

LITIGATION***Iowa et al. v. CEQ /NEPA*****February 14, 2025
Special Report #2648**

On February 3, the U.S. District Court for North Dakota ruled on four motions for summary judgment. The court held that the Council on Environmental Quality (CEQ) has no rulemaking authority and vacated the 2024 National Environmental Policy Act (NEPA) Implementing Regulations, Revisions Phase 2 (89 FR 35442). Under the Biden Administration, CEQ initiated a multi-phase rulemaking process in 2021, in part to rescind the 2020 NEPA Rule issued under the first Trump Administration, with some additional changes to the 1978 NEPA Rule, including conformity with the 2023 Fiscal Responsibility Act (FRA) (P.L. 118-5).

A coalition of 21 states sued in *Iowa et al. v. CEQ* (#1:24-cv-00089), including Alaska, Idaho, Kansas, Montana, Nebraska, North Dakota, South Dakota, Texas, Utah, and Wyoming. They alleged that the 2024 Rule violated the NEPA statute and the Administrative Procedures Act (APA), and requested that the 2024 Rule be vacated and the 2020 Rule reinstated. The Plaintiff States argued: “NEPA is a procedural statute intended to ensure that federal agencies take a hard look at the environmental impacts of their proposed actions. The statute does not require or authorize an agency to take any substantive actions or elevate the protection of environmental resources above other priorities.” The Plaintiff States noted that the 2024 Rule failed to sufficiently consider its own relevant impacts under the NEPA statute. They argued that there is no statutory or Congressional authority to create exceptions for beneficial impacts or special environmental assessments.

A coalition of 13 States intervened as defendants, including California, Colorado, New Mexico, and Oregon. They argued that the 2024 NEPA Rule “reverses many of the remaining problematic provisions of the 2020 Rule and reinstates aspects of the 1978 regulations, while also modernizing and updating the 1978 regulations, in ways that streamline review and increase public participation, without sacrificing quality analysis. The Final Rule correctly recognizes federal agencies’ obligation under NEPA to identify, analyze, and consider alternatives and mitigation measures for the reasonably foreseeable direct, indirect, and cumulative effects, including ‘climate change related effects’ of all major federal actions.” The State Intervenor Defendants noted that under a reinstated 2020 Rule, they would lose the opportunity to comment on actions that proceed under the diminished public process of a categorical exclusion, or challenge them before environmental or health injuries occur, and it would interfere with their sovereign interests in their respective state lands, waters, and other natural resources.

Following the November decision in *Marin Audubon Society v. FAA* (#23-1067, D.C. Cir. 2024) which found that CEQ had no rulemaking authority (WSW #2638), the North Dakota court ordered additional briefings on CEQ’s authority. The North Dakota court’s ruling provided additional historical context, and held: “NEPA is not ambiguous. The plain text of the statute does not give CEQ authority to issue binding regulations. NEPA only authorizes CEQ to make recommendations to the President. ... For forty years CEQ’s authority has been assumed, but these assumptions by the courts and others do not constitute binding precedent.” The court noted that none of the cases cited in the parties’ briefings directly analyzed whether CEQ had regulatory authority.

The court considered the President’s authority to issue executive orders under the Take Care clause of the Constitution, Article II, Section 3. The court held that President Carter’s Executive Order 11,991 was not a valid exercise of power under the Take Care clause. “The case before this Court does not involve an issue given to the President by the Constitution. Congress gave the President the authority to set national policy concerning the environment and explicitly gave CEQ authority to advise the President. The courts at the time correctly interpreted NEPA and held CEQ to be an advisory body. President Carter proceeded to grant CEQ power to create binding regulations, affecting not only federal agencies but all the third parties that are also subject to NEPA. This bestowal of authority implicates the exact separation of power issues that the judicial system is bound to uphold and protect. Agency power comes from statutes explicitly issued by Congress and not from Congressional inaction or continuation of the status quo. For the foregoing reasons, the Court finds CEQ does not have authority from Congressional ratification.”

The court also went through an analysis of the 2024 NEPA Rule “in the event another court decides CEQ has valid rulemaking authority.” With an underlying assumption of authority, the court found that some rule provisions did not exceed that authority, but others were arbitrary and capricious: (1) the rule removed wording supported by current Supreme Court interpretation; (2) it would allow applicants to submit environmental analysis but prohibit them from finding no significant impact; and (3) it would require evaluation of indigenous knowledge for all projects, which may not always be applicable.

The court vacated the 2024 Rule on a nationwide basis and said: "It is very likely that if the CEQ has no authority to promulgate the 2024 Rule, it had no authority for the 2020 Rule or the 1978 Rule and the last valid guidelines from CEQ were those set out under President Nixon. However, vacating a rule does not mean the Court decides the appropriate replacement. The law states that vacating simply reinstates the previous rule. The validity of the 2020 Rule is not before this Court. Whether or not the 2020 Rule conflicts with the FRA does not affect this Court's ruling and is not relevant to this decision. The Court holds CEQ has no rulemaking authority and therefore, the 2024 Rule is invalid and vacated as a matter of law."

The court concluded: "The first step to fixing a problem is admitting you have one. The truth is that for the past forty years all three branches of government operated under the erroneous assumption that CEQ had authority. But now everyone knows the state of the emperor's clothing and it is something we cannot unsee. The problem lies not only with CEQ and NEPA, but with the disheveled hodgepodge of law surrounding administrative agencies and executive orders generally. Presidents rely on the Constitution and the laws of the United States, then leave it to the courts to decide which ones give them power. The Constitution separated the powers of government for very good reasons. The separation of powers doctrine is not an esoteric point of procedure that academics make a fuss about to get tenure. After centuries, we as Americans do not understand what it was like to live under a monarchy without checks and balances. People fought to separate these powers in a new form of government. People died for this new government because they saw what happened when all the power was held in one hand. Power can be taken by force, given, or lost inch by inch. It is the job of Congress to enact the law. It is the job of the President to enforce the law. It is the job of the Judiciary to determine the boundaries of the law. If Congress wants CEQ to issue regulations, it needs to go through the formal process and grant CEQ the authority to do so."