^[6] after which essentially every court considered CEQ's regulations to be authoritative law. However, in *Marin Audubon Society*, the D.C. Circuit dismissed this Supreme Court statement as a "stray remark," reigniting an argument that has not been seen in decades.

The D.C. Circuit Denies En Banc Review

Shortly after the opinion was issued, all parties in the case petitioned for en banc rehearing before all 11 judges on the D.C. Circuit, with environmental groups describing their frustration that the November 12 decision had left them "worse off than if they had never brought this case" because of the court's failure to consider the wide-reaching effects its novel answer would have or to limit those effects in any meaningful way. [7] Likewise, the federal agencies involved argued that en banc review was warranted to "address this question of exceptional importance."^[8]

On January 31, 2025, the D.C. Circuit denied the petitions for review, leaving its November 12 decision in place.^[9] However, seven of the eleven judges on the D.C. Circuit provided a statement to explain their denial. The statement -- authored by Chief Judge Srinivasan, the dissenter in *Marin Audubon Society* -- agreed with the parties that the panel opinion violated the well-established rule that courts should not consider arguments not presented to them by the parties. The statement went on to conclude that there was nevertheless no cause to grant en banc rehearing, because the court had unanimously determined that the federal agencies had violated NEPA on completely separate grounds, and therefore the challenged portion of the opinion was "unnecessary to the panel's disposition."

The North Dakota District Court Invalidates NEPA Regulations

To the extent the D.C. Circuit's January 31st *en banc* statement was intended to limit the

fallout of the *Marin Audubon Society* panel opinion, it failed. Just four days later, the District Court of North Dakota issued its opinion in *Iowa v. CEQ*, which fully endorsed the *Marin Audubon Society* panel opinion's reasoning and explicitly invalidated CEQ's existing NEPA regulations nationwide. After reviewing additional briefing based on the *Marin Audubon* decision, the District Court ruled in favor of 21 state governments, vacating CEQ's 2024 regulations.^[10] The court's decision rested in large part on its finding that the plain text of NEPA did not give CEQ authority to issue binding regulations and thus that President Carter's Executive Order that federal agencies follow CEQ regulations exceeded Congress' initial delegation of authority.^[11]

NEPA Chaos Ahead

If the decision in *Iowa v. CEQ* is not overturned by the Eighth Circuit or Supreme Court, ^[12] there will be significant legal and practical implications for all federal agencies and any private actor doing a project that requires federal approvals.

In short, CEQ's existing regulations provide the playbook for compliance with the NEPA statute. The statute is short, broad, and vague^[13] while the regulations are detailed and backed by 50 years of precedent. Federal agencies have historically relied on CEQ's regulations, both to guide their procedures to comply with NEPA and to use as a defense that they have done so. Conversely, if an agency failed to follow CEQ's regulations, environmental groups had a straightforward argument the agency had violated NEPA. Notably, CEQ's issuance of the original regulations in 1978 contributed to ending a wave of lawsuits and conflicting court decisions about what agencies must do to comply with the statute.

If *Iowa v. CEQ* is not overturned, agencies may still be able to argue that CEQ's vacated regulations and precedent reflect a reasonable interpretation of NEPA's mandate and thus that an action in compliance with CEQ's rules should presumptively comply with the statute, but this is at best weakly persuasive. Executive Order 14154, issued on January 20, 2025, would undermine even this argument, leading to worsened chaos. The Executive Order called for the CEQ to propose rescinding its NEPA regulations by February 21, 2025. If these regulations are fully rescinded, it would effectively circumvent any possible appeals of *Iowa v. CEQ* and solidify the bombshell impacts of these recent cases as law.

These uncertainties are further compounded by the Supreme Court's curtailment of deference to agency interpretations of statutes in last Term's *Loper Bright* decision.^[14] Without clear regulations to validate agency actions and with a general doubt about agency authority, agencies and project proponents are left to guess what decisions will survive judicial review. This cuts both ways. An agency with a favorable judicial draw is more likely to have its decisions upheld against challenges that the agency did not check all the NEPA boxes, and a judicial skeptic of agency action has greater freedom to hold that the agency's decisions are unreasonable.

The Trump Administration almost certainly views the *Marin Audubon Society* and *Iowa v. CEQ* decisions as favorable developments in its assault on the "Administrative State."

Yet an important theme in the cases is the limitations in governance by Executive Order, and for both NEPA and other areas of law, they may be exemplars of the Law of Unintended Consequences.

[1] 42 U.S.C. §§ 4321 et seq.

[2] The decision is available at <https://media.cadc.uscourts.gov/opinions/docs/2024/11/23-1067-2084381.pdf>.

[3] Sec. 5(b). This Executive Order is available at <https://www.federalregister.gov/documents/2025/01/29/2025-01956/unleashing-american-energy>.

[4] ¶ 126. The decision is available at https://attorneygeneral.nd.gov/wp-content/uploads/2025/02/20250203_NEPA_SJ_Order.pdf.

[5] U.S. Court Appeals Dist. Columbia Circuit, *Karen LeCraft Henderson*, available at <https://www.cadc.uscourts.gov/content/karen-lecraft-henderson>; U.S. Court Appeals Dist. Columbia Circuit, *A. Raymond Randolph*, available at <https://www.cadc.uscourts.gov/content/raymond-randolph>.

[6] 442 U.S. 347 (1979), available at <https://www.loc.gov/item/usrep442347/>.

[7] The environmental groups' November 27, 2024 petition is not publicly available but is accessible through the D.C. Circuit's website after creating a PACER account at <https://ecf.cadc.uscourts.gov/>.

[8] The federal agencies' December 5, 2024 petition for en banc rehearing is not publicly available but is accessible through the D.C. Circuit's website after creating a PACER account at <https://ecf.cadc.uscourts.gov/>.

[9] This order is available at <https://media.cadc.uscourts.gov/opinions/docs/2025/01/23-1067-2097987.pdf>. The order also denied the environmental groups' separate petition for a panel rehearing.

[10] The court limited its remedy to vacating the 2024 regulations because the case did not concern the previous 2020 regulations. ¶ 131. Despite noting that the 2020 regulations were likely also invalid for the same reasons, this remedy resulted in reinstating the 2020 regulations. *Id.*

[11] ¶ 36. The District Court provided an alternative basis for its decision “in the event another court decides CEQ has valid rule-making authority.” ¶ 62. The court additionally ruled that certain portions of the May 2024 regulations were arbitrary and capricious or otherwise exceeded CEQ's authority under NEPA by changing the stated purpose of NEPA, requiring agencies to prioritize global effects over domestic interests, and

requiring periodic review for all categorical exclusions.

[12] The *Iowa v. CEQ* decision reduces the likelihood that the *Marin Audubon Society* decision will be directly heard by the Supreme Court. Because of the uncertainty over whether the panel opinion sections on CEQ's authority are dicta, the Court may choose to wait for the *Iowa v. CEQ* decision to work its way through appeals.

[13] The Supreme Court is currently reviewing the meaning of some of these vague statutory requirements in *Seven County Infrastructure Coalition v. Eagle County, Colorado*. After hearing oral arguments on December 10, 2024, the Court seems likely to provide additional guidance interpreting NEPA's provisions related to the scope of review.

[14] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), available at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.