COMMENTS OF THE
INSTITUTE FOR ENERGY RESEARCH

Comments on the Council on Environmental Quality's Interim Final Rule "Removal of National Environmental Policy Act Implementing Regulations," Docket No. CEQ–2025–0002

On Request for Comments

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EXECUTIVE SUMMARY

The National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970), imposes a purely procedural mandate on federal agencies, requiring that they think about environmental consequences before they act. NEPA also created the Council on Environmental Quality (CEQ), which makes recommendations to the Presidents about national policy that can improve the environment.

With Executive Order 11991 of 1977, President Carter turned this scheme on its head, enlisting CEQ to promulgate NEPA regulations that purported to bind all federal agencies and could be enforced in court. This development multiplied the burdens imposed by NEPA on federal agencies, increasing the number of projects halted by court orders and the resources wasted on NEPA compliance.

CEQ never had the authority to issue binding NEPA regulations, as two courts have recently held. CEQ is a creature of statute that has no power to act without authorization from Congress, and Congress only delegated CEQ the power to make recommendations, not regulations.

CEQ has good cause to rescind these unlawful regulations through an interim final rule. Because a court recently vacated the CEQ regulations, CEQ needs to act promptly to minimize confusion about interested parties' obligations and to ensure that unlawful regulations are no longer on the books.

BACKGROUND

A. Evolution of the CEQ NEPA Regulations

NEPA requires federal agencies to issue a "detailed statement" addressing the environmental impact of any proposed "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA requires all federal agencies to develop NEPA procedures. *Id.* § 4332(B).

NEPA also created a "Council on Environmental Quality" (CEQ) within the Executive Office of the President. *Id.* § 4342. CEQ's job was to "review and appraise" agencies' compliance with NEPA; to "make recommendations to the President with respect thereto"; and to "develop and recommend to the President national policies to foster and promote the improvement of environmental quality." *Id.* § 4344(3)–(4).

In 1970, President Nixon issued an Executive Order instructing CEQ to "[i]ssue guidelines to Federal agencies for the preparation of" the "detailed statements" NEPA required. Exec. Order No. 11514, § 3(h), 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970). In response, CEQ published a "memorandum" containing "guidelines" for federal agencies considering the environmental impact statements required by NEPA. 36 Fed. Reg. 7724, 7724 (Apr. 23, 1971).

Around the same time, several courts recognized that CEQ's role was "merely advisory" because it lacked any "authority to prescribe regulations governing compliance with NEPA." *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 424 (5th Cir. 1973) (citing *Greene Cnty. Plan. Bd. v. Fed. Power Comm'n*, 455 F.2d 412 (2d Cir. 1972)). These courts and others viewed CEQ's guidelines as non-binding guidance to assist agencies in developing their own NEPA procedures. *See Aertsen v. Landrieu*, 637 F.2d 12, 17 (1st Cir. 1980); *Nat'l Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971).

In 1977, President Carter issued Executive Order 11991, 42 Fed. Reg. 26967 (May 25, 1977). President Carter's Executive Order sought to empower CEQ to issue "regulations," rather than "guidelines," "to Federal agencies for the implementation of the procedural provisions of [NEPA]." *Id.* at 26967. It required all federal agencies to "comply with the regulations issued by [CEQ]" unless doing so would violate federal law. *Id.* at 26968. President Carter imposed these duties "[b]y virtue of" his authority as President and "in furtherance of the purpose and policy" of NEPA and other environmental laws, particularly the Environmental Quality Improvement Act of 1970. *Id.* at 26967.

Under President Carter's Executive Order, CEQ issued new regulations that purported to "bind[] … all Federal agencies," the federal courts, and the non-federal litigants in NEPA cases, while setting forth "uniform standards applicable throughout the Federal government." 43 Fed. Reg. 55978, 55978 (Nov. 29, 1978). As authority for its regulations, CEQ invoked Executive Order 11991 and "the President's Constitutional and statutory authority." *Id.*

B. New Executive Order

On January 20, 2025, President Trump issued Executive Order 14154, *Unleashing American Energy*, 90 Fed. Reg. 8353 (Jan. 29, 2025), which revoked President Carter's 1977 Executive Order that directed CEQ to issue regulations implementing NEPA and requiring Federal agencies to comply with them, *id.* at 8355. President Trump's Executive Order 14154 also directed CEQ to provide guidance to agencies implementing NEPA and propose rescinding CEQ's NEPA regulations within 30 days of the order. *Id.*

ARGUMENT

CEQ never had the legal authority to promulgate regulations that purported to carry the force of law. Two recent judicial decisions agreed, holding that the CEQ regulations are invalid. *See Marin Audubon Soc'y v. FAA*, 121 F.4th 902 (D.C. Cir. 2024); *Iowa v. CEQ*, No. 1:24-cv-89, 2025 WL 598928 (D.N.D. Feb. 3, 2025). Because the *Iowa* Court vacated the CEQ regulations in their entirety, 2025 WL 598928, at *22, CEQ has good cause to issue an interim final rule that resolves uncertainty and brings its regulations in line with the best reading of the statute. Moreover, rescinding the CEQ regulations will reduce the extra-statutory burdens imposed by CEQ's NEPA regulations on federal agencies and project developers.

I. CEQ Lacks Authority for its NEPA Regulations

CEQ is a federal agency. Thus, it "literally has no power to act" except to the extent Congress has authorized it. *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). For CEQ's regulations to legally bind other agencies, courts, and the public, "it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979).

Congress never authorized CEQ to issue regulations that bind other agencies and the public. The plain text of NEPA only authorizes CEQ to "make recommendations to the President" and "develop and recommend to the President national policies." 42 U.S.C. § 4344(3)–(4). This may authorize CEQ to put forward limited, non-binding guidelines, like those CEQ issued under President Nixon's Executive Order. But it does not authorize binding regulations that plaintiffs can enlist courts in requiring agencies to follow. Another statute invoked by President Carter, the Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 114, provides no such authority either. As Judge Randolph explained, that statute merely permits CEQ's chairman to "'assist[ ]' other federal agencies" and to "'promulgate regulations' … related to a fund used to finance" the Office of Environmental Quality's operations. *Marin Audubon*, 121 F.4th at 913 (quoting Environmental Quality Improvement Act of 1970). None of that authorizes regulations that purport to bind the entire federal government, enforceable by private litigants in court.

Early practice immediately after the enactment of NEPA tracks this narrow reading of CEQ's authority. Executive Branch interpretations issued "roughly contemporaneously with enactment of the statute" that "remained consistent over time" are entitled to "very great respect." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024) (quotation omitted). And in 1970, immediately after NEPA's enactment, President Nixon confirmed that NEPA merely permitted CEQ "to issue guidelines," not to promulgate binding regulations. *Marin Audubon*, 121 F.4th at 910

(quotation omitted). Moreover, several courts of appeals in the early 1970s accepted this view and likewise recognized that CEQ does not have the authority to issue binding regulations. *See id.* (collecting cases).

And, absent congressional authorization, President Carter's Executive Order could not itself provide the authority to issue binding regulations. The "President may only confer by Executive Order rights that Congress has authorized the President to confer," *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1375 (Fed. Cir. 2000), or rights derived "from the Constitution itself," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Since Congress never authorized the President to grant CEQ authority to adopt legally binding NEPA regulations and neither does the Constitution, President Carter's Executive Order cannot justify the CEQ regulations.

Resisting this conclusion, supporters of the CEQ regulations have claimed support in Supreme Court decisions and in Congressional acquiescence. Neither provides a basis for the CEQ regulations.

Start with the Supreme Court's brief mentions of the CEQ regulations. The Court did say once that CEQ's regulations are "entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). But as Judge Randolph explained, "that *Chevron*-like statement did not result from an examination of CEQ's authority to issue judicially enforceable regulations and cannot be credited in light of the Supreme Court's ruling in *Loper Bright*." *Marin Audubon*, 121 F.4th at 913. More recently, the Supreme Court said in passing that CEQ was "established by NEPA with authority to issue regulations interpreting it." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004). But again, that "stray remark" simply "appeared without any accompanying legal analysis." *Marin Audubon*, 121 F.4th at 913. Indeed, it appeared in the background section of the opinion, in a case where the CEQ's rulemaking authority was not directly at issue. *See Pub. Citizen*, 541 U.S. at 757. None of those quick, unconsidered asides can justify keeping regulations that lack any congressional authorization.

Next, supporters of the CEQ regulations have argued that by letting the CEQ regulations stand for decades, Congress implicitly ratified them through acquiescence. But "congressional inaction is insufficient" to ratify such a consequential power-grab by the CEQ. *Iowa*, 2025 WL 598928, at *11. As Justice Scalia explained, the Constitution's complicated lawmaking procedures create "an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.… I think we should admit that vindication by congressional inaction is a canard." *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 671–72 (1989) (Scalia, J., dissenting); *see also Rapanos v. United States*, 547 U.S. 715, 750–51 (2006) (plurality op.) (Scalia, J.). Skepticism of congressional ratification through silence is especially warranted in a situation like this, where the supposed "bestowal of authority" to CEQ by Congress "implicates the exact separation of power issues that the judicial system is bound to uphold and protect." *Iowa*, 2025 WL 598928, at *11.

Because the separation of powers requires authorization from Congress before CEQ can issue binding regulations, Congress's decision to not provide such authorization makes the CEQ regulations contrary to law. *See id.* at *10–12.

II. CEQ Has Good Cause for Repealing its Regulations Through an Interim Final Rule

Federal agencies can adopt "interim final rules" that become effective immediately, while inviting post-effective public comment to inform the ultimate final rule. "Interim-final rules have become a generally-accepted and frequently-employed rulemaking technique in the federal administrative establishment." Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 705 (1999). In order to bypass the pre-effective public comment process generally required by the Administrative Procedure Act (APA), the agency must show "good

cause … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(4)(B); *see also id.* § 553(d)(3).

CEQ found that "good cause" exists to proceed through an interim final rule. *See id.* § 553(b)(4)(B). As CEQ explained, its regulations have been "vacated by a district court after it concluded that CEQ has no rulemaking authority," leaving CEQ "concerned that agencies and the public are confused as to the status and legitimacy of its NEPA regulations." 90 Fed. Reg. 10610, 10614 (Feb. 25, 2025).

The need for regulatory clarity in this context satisfies the good-cause requirement. As the D.C. Circuit held, it is "reasonable and perhaps inevitable" that agencies will issue interim final rules immediately in "response to … injunctive court order[s]" that "void[] the status quo" rules. *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981). Once the District Court in *Iowa v. CEQ* vacated the CEQ regulations, *see* 2025 WL 598928, at *22, the absence of any new guidance from CEQ could "creat[e] confusion" for both agencies and regulated parties alike, *Am. Fed'n of Gov't Emps.*, 655 F.2d at 1157. Thus, given the district court order vacating the prior regulations, "the issuance of emergency regulations" does "not violate section 553" of the APA. *Id.*

Other courts have reached the same conclusion. *Serv. Emps. Int'l Union, Loc. 102 v. County of San Diego*, 60 F.3d 1346, 1352 n.3 (9th Cir. 1994) (holding that good cause exists when "the federal courts were issuing conflicting decisions and [the regulated parties] were therefore unable to predict whether they were complying with [the challenged regulation]"); *Mid-Tex Elec. Co-op., Inc v. FERC*, 822 F.2d 1123, 1133 (D.C. Cir. 1987) (holding that "regulatory confusion" caused by a judicial "remand order" helped show good cause); *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1283–84 (N.D. Fla. 2016) (finding "good cause for an agency's decision to bypass notice and comment where the agency's prior regulations have been invalidated by court order").

Regardless, CEQ's "Interim Final Rule" with its "Request for Comments," includes everything that a notice of proposed rulemaking must contain. *See* 90 Fed.

Reg. at 10614. Thus, once the interim final rule becomes a final rule, CEQ will have fulfilled the APA's notice-and-comment requirements for that final rule, and any APA foot-fault in proceeding with an interim final rule would likely be harmless anyway. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683–85 (2020); *see id.* at 672–73.

III. The CEQ Regulations Imposed Significant, Unexpected Burdens and Should be Rescinded

NEPA itself is "a rather barebones statute." Jennifer Jeffers et al., *The CEQ Has No Clothes: The End of CEQ's NEPA Regulations and the Future of NEPA Practice*, Nat'l L. Rev. (Feb. 21, 2025), https://natlawreview.com//article//ceq-has-no-clothes-end-ceqs-nepa-regulations-and-future-nepa-practice. Congress passed NEPA "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97–98 (1983). When Congress passed NEPA in 1970, the substantive environmental laws that take a more prescriptive approach with federal agencies and regulated parties did not yet exist.[1] NEPA served as a narrow precursor, merely ensuring environmental concerns were considered.

Reflecting that limited procedural purpose, NEPA simply requires federal agencies to issue a "detailed statement" addressing the environmental impact of any proposed "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). There is little evidence in the legislative history that Congress even considered that litigants could challenge agencies' compliance with the NEPA procedures in court. David R. Mandelker et al., *NEPA Law & Litigation* § 2:5 (2d ed. 2024); Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 Cal. L. Rev. 929, 956 & n.184 (1993). Indeed, given the state of administrative law at the time of NEPA's passage, Congress

[1] *See, e.g.*, Clean Air Act of 1970; Clean Water Act of 1972; Endangered Species Act of 1973.

likely would have thought that federal courts *could not* review agencies' compliance with NEPA. *See* Amicus Brief of U.S. Senators, *Seven Cnty. Infrastructure Coal. v. Eagle County*, No. 23-975, at 5–9 (U.S. Sept. 4, 2024)

Yet, despite this limited, procedural mandate for agencies, NEPA rapidly grew into a massive hurdle for nearly every development project in the country. The number of NEPA cases multiplied exponentially—at least 4,000 cases, delaying or halting as many as 2,000 government projects. Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, Federalist Soc'y, at 11 (2018), https://perma.cc/SZT2-SNY3. As the threat of a NEPA challenge in the courts has grown, agencies take more time to write longer environmental impact statements, increasing costs, all with no evidence that this increase in paperwork benefits the American people. *See id.* at 11–15 (collecting studies).

"The CEQ regulations – which fill over 30 pages of the Federal Register – lie at the heart of NEPA's unexpected impact." *Id.* at 5. Going far beyond the basic procedural requirements of NEPA, the CEQ regulations imposed significant new burdens on agencies. First, they made the environmental impact statement itself much more complex and costly. For instance, they required agencies to submit draft environmental impact statements to the public for comment and respond in writing to those comments, a requirement nowhere in the original statutory text of NEPA.[2] *See* 40 C.F.R. § 1502.9(a)–(c). Then, they required agencies to prepare "Environmental Assessments"—a quick estimate of environmental impact—for *every*

[2] In the Fiscal Responsibility Act of 2023, Congress for the first time required public comment on environmental impact statements. *See* Pub. L. No. 118-5, § 321(b), 137 Stat. 10, 41 (codified at 42 U.S.C. § 4336a(c)).

project, not just the "major" ones mentioned by the original statute.[3] *See* 40 C.F.R. § 1508.9 (2020).

Most important of all, the 1978 CEQ regulations activated aggressive judicial review of agencies' compliance with NEPA. By making the CEQ regulations "binding on all Federal agencies," the Carter Administration also hoped to "establish formal guidance from [CEQ] on the requirements of NEPA for use by the courts in interpreting this law." 43 Fed. Reg. at 55978. And once CEQ published its regulations in the Code of Federal Regulations, "litigants and courts" alike began "to treat publication in the C.F.R. as equal to publication in the United States Code." *Marin Audubon*, 121 F.4th at 912. Combined with changes to access-to-court and remedial doctrines that made enjoining projects easier, federal courts began blocking projects left and right for failing to comply with CEQ's purportedly binding regulations. *See* Amicus Brief of U.S. Senators, *Seven Cnty. Infrastructure Coal.*, *supra*, at 5–9; Rutzick, *supra*, at 6–11

CEQ, however, never had the authority to issue binding regulations that carried the force of law. *See supra* Part I. Thus, there was never a basis for courts to invalidate agencies' project approvals based on their failure to comply with these regulations. But that did not stop courts and litigants from transforming NEPA from a narrow, procedural requirement to a judicial veto on nearly every development project in the country.

By finally rescinding its regulations, CEQ will return the focus of courts to the actual scope of agencies' authority to consider environmental effects in their substantive decisionmaking. *See Pub. Citizen*, 541 U.S. at 770. And by narrowing the grounds on which project approvals can be halted by courts, one can only hope that

[3] The Fiscal Responsibility Act of 2023 similarly codified this requirement, which for over 40 years, was imposed only by the CEQ regulations. *See* Pub. L. No. 118-5, § 321(b), 137 Stat. at 39 (codified at 42 U.S.C. § 4336(b)(2)).

the time and resources wasted on excessive environmental impact statements that went beyond NEPA's requirements can be redirected to more fruitful purposes.

This refocusing and retrenchment of NEPA's requirement cannot come soon enough. In recent years, a bipartisan consensus has emerged that NEPA is a massive obstacle to economic growth and effective governance. Even committed environmentalists now realize that NEPA hinders even their goals, as it makes green energy development difficult. Ezra Klein, *Government is Flailing, in Part Because Liberals Hobbled It*, N.Y. Times (Mar. 13, 2022), https://www.nytimes.com/2022/03/13/opinion/berkeley-enrollment-climate-crisis.html?smid=url-share.

It is easy to see why NEPA has become a point of public fixation. It consistently delays valuable projects for merely procedural reasons. The uncertainty of the process means many projects are never proposed. And NEPA hobbles some of our most important industries, including many energy projects—one study found that 50 percent of pipelines and nearly 40 percent of wind-energy projects face predevelopment litigation on projects requiring an environmental-impact statement. *See* Michael Bennon & Devon Wilson, *NEPA Litigation over Large Energy and Transport Infrastructure Projects*, 53 Env't L. Rep. 10836 (2023).

CONCLUSION

For these reasons, the Institute for Energy Research supports CEQ's rescission of its NEPA regulations.

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