THE TRUMP ADMINISTRATION'S SELF-INFLICTED PROBLEM: WHY REPEALING CEQ REGULATIONS WILL DELAY INFRASTRUCTURE AND ENERGY DEVELOPMENT

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On March 27, a group of 28 professors of environmental law from across the United States submitted joint comments to the White House Council on Environmental Quality (CEQ).[1] These comments responded to an interim final rule (IFR) published on February 25, rescinding all CEQ regulations implementing the National Environmental Policy Act (NEPA).[2] The rule became effective on April 11, 2025.[3] Since then, for the first time in nearly 50 years, there are no governmentwide regulations in place to provide consistent direction to all federal agencies on how to implement the governmentwide procedural obligations established by NEPA.

This Comment is an outgrowth of that submission, and details how the comment letter's lead authors came to the conclusions discussed in the letter.[4] It explains the costs of eliminating the common floor that the CEQ regulations had established for federal agencies conducting the environmental analyses required to comply with NEPA's statutory mandate, and why those costs need not have been incurred.

Part I provides general context and background on NEPA to lay a foundation for understanding the role the CEQ regulations played. Part II incorporates the comment letter, revised only slightly to build on the foundation established in Part I and to conform to *ELR* style. This part proceeds in five sections: an overview; a description of how CEQ's NEPA procedures created stability and predictability across the federal government; a discussion of how eliminating CEQ regulations will decrease predictability and efficiency, burden agencies, and invite litigation; an examination of the president's authority to issue governmentwide NEPA implementation procedures, and the related ability of the president to delegate that authority to CEQ; and an explanation of why eliminating governmentwide NEPA regulations is inconsistent with bipartisan permitting reform efforts. Part III concludes.

President Donald Trump initiated repeal of the CEQ NEPA regulations through the Executive Order he signed on the first day of his second term to "unleash America's affordable and reliable energy and natural resources."[5] The analysis in this Comment, and in the letter submitted to CEQ, reveals that abandoning the CEQ regulations compromises those goals because critical federal activities will experience delay, uncertainty, and litigation as a result of this decision. The Administration can reverse course and reestablish a consistent, governmentwide framework for NEPA compliance. If not, the U.S. Congress should intervene as part of any future permitting reform legislation.

I. NEPA

NEPA has been described as the "Magna Carta" of environmental laws because of its central role in federal agency decisionmaking.[6] NEPA "does not mandate a particular result,"[7] but rather requires federal agencies to look before they leap, by identifying and analyzing the impacts of

1. Robert Abrams et al., Public Comment to CEQ, Docket #CEQ-2025-0002, Interim Final Rule, National Environmental Policy Act Implementing Regulations, RIN 0331-AA10 (Mar. 27, 2025), https://www.regulations.gov/comment/CEQ-2025-0002-87881.
2. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025).
3. *Id.* at 10610, 10611.
4. While we believe our analysis in this Comment is consistent with the opinions expressed by our cosigner colleagues in the March 27, 2025, letter, we do not speak for them here.
5. Unleashing American Energy, Exec. Order No. 14154, 90 Fed. Reg. 8353, 8353 (Jan. 29, 2025).
6. Daniel R. Mandelker et al., NEPA Law and Litigation §1:1 (2d ed. 2024).
7. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

"major Federal actions significantly affecting the quality of the human environment."[8] In so doing, NEPA aims to improve the quality of government decisions, increase the transparency of government decisionmaking processes, and enable those whose interests may be affected to have an opportunity to participate in the decisionmaking process.

This part provides a brief history of NEPA, the CEQ implementing regulations, and President Trump's withdrawal of CEQ's rulemaking authority.

A. NEPA's Enactment and Mandate

NEPA was signed into law on January 1, 1970, by President Richard Nixon,[9] declaring "a national policy which will encourage productive and enjoyable harmony between man and his environment . . . and establishing a Council on Environmental Quality," housed within the Executive Office of the President.[10]

In passing NEPA, a near-unanimous Congress[11] and the president directed that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" to achieve an array of broad, ambitious environmental goals, such as "fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations."[12]

As enacted, NEPA codifies Congress' environmental ambition by imposing procedural obligations on all agencies to:

> [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[13]

While short in length, this new procedural obligation was designed to be transformative. As the U.S. Supreme Court explained, "[s]imply by focusing the agency's action on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[14]

NEPA, however, left a number of key terms undefined, including what constituted a "major federal action" or the "human environment"; and begged difficult questions, including how to determine whether impacts were "significant." Resolving these questions fell in large part to CEQ.

B. CEQ's NEPA Guidelines and Regulations

NEPA left a lot unsaid. It contained no definitions and little direction on how agencies should implement its procedural obligations. And because it applied to all federal agencies and would require significant interagency coordination, developing a consistent and predictable process was critical to its implementation.

Three months after signing NEPA into law, President Nixon addressed these issues by directing CEQ to "[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment."[15] In 1971, CEQ complied with the president's directive, issuing guidelines for federal agencies on how to prepare the "detailed environmental statements" required by the statute.[16] Two years later, CEQ revised and expanded the guidelines to provide additional detail.[17]

The guidelines failed to create consistent NEPA implementation across federal agencies, because they were voluntary and agencies developed divergent practices due to the differing statutes they administered.[18] Inconsistent agency practice led to conflict and unpredictability, and failed to fulfill the responsibility NEPA established for the federal government to "coordinate Federal plans, functions, programs, and resources to" meet NEPA's statutory objectives.[19] As CEQ explained:

> Although the Council conceived of the Guidelines as non-discretionary standards for agency decisionmaking, some agencies viewed them as advisory only. Similarly, courts differed over the weight which should be accorded the Guidelines in evaluating agency compliance with the statute.
>
> The result has been an evolution of inconsistent agency practices and interpretations of the law. The lack of a uniform, government-wide approach to implementing NEPA has impeded Federal coordination and made it more difficult for those outside government to understand and par-

8. 42 U.S.C. §4332(2)(C).
9. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§4331-4347).
10. 42 U.S.C. §§4321, 4342.
11. *See Environmental Quality Council*, *in* CQ Almanac 525-27 (25th ed. 1969), http://library.cqpress.com/cqalmanac/cqal69-1248484 (discussing voice votes in both chambers).
12. 42 U.S.C. §4331(b).
13. *Id.* §4332(2)(C) (2018).
14. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).
15. Protection and Enhancement of Environmental Quality, Exec. Order No. 11514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970).
16. Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724, 7724 (Apr. 23, 1971).
17. Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550 (Aug. 1, 1973).
18. *See* 43 Fed. Reg. 55978 (1978) (discussing inconsistent implementation of the 1973 guidelines).
19. 42 U.S.C. §4331(b).

> ticipate in the environmental review process. It has also caused unnecessary duplication, delay and paperwork.[20]

In 1977, President Jimmy Carter issued Executive Order No. 11991 to address these shortcomings, directing CEQ to issue regulations to implement NEPA and ordering federal agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements."[21] Following notice and comment, CEQ issued its final NEPA regulations on November 29, 1978,[22] "provid[ing] regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended."[23]

The CEQ NEPA regulations "replace[d] some seventy different sets of agency regulations, and provide[d] uniform standards applicable throughout the Federal government for conducting environmental reviews,"[24] that remained largely unchanged over the following 42 years.[25] The regulations did not entirely displace the role of each agency in tailoring NEPA to the agency's specific mission. Rather, agencies were directed to adopt agency-specific "supplemental" procedures—which could be tailored to the agency's unique statutory mandates—through a process that CEQ would review to ensure "conformity" with NEPA and the CEQ regulations.[26]

C. 2023 NEPA Amendments

Congress amended the NEPA statute through the 2023 Fiscal Responsibility Act (FRA), considerably expanding the statutory direction on how agencies are to carry out the environmental review process.[27] The vast majority of changes made by the 2023 NEPA amendments codified existing aspects of the CEQ regulations. Some of these had been part of the CEQ regulations since 1978, such as provisions on the designation of a lead agency and cooperating agencies for projects involving multiple federal, state, or tribal agencies with authority or special expertise.[28]

Other provisions codified into statute reflected requirements added to the CEQ regulations in 2020, such as provisions on timelines and page limits for environmental assessments and environmental impact statements (EISs).[29] Those aspects of the 2023 NEPA amendments did not substantially change the implementation of NEPA, because they codified existing regulatory provisions and requirements. A few components of the amendments modified the existing environmental review process, including a provision related to agencies adopting other agencies' categorical exclusions (CEs).[30]

D. CEQ's NEPA Regulations in the Courts

Since 1970, agencies have published more than 35,000 EISs,[31] and these represent a small portion of the NEPA decisions that have been made in reliance on the CEQ regulations.[32] While only a very small proportion of these NEPA decisions are litigated—one of us estimated a litigation rate of 0.22% for decisions made between 2001 and 2013—the sheer volume of NEPA decisions means that thousands of claims were filed during the 46 years that the CEQ regulations were in effect.[33] During that time, the Supreme Court has referred to CEQ's regulations on six occasions when resolving claims that agencies violated NEPA,[34] as have the federal courts of appeals in 11 circuits.[35]

Since 1999, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has been dropping footnotes hinting at a contrary view that, notwithstanding the extensive reliance on CEQ regulations by the courts (including the Supreme Court), the agencies, the public, and Congress,[36] CEQ might not have authority to issue regulations at all. This concern was first noted in *City of Alexandria v. Slater*, where a footnote explains that CEQ "has no express regulatory authority under [NEPA]; instead, the Council was empowered to promulgate binding regula-

20. 43 Fed. Reg. at 55978.
21. Relating to Enhancement and Protection of Environmental Quality, Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 25, 1977).
22. Implementation of Procedural Provisions, 43 Fed. Reg. 55978 (Nov. 29, 1978) (codified as amended at 40 C.F.R. pts. 1500-1508).
23. 40 C.F.R. §1500.3 (1978).
24. 43 Fed. Reg. at 55978.
25. In 1986, CEQ amended its NEPA regulations to clarify how agencies should address "incomplete or unavailable information," 51 Fed. Reg. 15618, 15625 (Apr. 25, 1986), though these changes have generally not been seen as significantly modifying CEQ's regulations.
26. 50 C.F.R. §1507.3(a) (1978).
27. Prior to 2024, Congress enacted many laws to adjust the environmental review process for particular categories of federal activities, but did not amend the NEPA statute. As described *infra* Section II.D, those laws frequently referred to or relied on the CEQ NEPA regulations.
28. *Compare* 42 U.S.C. §4336a(a), *with* 50 C.F.R. §§1501.5, 1501.6 (1978).
29. *Compare* 42 U.S.C. §4336a(e), (g), *with* 50 C.F.R. §§1501.10, 1502.7 (2020).
30. 42 U.S.C. §4336c.
31. *See* Steven Bethard et al., *Inferring Missing Metadata From Environmental Policy Texts*, Proc. 3rd Joint SIGHUM Workshop on Computation Linguistics for Cultural Heritage Soc. Scis. & Literature 46 (2019), https://aclanthology.org/W19-2506.pdf.
32. EISs account for less than 1% of the environmental documents prepared to satisfy NEPA. *See* John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 Nat. Res. & Env't 14, 14 (2020).
33. John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 Env't L. 479, 500 (2020).
34. Department of Transp. v. Public Citizen, 541 U.S. 752 (2004); Norton v. Southern Utah Wilderness All., 542 U.S. 55 (2004); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Marsh v. Oregon Nat. Res. Council, 490 U.S. 360 (1989); Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); Andrus v. Sierra Club, 442 U.S. 347 (1979).
35. *See* Massachusetts v. Watt, 716 F.2d 946, 948 (1st Cir. 1983), *abrogated on other grounds by Marsh*, 490 U.S. 360; Brodsky v. U.S. Nuclear Regul. Comm'n, 704 F.3d 113, 120 n.3 (2d Cir. 2013); State Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs, 685 F.3d 259, 269 (3d Cir. 2012); Sugarloaf Citizens Ass'n v. Federal Energy Regul. Comm'n, 959 F.2d 508, 512 (4th Cir. 1992); City of Dallas v. Hall, 562 F.3d 712, 722 (5th Cir. 2009); Kentucky Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 407 (6th Cir. 2013); Rhodes v. Johnson, 153 F.3d 785, 787 (7th Cir. 1998); In re Operation of Mo. River Sys. Litig., 516 F.3d 688, 694 (8th Cir. 2008); Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986); Colorado Wild v. U.S. Forest Serv., 435 F.3d 1204, 1209 (10th Cir. 2006); Defenders of Wildlife v. Hogarth, 330 F.3d 1358, 1369 (Fed. Cir. 2003).
36. *See infra* Section II.D.

tions by President Carter's Executive Order No. 11991."[37] The court did not further consider that question because regulatory authority had not been challenged in the case and, therefore, the court "treat[s] the Council's regulations as binding on the agency."[38]

Likewise, the 2002 opinion in *Grand Canyon Trust v. Federal Aviation Administration* noted that "[n]either party challenges the regulatory authority of the CEQ, and hence we have no occasion to question the binding effect of the regulations,"[39] and the 2006 opinion in *Taxpayers of Michigan Against Casinos (TOMAC) v. Norton* "note[s] that the binding effect of CEQ regulations is far from clear."[40] And in 2021, Judge A. Raymond Randolph—22 years after joining the panel decision in *City of Alexandria v. Slater*—wrote a concurrence in *Food & Water Watch v. U.S. Department of Agriculture* that expressed more extensive concern about CEQ's authority and culminated with the following:

> If CEQ's regulations are binding, several concerns would need to be addressed. What, if any, mechanism is there for judicial review of CEQ's regulations? Do CEQ's regulations bind executive and independent agencies alike? Can the President override the requirement (and safeguard) of notice-and-comment rulemaking? And can other executive offices assert this authority as well?
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> "[W]here there is so much smoke, there must be a fair amount of fire, and we would do well to analyze the causes[.]" Nevertheless, since we decide this case on standing grounds, these questions and related ones cannot be answered now.[41]

In his 2024 opinion in *Marin Audubon Society v. Federal Aviation Administration*,[42] where no party raised the issue, Judge Randolph abandoned the court's long-standing practice of assuming CEQ had regulatory authority. The case involved a challenge to the Federal Aviation Administration's (FAA's) and National Park Service's NEPA analysis of commercial tourist flights over four national parks in California. Flights had been ongoing for several years and were managed in accordance with an interim operating plan, but that plan had not undergone NEPA review. The agencies relied on a CE to satisfy their NEPA obligations before finalizing the operating plan,[43] reasoning that flights would not exceed levels discussed in the interim plan and that significant environmental impacts were therefore unlikely to occur.

The court ruled the agencies could not rely on the interim plan to conclude that existing operations were insignificant, because the interim plan had not undergone NEPA review. By "treating interim operating authority as the baseline, the Agencies enshrined the status quo without evaluating the environmental impacts of the existing flights."[44] This, the court concluded, violated NEPA's mandates. The court's holding would have been a largely unremarkable ruling on the adequacy of the agencies' analysis had two judges not also decided to wade into the issue of CEQ authority.

Writing for the panel majority, Judge Randolph wrote that "[f]or CEQ's regulations to be legally binding on 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.'"[45] However, here, "[n]o 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."[46] Absent express congressional authorization, he concluded, CEQ's regulations were ultra vires and unenforceable.[47] Chief Judge Sri Srinivasan wrote a strenuous dissent from the majority's discussion of CEQ's authority, because it had not been presented by the parties, was unnecessary to the disposition of the case, and CEQ was not even a party.[48]

All parties to the case recognized the ruling's potentially destabilizing effects, and sought en banc review regarding the question of CEQ's regulatory authority. While the court denied en banc review, a majority of the judges joined a concurrence to the denial, stating that "the panel majority's opinion . . . ran afoul of the principle of party presentment," and that "the panel majority's rejection of the CEQ's authority to issue binding NEPA regulations was unnecessary to the panel's disposition."[49]

Subsequently, on February 3, 2025, Judge Daniel Traynor of the U.S. District Court for the District of North Dakota granted the state of Iowa's motion for partial summary judgment challenging CEQ's rulemaking authority. *Iowa v. Council on Environmental Quality*[50] directly addressed the question raised ab initio by the D.C. Circuit, adopting the panel majority's reasoning and holding that "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. Therefore, the Court finds that CEQ does not have authority under NEPA to issue

37. 198 F.3d 862, 866 (D.C. Cir. 1999).
38. *Id.* (citations omitted).
39. 290 F.3d 339, 341 n.* (D.C. Cir. 2002), as amended (Aug. 27, 2002).
40. 433 F.3d 852, 861 (D.C. Cir. 2006); *see also* Nevada v. Department of Energy, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (quoting *TOMAC*, 433 F.3d at 861).
41. Food & Water Watch v. U.S. Dep't of Agric., 1 F.4th 1112, 1118 (D.C. Cir. 2021) (Randolph, J., concurring) (quoting Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 432 (1960)).
42. 121 F.4th 902, 916 (D.C. Cir. 2024).
43. CEs apply to categories of actions that a federal agency has determined normally do not significantly affect the quality of the human environment and therefore do not require completion of the "detailed statement" on effects required by 42 U.S.C. §102(2)(C).
44. *Marin Audubon Soc'y*, 121 F.4th at 916.
45. *Id.* at 912 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979)).
46. *Id.*
47. *Id.* at 914.
48. *Id.* at 920 (Srinivasan, C.J., dissenting in part).
49. Marin Audubon Soc'y v. Federal Aviation Admin., No. 23-1076, 2025 WL 374897, at *1 (D.C. Cir. Jan. 31, 2025) (en banc) (Srinivasan, Millet, Wilkins, Childs, and Garcia, JJ., concurring).
50. 765 F. Supp. 3d 859, 896 (D.N.D. 2025).

regulations."[51] Based on that reasoning, the court proceeded to vacate the 2024 CEQ rule.[52] The district court's opinion has not been appealed.

In vacating CEQ's 2024 regulations, the North Dakota court noted that if CEQ lacked authority to issue the 2024 rule, it likely also lacked authority to issue earlier rules as well. Nonetheless, the court concluded that "vacating a rule does not mean the Court decides the appropriate replacement. The law states that vacating simply reinstates the previous rule."[53] The court then went on to say that "[a]ll parties agree if the 2024 Rule is vacated, the status quo is the version of NEPA in place on June 30, 2024, the day before the rule took effect."[54] CEQ's 2022 rule would therefore control, prior to the arrival of CEQ's IFR.

E. President Trump's Executive Order to Repeal CEQ's NEPA Regulations

President Trump's Executive Order No. 14154, in §5(a), revokes President Carter's 1977 Executive Order directing CEQ to promulgate regulations that are binding on all federal agencies.[55] Additionally, §5(b) of the order directs CEQ to propose rescinding all of CEQ's NEPA regulations.[56]

In response to President Trump's order, CEQ published an IFR, Removal of National Environmental Policy Act Implementing Regulations, on February 25, 2025.[57] The repeal took effect two weeks later, on April 11, 2025.[58] CEQ invited public comment on the IFR. According to Regulations.gov, CEQ received 88,805 comments, including the comment letter submitted by 28 environmental law professors that is adapted below.

II. Comments From 28 Environmental Law Professors

This part turns to the comments on the IFR we provided to CEQ on behalf of 28 law professors, edited minimally to improve readability and flow in light of the background provided in Part I. While we do not write here on behalf of our cosigner colleagues, we have endeavored to hold fast to both the substance and intent of our collective IFR comments.

A. Comment Overview

We believe that NEPA plays a vital role in promoting science-based decisionmaking and government transparency, and that NEPA enables communities, businesses, and members of the public to have a meaningful voice in the federal decisions that affect them. We also support efforts to modernize the environmental review process and improve its efficacy, consistency, and predictability, because we recognize that the federal government plays a critical role in numerous facets of American life and that lengthy environmental review processes can delay the benefits that accrue from federal projects and investments.

The IFR's elimination of CEQ's unifying regulations will frustrate the achievement of NEPA's purposes; increase inefficiency, inconsistency, and uncertainty; and undermine interagency coordination. Moving forward, dozens of agencies will need to initiate duplicative rulemakings to adopt or update their own procedures, straining federal agency resources and requiring repetitive and time-consuming participation from the businesses, organizations, and members of the public whose interests may be affected.

The resulting agency balkanization will also create unnecessary complexity and hamper coordination. This result is contrary to Congress' direction that "it is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and *coordinate* Federal plans, functions, programs, and resources" in pursuit of NEPA's lofty aspirations, which include striking a balance between progress, protection, and unintended consequences.[59]

All those seeking federal authorizations that are subject to environmental reviews—government agencies, private entities, and local communities alike—will be harmed by the loss of unifying instructions on how to implement NEPA's mandate. Moreover, decentralizing environmental review procedures will stymie some of the president's domestic policy priorities, such as increasing domestic energy production.

Our argument proceeds in four parts: it explains why removing standardized NEPA procedures will result in regulatory upheaval and eliminate long-standing predictability; why eliminating CEQ's regulations will decrease predictability and efficiency, burden agencies, and invite litigation; how the president has authority to issue governmentwide NEPA implementation procedures and can delegate that authority to CEQ; and how eliminating governmentwide NEPA regulations is inconsistent with bipartisan permit reform efforts.

We therefore urge reinstatement of CEQ's rulemaking authority and the regulations revoked by the IFR. If this does not occur, we hope that Congress will intervene and enact legislation expressly authorizing CEQ to issue binding regulations.

B. CEQ's NEPA Procedures Established a Standardized Process Across the Federal Government

For almost 50 years, CEQ regulations have provided all federal agencies with a common body of procedures to gov-

51. *Id.* at 878.
52. *Id.* at 896.
53. *Id.* (quoting Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005)).
54. *Id.* at 896.
55. Exec. Order No. 14154, 90 Fed. Reg. 8353, 8355 (Jan. 29, 2025).
56. *Id.*
57. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025).
58. *Id.*

59. 42 U.S.C. §4331(b) (emphasis added).

ern the environmental review processes required by NEPA. This approach, set in motion in 1977 by Executive Order No. 11991, is sensible because having a common blueprint for NEPA processes helps everyone. It creates consistency and predictability for businesses requesting federal authorizations, for communities and members of the public seeking to participate in decisionmaking processes that affect them, for judges adjudicating challenges to agency actions, and for the agencies themselves.

The IFR is the first time since 1978, when CEQ initially issued NEPA regulations, that an administration has pursued a decentralized approach to NEPA implementation. Even as different administrations, and particularly the first Trump Administration, have taken different approaches to certain aspects of environmental review, CEQ's regulations have been binding on all federal agencies. The 1978 regulations were explicit and clear: they were "applicable to and binding on all Federal agencies . . . except where compliance would be inconsistent with other statutory requirements."[60]

The regulations recognized that each agency may have specialized needs that could benefit from more specific procedures, and directed federal agencies to "adopt procedures to supplement [CEQ's] regulations."[61] Eighty-six agencies adopted NEPA procedures, which typically incorporated CEQ's regulations by reference because agency-specific regulations must "supplement" rather than "paraphrase" CEQ's rules.[62]

In 2020, during President Trump's first term in office, CEQ substantially revised many aspects of its regulations but continued to provide that the CEQ regulations bound all other agencies. If anything, the 2020 regulations exercised more control over agency NEPA implementation, because they significantly curtailed the extent to which agency-specific procedures could incorporate additional or different procedures.[63] The 2022 regulations removed this restriction,[64] and the 2024 regulations directed agencies to submit implementing procedures to CEQ for review as the mechanism to maintain consistency across the government.[65]

Accordingly, and for almost half a century, CEQ's NEPA regulations have provided a common procedural foundation for all federal agency actions subject to environmental review. Some federal agencies have built on this common foundation by issuing agency-specific regulations as necessary to comply with agency organic statutes and otherwise meet agency needs. Through it all, CEQ's unifying regulations have provided a common foundation that facilitated consistent standards between agencies.

60. 40 C.F.R. §1500.3 (1978) (internal citations omitted).
61. *Id.* §1507.3(a).
62. *Id.*
63. *See id.* §1507.3(b) (2020) (directing that "agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the regulations in this subchapter").
64. *Id.* §1507.3 (2022).
65. *Id.* §1507.3(b)(1)-(2) (2024).

C. *Eliminating CEQ's Regulations Will Decrease Predictability and Efficiency, Burden Agencies, and Invite Litigation*

Abandoning CEQ's governmentwide NEPA regulations in favor of a decentralized approach in which each agency adopts its own independent procedures will have far-reaching negative consequences by (1) impeding the predictability and efficiency of environmental review before new procedures can be drafted and adopted; (2) burdening agencies and other interested parties during the preparation of new procedures; and (3) creating inefficiency and litigation risk in the long term after new procedures are adopted.

1. Abandoning Governmentwide Regulations Will Impede Predictability and Efficiency of Ongoing Environmental Reviews

Many projects are currently in environmental review and permitting processes, and the IFR's revocation of uniform direction creates substantial uncertainty for project proponents and severely compromises interagency coordination. These challenges will arise because, in the absence of the CEQ regulations, agencies will be left to apply their own existing procedures, coupled with generalized evaluation of the statutory requirements.

That task will be challenging, because each agency's existing procedures include different features and provisions and were only intended to supplement the CEQ regulations, rather than provide a comprehensive framework for environmental review. Moreover, each agency's assessment of its own procedures and the NEPA statute will occur within each agency's respective legal department, and coming to a common understanding among the agency's lawyers for any project requiring interagency coordination will be a new obstacle to completing the environmental review processes.

That challenge will be magnified because many agency procedures incorporate by reference some or all of the CEQ regulations, and under principles of administrative law, those provisions incorporate the CEQ regulations that were in effect at the time that the agency procedures were adopted.[66] Adopted regulations remain valid, enforceable parts of the adopting agency's rules until the adopting agency amends its regulations to strike the adopted content. As a result, while CEQ's regulations would no longer have direct and independent effect, CEQ's regulations may have indirect and binding effect as part of the adopting agency's regulations.

Consequently, different agencies will need to apply different versions of the CEQ regulations by operation of their own rules, where agency regulations incorporate CEQ's regulations by reference. Further complicating matters, agencies may have incorporated CEQ's 1978, 1986, 2020,

66. *See* 1 C.F.R. §51.5(f).

2022, or 2024 regulations. Determining which regulations apply, and how to resolve potential differences in applicable regulations for projects involving multiple federal agencies, will unnecessarily complicate NEPA reviews and agency decisionmaking.

The delays and uncertainties that lie ahead are likely to disproportionately affect large infrastructure projects because larger projects generally require multiple agency authorizations, and therefore will require harmonization of differing agency procedures. These projects will also be particularly vulnerable to delays from agencies having to direct available resources to completing new procedures; if any agency involved in the interagency coordination process faces resource constraints, that will affect the environmental review process as a whole.

A hypothetical oil and gas field development on a national forest or grassland provides an example. Before offering land to prospective lessees, the U.S. Forest Service must engage in land management planning to determine whether lands are appropriate for development and, if so, what lease stipulations are needed to protect other resources. This planning process requires NEPA review.[67] The Bureau of Land Management (BLM), which oversees all federal onshore mineral leasing, will need to conduct its own independent NEPA analysis prior to offering specific tracts of land for lease.[68]

The successful bidder will then need to submit a drilling permit application to BLM and a surface use plan of operations to the Forest Service. The successful bidder may also need to obtain a permit to fill wetlands from the U.S. Army Corps of Engineers, obtain permits to discharge pollutants into the air and water from the Environmental Protection Agency (or state agencies exercising delegated authority), undergo consultation with either the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service regarding protected fish and wildlife, and obtain pipeline authorizations from the Federal Energy Regulatory Commission—all of which will require some level of NEPA review.

This simplified example involves at least six federal agencies, each of which will need updated regulations to guide their NEPA analysis and fill regulatory gaps left by the withdrawn CEQ regulations. The result is predictable: increased costs for agencies and operators alike, lengthy delays, more litigation, a slowing of energy development, and an unnecessary burden on economic growth.

2. Abandoning Governmentwide Regulations Will Burden Agencies and Other Interested Parties During Preparation of New Procedures

The challenges agencies will face conducting environmental reviews in the immediate term will continue until they complete rulemakings to adopt or amend their own NEPA procedures. We do not know how many rulemakings this will entail, but it will be a large number. There are currently 86 agencies with NEPA implementing procedures,[69] and those agencies will need to complete new rulemakings.

Other agencies have never adopted NEPA procedures and have relied directly on CEQ's regulations. Those agencies will now have to develop their own NEPA regulations. This could be an extraordinary number of rulemakings because the *Code of Federal Regulations* identifies 441 agencies,[70] although many of those agencies are nested within a department that could pursue one rulemaking to cover multiple component agencies.

Each rulemaking effort will be resource-intensive because the Administrative Procedure Act imposes requirements on the promulgation of rules—which is vital to ensuring that states, tribes, the private sector, and the public have an opportunity to provide feedback on rules that will affect their interests. This kind of engagement, while time-intensive, leads to more effective rules. Similarly, the interagency review process established by Executive Order No. 12866 promotes interagency coordination to minimize the risk of conflicting regulatory requirements, and this too requires staff time and effort. These rulemaking requirements will involve the publication of a notice of proposed rulemaking in the *Federal Register*, solicitation of public comments on the proposed rule, consideration of and response to public comments, and publication of the final rule in the *Federal Register*.[71]

Complex rules can generate thousands of stakeholder comments, and responding to those comments can require substantial resources. CEQ's 2024 NEPA regulations, for example, generated more than 82,000 comments,[72] and CEQ's response to comments totaled 941 pages.[73] While CEQ has directed agencies to complete their implement-

67. *See, e.g.*, 36 C.F.R. §220.4(2) (discussing NEPA's applicability to Forest Service decisions).
68. *See, e.g.*, 43 C.F.R. §3921.20 (requiring BLM to complete a NEPA analysis before offering tracts of land for competitive lease sale).
69. *See* CEQ, Federal Agency NEPA Implementing Procedures (rev. 2023), https://ceq.doe.gov/docs/laws-regulations/Federal-Agency-NEPA-Implementing-Procedures-2023-01-27.pdf.
70. *See* Federal Register, *Agencies*, https://www.federalregister.gov/agencies (last visited May 19, 2025).
71. Agencies will invite litigation with a strong likelihood of success if they seek to shortcut this process by contending that their NEPA procedures are procedural rules exempt from the notice-and-comment rulemaking set forth in 5 U.S.C. §553. This exception to notice-and-comment rulemaking is limited to rules "that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agencies." AFL-CIO v. National Lab. Rels. Bd., 57 F.4th 1023, 1034 (D.C. Cir. 2023) (quoting James v. Hurson Assocs., Inc. v. Glickman, 229 F.3d 277, 280 (D.C. Cir. 2000)).

    Implementing NEPA implicates the rights and interests of nonfederal actors, both those of parties seeking authorizations, financial assistance, or other government actions, and those whose interests are affected by proposed federal actions. They are not procedural rules for purposes of the Administrative Procedure Act, an understanding that Congress has confirmed by entertaining resolutions of disapproval under the Congressional Review Act, which similarly excludes procedural rules, 5 U.S.C. §804(3), directed at CEQ's NEPA regulations. *See, e.g.*, S.J. Res. 99, 118th Cong. (2024); S.J. Res. 55, 117th Cong. (2022).
72. *See* Regulations.gov, *National Environmental Policy Act Implementing Regulations Revisions Phase 2—All Comments on Docket*, https://www.regulations.gov/docket/CEQ-2023-0003/comments (last visited May 19, 2025).
73. CEQ, NEPA Phase 2 Final Rule Response to Comments (Apr. 30, 2024), https://www.regulations.gov/document/CEQ-2023-0003-82042.

ing procedures within a year, doing so will be a herculean feat in light of the reality that "[t]he federal rulemaking process usually takes two to three years for a suggestion to be enacted as a rule."[74] The time, personnel, and resources needed to complete independent rulemakings on anything resembling the timeline that has been set out will simply be too much for some agencies. It is doubly questionable whether any agency will be able to meet the timeline set by CEQ following the reductions in force that are occurring and being contemplated.

The Office of Management and Budget will also require substantial resources to simultaneously oversee these efforts and undertake the interagency review process mandated by Executive Order No. 12866. The U.S. Department of Justice will face the demanding tasks of providing legal advice to agencies during their rulemakings and defending against (and coordinating) the inevitable legal challenges that will be brought. Agencies will need to issue new guidance and staff trainings. Staff will then need to communicate new requirements to anyone seeking agency authorization: entities seeking federal authorizations, consultants conducting the requisite environmental analyses, and publics seeking to engage in the NEPA process.

Stated simply, the process ahead threatens to grind government decisionmaking to a halt, and absent federal approvals that are contingent on NEPA review, thousands of projects will languish, costing jobs and weighing on the economy.

3. Abandoning Governmentwide Regulations Will Create Inefficiency and Litigation Risk in the Long Term After New Procedures Are Adopted

Ensuring consistency among this multitude of rulemakings will also be extraordinarily difficult because each agency will have a different constellation of public comments related to the agency's responsibilities, legal authorities, and the factual contexts in which the agency operates. Even minor deviations among the procedures agencies ultimately adopt will create friction in interagency coordination processes, and inconsistent requirements will invite litigation and the potential for conflicting judicial opinions. Over time, interagency coordination will become more complex and difficult because litigation will arise under the procedures of specific agencies, and court decisions will be specific to those procedures, resulting in an increasingly fractured body of case law to inform the environmental review process.

This legal ambiguity is likely to give rise to novel questions of law, which may increase litigation and further complicate the environmental review process and associated permitting decisions until the relevant agencies complete rulemakings to adopt or revise their NEPA procedures. Lower courts will likely reach inconsistent decisions about the procedures of different agencies, and because those decisions will be unrelated to a common body of binding rules (like the CEQ regulations), different agencies may face differing legal requirements within the same geographic areas, making it difficult for agencies and project proponents to discern the standard for compliance. Over time, inconsistent lower court decisions will give rise to appellate litigation, which could produce circuit splits. All of this uncertainty will fuel litigation, and may well delay the development of needed infrastructure as agencies try to sort out what to do.

In sum, revocation of CEQ's regulations will create uncertainty, and delay and undermine interagency coordination while a huge number of rulemaking processes are underway for each agency to adopt its own NEPA procedures. Those rulemakings will strain agency resources and create litigation risk. They also threaten to result in discrepancies in the rules agencies will operate under. Inefficiency will persist even after agencies adopt new procedures and as courts resolve disputes. These costs produce no benefits, but rather an environmental review process that will be worse for agencies, the private sector, and the public.

D. The President Has Authority to Issue Governmentwide NEPA Implementation Procedures and Can Delegate That Authority to CEQ

Although President Trump revoked Executive Order No. 11991, which served as the basis for CEQ's regulations, we offer these further comments on the president's authority to direct governmentwide implementation of NEPA and, correlatively, to delegate regulatory authority to CEQ. We do so to underscore the fact that the multitude of problems detailed above are unnecessary and avoidable. The president can—and should—redelegate authority to CEQ to issue governmentwide implementing regulations.

CEQ's authority to issue regulations arose from a delegation of presidential power by President Carter. As a matter of separation-of-powers doctrine, President Carter had ample authority to direct governmentwide implementation of NEPA in 1977 when he issued Executive Order No. 11991, and we are aware of no impediment to his delegating that authority to CEQ. Moreover, any question about the existence of that authority in 1977 has been put to rest by Congress' enactment of extensive legislation relying on the CEQ regulations and, therefore, confirming the lawfulness of the delegation under which CEQ acted. It should, therefore, come as no surprise that the Supreme Court has consistently recognized that CEQ "has promulgated regulations to guide federal agencies in determining what actions are subject to the [NEPA] statu-

74. U.S. Courts, *About the Rulemaking Process*, https://www.uscourts.gov/forms-rules/about-rulemaking-process (last visited May 19, 2025).

tory requirement,"[75] and 11 federal circuit courts of appeals have made similar statements.[76]

President Carter's authority to direct the implementation of NEPA arises from three features of the NEPA process: (1) NEPA imposes obligations limited only to the executive branch; (2) those obligations encompass all executive branch agencies so, in the absence of a legislative direction, only the president can oversee implementation of the statute in its entirety; and (3) implementing NEPA often requires multiple agencies to coordinate together, rendering the establishment of a common set of procedures applicable to all federal agencies necessary to ensure efficient and predictable interagency coordination. In such circumstances, presidential power to direct implementation by the executive branch is within the president's "general administrative control" of the executive branch that is part and parcel of the president's duty under the Take Care Clause of Article II of the U.S. Constitution.[77]

The presidential power to establish governmentwide NEPA procedures also furthers the statutory purpose to "promote efforts which will prevent or eliminate damage to the environment,"[78] and the congressional policy that the federal government "use all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources" in pursuit of various environmental goals.[79] At a minimum, the power President Carter exercised in issuing Executive Order No. 11991 lies in the zone of congressional silence that the Supreme Court has recognized may invite presidential action.[80]

Further, there is no legal principle of which we are aware that would prevent the president from delegating implementation of NEPA to CEQ. Rather, Congress has spoken directly to this issue through 3 U.S.C. §301, which, absent other statutory authority to the contrary, expressly authorizes the president to delegate any function to any principal officer of the United States, which includes the chair of CEQ.

The D.C. Circuit's opinion in *Marin Audubon*[81] offers one potential—but meritless—objection to the separation-of-powers analysis we have offered. There, the court in dicta asserted that, under the Supreme Court's decision in *Chrysler Corp. v. Brown*, "[f]or CEQ's regulations to be legally binding on 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.'"[82] *Chrysler Corp*. involved an Executive Order charging the Secretary of Labor with ensuring that corporations that benefit from government contracts provide equal employment opportunity regardless of race or sex, and the regulations promulgated by the U.S. Department of Labor in response to the Executive Order were therefore directed at private parties.[83] In contrast, CEQ's regulations are directed at federal agencies in order to coordinate their implementation of a federal law.

The *Marin Audubon* panel's majority opinion fails to recognize the president's authority described above with respect to the administration of the executive branch and 3 U.S.C. §301's grant of authority to the president to delegate authority to any U.S. Senate-confirmed official. The majority's statement also misstates the nature of CEQ regulations, which do not bind the public or the courts, because NEPA directly applies only to federal executive department agencies.

Thus, the *Chrysler Corp*. case does not control in this circumstance because it involved a regulation directed to private actors.[84] As a result, the statement in the D.C. Circuit panel's opinion is, on its face, an inadequate basis for deeming delegation of authority from the president to CEQ to be unlawful. Moreover, the D.C. Circuit issued a subsequent order disavowing any holding regarding CEQ's authority to issue binding regulations as running "afoul of the principle of party presentation," "[b]ecause no party raised or briefed that issue."[85]

Congressional ratification of CEQ's regulatory authority is also clear.[86] Since 1977, Congress has recurrently confirmed the validity of the delegation of authority to CEQ. Over the past 25 years, Congress has repeatedly enacted legislation premised on the existence and validity of the CEQ regulations, and thereby ratified the validity of Executive Order No. 11991's delegation of authority to CEQ.[87]

Congress directly codified substantial portions of CEQ's regulations in the NEPA amendments enacted through the

75. Department of Transp. v. Public Citizen, 541 U.S. 752, 757 (2004); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354 (1989); Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 372 (1989); Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
76. *See* Massachusetts v. Watt, 716 F.2d 946, 948 (1st Cir. 1983), *abrogated on other grounds by Marsh*, 490 U.S. 360; Brodsky v. U.S. Nuclear Regul. Comm'n, 704 F.3d 113, 120 n.3 (2d Cir. 2013); State Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs, 685 F.3d 259, 269 (3d Cir. 2012); Sugarloaf Citizens Ass'n v. Federal Energy Regul. Comm'n, 959 F.2d 508, 512 (4th Cir. 1992); City of Dallas v. Hall, 562 F.3d 712, 722 (5th Cir. 2009); Kentucky Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 407 (6th Cir. 2013); Rhodes v. Johnson, 153 F.3d 785, 787 (7th Cir. 1998); In re Operation of Mo. River Sys. Litig., 516 F.3d 688, 694 (8th Cir. 2008); Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986); Colorado Wild v. U.S. Forest Serv., 435 F.3d 1204, 1209 (10th Cir. 2006); Defenders of Wildlife v. Hogarth, 330 F.3d 1358, 1369 (Fed. Cir. 2003).
77. Louisiana v. Biden, 64 F.4th 674, 678 (5th Cir. 2023).
78. 42 U.S.C. §4321.
79. *Id*. §4331(b).
80. *See* Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).
81. 121 F.4th 903 (D.C. Cir. 2024); *see* Justin L. McCarthy, *Separating Holding From Dicta:* Marin Audubon v. FAA, 55 ELR 10370 (July/Aug. 2025). (This article, while not available at the time and therefore not cited in our original comments, provides background on the case and is consistent with the position taken in our comment letter).
82. *Marin Audubon Soc'y*, 121 F.4th at 912 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979)).
83. *Chrysler Corp.*, 441 U.S. at 286.
84. *Id*. at 306.
85. Marin Audubon Soc'y v. Federal Aviation Admin., No. 23-1076, 2025 WL 374897, at *1 (D.C. Cir. Jan. 31, 2025) (en banc) (Srinivasan, Millet, Wilkins, Childs, and Garcia, JJ., concurring).
86. *See* Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147 (1937) (holding that Congress "recognized the validity of" actions taken pursuant to an executive order and "ratified the President's actions" through enactment of subsequent funding legislation); *accord* Swayne & Hoyt v. United States, 300 U.S. 297, 301 (1937).
87. *See* United States v. Alaska, 521 U.S. 1 (1997); *cf.* United States v. Midwest Oil, 236 U.S. 459 (1915).

FRA of 2023,[88] and has also specifically referenced CEQ's regulations in at least 20 other laws enacted by 11 Congresses, including:

- FAA Reauthorization Act of 2024, Pub. L. No. 118-63, §230, 138 Stat. 1025;
- Building Chips in America Act of 2023, Pub. L. No. 118-105, §2, 138 Stat. 1587 (2024);
- National Defense Authorization Act (NDAA) for Fiscal Year 2023, Pub. L. No. 117-263, §8134, 136 Stat. 2395 (2022);
- Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, §§11301, 11312, 11318, 40106, 135 Stat. 429 (2021);
- Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, §102, 134 Stat. 1182 (2020);
- Consolidated Appropriations Act of 2019, Pub. L. No. 115-245, §8141, 132 Stat. 2981 (2018);
- Agricultural Improvement Act of 2018, Pub. L. No. 115-334, §8611, 132 Stat. 4490;
- FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §1220, 132 Stat. 3186;
- Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, §121, 132 Stat. 348;
- NDAA for Fiscal Year 2017, Pub. L. No. 114-328, §341, 130 Stat. 2000 (2016);
- Water Infrastructure Improvements for the Nation Act of 2016, Pub. L. No. 114-322, §§1156, 4010, 130 Stat. 1628;
- Fixing America's Surface Transportation Act of 2015, Pub. L. No. 114-94, §§168, 1315, 1432, 24201, 41001, 41003, 41005, 129 Stat. 1312;
- Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, §1005, 128 Stat. 1193;
- Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21), Pub. L. No. 112-141, §§1315-1318, 126 Stat. 405;
- FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, §213, 126 Stat. 11;
- Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, §423, 123 Stat. 524;
- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, §6001, 119 Stat. 1144 (2005);
- Healthy Forest Restoration Act of 2003, Pub. L. No. 108-148, §404, 117 Stat. 1887;
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century Act of 2000, Pub. L. No. 106-181, §803, 114 Stat. 61; and
- Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §5041, 101 Stat. 1330.

Congress has also repeatedly enacted other laws, effectuation of which relied on CEQ's NEPA regulations. Often, such directives relate to CEs, which were a creature of the CEQ regulations,[89] and to which Congress acquiesced for 46 years until eventually being codified in the FRA of 2024. Examples of such directives include[90]:

- Hazard Eligibility and Local Projects Act of 2022, Pub. L. No. 117-332, §2, 136 Stat. 6119 (2023);
- Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act, Pub. L. No. 113-24, §2, 127 Stat. 498 (2023);
- Reinforcing Education Accountability in Development Act of 2017, Pub. L. No. 115-56, §7, 131 Stat. 1129;
- Energy Policy Act of 2005, Pub. L. No. 109-58, §390, 119 Stat. 594;
- An Act to Amend the Federal Food, Drug, and Cosmetic Act of 2004, Pub. L. No. 108-282, §102, 118 Stat. 891;
- NDAA for Fiscal Year 1996, Pub. L. No. 104-106, §2897, 110 Stat. 186; and
- National Highway System Designation Act of 1995, Pub. L. No. 104-59, §316, 109 Stat. 568.

Finally, Congress has routinely defined activities for purposes of budget resolutions or appropriations by reference to activities covered by a CE, which would have been adopted through implementation of CEQ's NEPA regulations. Examples include:

- Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. No. 116-20, tit. XI, 133 Stat. 871;
- Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §21101, 132 Stat. 64;
- Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act of 2017, Pub. L. No. 114-223, §145, 130 Stat. 857 (2016);
- Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, §420, 129 Stat. 2242;
- Supplemental Appropriations Act of 2013, Pub. L. No. 113-2, tit. VIII, 127 Stat. 4; and
- Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, §403, 117 Stat. 11.

These examples demonstrate that CEQ's regulations have been woven into the fabric of law, and ratified and relied upon by multiple different sessions of Congress. The consistent acceptance of CEQ regulations as a lawful exercise of executive authority is strong evidence that Congress

88. Pub. L. No. 118-5, 137 Stat. 10 (2023).

89. CEs were first created in 1978 as part of CEQ's regulations. *See* 40 C.F.R. §1508.4 (1978).

90. This list does not include circumstances in which Congress enacted legislation directly establishing a CE, rather than directing an agency to promulgate one. *See, e.g.*, Agricultural Act of 2014, Pub. L. No. 113-79, §8204, 128 Stat. 649. While interpreting the text of such enactments involves referring to CEQ's regulations in existence at the time of enactment, they did not require agencies to act through the CEQ NEPA procedures to be given effect.

intended CEQ to have authority to issue regulations binding other agencies.

E. Elimination of Governmentwide NEPA Regulations Is Inconsistent With Bipartisan Permit Reform Efforts

Congress has enacted multiple bipartisan permitting reform bills that emphasize the facilitation of interagency coordination as a key mechanism to improve the permitting process. By making interagency coordination more difficult, the IFR runs counter to this bipartisan consensus on how the permitting process can and should be improved. The IFR also impedes interagency processes enshrined in statute. We describe below some relevant features of the legislation enacted over many years by multiple Congresses, to demonstrate that the decentralized approach to NEPA implementation embodied in the IFR is a dramatic departure from the approach taken by Congress.

In 2023, Congress passed the FRA, which included the first major amendments to NEPA since the Act's original passage. Several of the amendments codified significant aspects of CEQ regulations in effect at the time that facilitated multiple agencies coordinating NEPA reviews for the same project into a single document, thereby avoiding the duplication caused by separately conducted environmental reviews.

So, for example, when a project like the hypothetical oil and gas field development described above involves more than one federal agency, a "lead agency" is tasked with stewarding the environmental review process and coordinating amongst agencies.[91] Other agencies are designated as "cooperating agencies" and are required to provide information and assistance to the lead agency to enable efficient development of a single environmental document that includes the environmental analysis necessary for every agency decision involved in the project.[92]

The FRA also directs agencies that, "[t]o the extent practicable, if a proposed agency action will require action by more than one Federal agency . . . the lead and cooperating agencies shall evaluate the proposal in a single environmental document."[93] Advancement of this direction, as noted in Part I, will be more difficult in the absence of unifying regulatory direction. Without CEQ's centralized regulations to harmonize procedures, agencies will have a more difficult time satisfying these statutorily mandated coordination requirements, while also adhering to the agency-specific requirements of their unique NEPA procedures.

Congress enacted similar provisions through the Fixing America's Surface Transportation Act (FAST-41) to bring greater efficiency, transparency, and accountability to the federal permitting review process for complex infrastructure projects. FAST-41 focused on achieving efficiency through improved interagency coordination, and it works.[94] Like the FRA, FAST-41 requires designation of a lead agency to oversee the federal environmental review and permitting processes, development of a single EIS for use by all federal agencies in most cases, and other measures related to transparent deadlines, concurrent reviews, early engagement, and coordination with state agencies.

The U.S. Chamber of Commerce explained that the FAST-41 procedures create "a general expectation for fairness in the permitting process that businesses, organizations, and individuals seeking permits need and deserve."[95] They further testified that FAST-41 procedures brought "openness, transparency, and accountability . . . to the environmental permitting process."[96]

The IFR puts the successful procedures implemented through FAST-41 at risk by eliminating a central component of interagency coordination, which is the shared obligation to comply with CEQ's implementing regulations. CEQ's regulations provided a common cornerstone that all agencies could rely upon and utilize when they were attempting to coordinate and align different agency practices during a complex permitting process. By removing that cornerstone, the IFR threatens to make coordination more complicated and difficult to achieve. With separate procedures, and different interpretations of their duties under NEPA, it will be increasingly difficult for agencies to develop a coordinated permitting schedule that promotes openness, transparency, and accountability. This result is contrary to the goals that Congress sought to achieve with the FAST-41 legislation.

FAST-41 built off earlier versions of permit reform that incorporated similar coordination mechanisms for transportation projects through the 1998 Transportation Equity Act for the 21st Century,[97] which have been expanded and reaffirmed through subsequent surface transportation reauthorization bills that included similar measures.[98] Similarly, the Energy Policy Act of 2005 addressed designation of a lead agency for environmental review and permitting for natural gas pipelines, interstate transmission lines, and oil shale and tar sands projects.[99]

These enactments demonstrate that for almost 20 years, the bipartisan consensus in Congress is that improving permitting requires clearer and more effective interagency coordination. The IFR dramatically departs from this consensus by making interagency coordination more difficult, more time-consuming, and less predictable. Coordination will simply take longer without the common blueprint pro-

91. 42 U.S.C. §4337(a)(1)-(2) (2024).
92. *Id.* §4337(b).
93. *Id.* §4336a(b).
94. Jamie Pleune & Edward Boling, *This Permit Reform Already Works. Why Aren't More Mining Projects Using It?*, 53 ELR 10463, 10469-73 (June 2023), https://www.elr.info/articles/elr-articles/permit-reform-already-works-why-arent-more-mining-projects-using-it.
95. Statement of Joseph Johnson on Behalf of the U.S. Chamber of Commerce Before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations (May 2, 2019).
96. *Id.*
97. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).
98. MAP-21, Pub. L. No. 112-141, 126 Stat. 405 (2012); SAFETEA-LU, Pub. L. No. 109-59, 119 Stat. 1144 (2005).
99. Pub. L. No. 109-58 §§313(b), 369(k), 1221(a), 119 Stat. 594 (2005).

vided by CEQ's regulations. It will also get more difficult over time, because court decisions will be tethered to specific agency procedures, leading to increasingly divergent environmental review procedures and case law interpreting those procedures among the agencies.

III. Conclusion

We have explained here how the revocation of CEQ's NEPA regulations will degrade environmental review processes, reduce efficiency and increase the time and resources needed to complete environmental reviews, create friction in the interagency review process, increase litigation risk, and result in environmental review processes that are less consistent and predictable. All that, with no obvious benefits for any type of project.

We have also explained that the law does not mandate this approach, which also runs directly counter to the bipartisan consensus on how the environmental review process should be improved. For those reasons, our submitted comments urged the Administration to reverse course, revest CEQ with regulatory authority, and restore CEQ regulations to establish the blueprint for NEPA implementation across the government.

Since we filed the comment letter on behalf of 28 law professors, the Congressional Research Service has published a briefing paper on the revocation of the CEQ regulations, noting that it "raise[s] the possibility that agencies may employ increasingly divergent interpretations of NEPA," and that "Congress has options available to address any concerns it may have about the evolving regulatory landscape for implementing NEPA."[100] We are reiterating here our hope that Congress, or the Administration itself, provides direction to reestablish CEQ regulations to provide a common blueprint for NEPA implementation across the government.

100. Congressional Research Service, IF12960, Council on Environmental Quality Rescinds NEPA Regulations: Legal and Policy Considerations (2025), https://www.congress.gov/crs_external_products/IF/PDF/IF12960/IF12960.1.pdf.