

## Rulemaking Doubletake: An Opportunity to Repair and Strengthen the National Environmental Policy Act

Rachel Keylon

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/sdlp>



Part of the [Agriculture Law Commons](#), [Constitutional Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Food and Drug Law Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), [Intellectual Property Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Land Use Law Commons](#), [Law and Society Commons](#), [Law of the Sea Commons](#), [Litigation Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Keylon, Rachel (2021) "Rulemaking Doubletake: An Opportunity to Repair and Strengthen the National Environmental Policy Act," *Sustainable Development Law & Policy*. Vol. 22 : Iss. 1 , Article 3.  
Available at: <https://digitalcommons.wcl.american.edu/sdlp/vol22/iss1/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Sustainable Development Law & Policy by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# RULEMAKING DOUBLETAKE: AN OPPORTUNITY TO REPAIR AND STRENGTHEN THE NATIONAL ENVIRONMENTAL POLICY ACT

*Rachel Keylon\**

---

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1
I. THE NATIONAL ENVIRONMENTAL POLICY ACT: HISTORY, PURPOSE, REQUIREMENTS, PROCESS, AND KEY PROVISIONS . . . . .	5
A. THE HISTORY AND PURPOSE OF NEPA . . . . .	5
B. PROCESS, REQUIREMENTS, AND KEY PROVISIONS OF NEPA . . . . .	6
II. CONGRESS ACTS TO RESTRICT NEPA . . . . .	7
III. THE COURTS RESTRICT THE SCOPE OF NEPA APPLICATION AND AVAILABLE REMEDIES . . . . .	8
A. COURT DECISIONS RESTRICTING WHEN NEPA APPLIES . . . . .	8
B. COURT DECISIONS RESTRICTING THE USE OF PRELIMINARY INJUNCTIONS . . . . .	9
IV. THE TRUMP ADMINISTRATION ELIMINATES AND RESTRICTS KEY NEPA PROVISIONS . . . . .	10
A. LIMITING THE APPLICATION OF NEPA . . . . .	10
B. REVISION OF THE REQUIREMENTS TO CONSIDER ALTERNATIVES . . . . .	11
C. REMOVAL OF THE DEFINITION OF CUMULATIVE IMPACTS AND REDEFINING “SIGNIFICANTLY AFFECTING”. . . . .	11
D. REVISIONS TO ENCOURAGE THE USE OF CATEGORICAL EXCLUSIONS . . . . .	11
V. RECOMMENDATIONS . . . . .	11
A. CONSIDERATION OF COURT RULING OVERTURNING THE TRUMP ADMINISTRATION RULEMAKING . . . . .	12
B. RECOMMENDATION THAT THE BIDEN ADMINISTRATION INITIATE A NEW NEPA RULEMAKING PROCESS . . . . .	12
CONCLUSION . . . . .	13

---

\* J.D. Candidate, American University Washington College of Law, 2023.

## INTRODUCTION

In the middle of the twentieth century, there was a turning point in the United States and around the world in the understanding of the human relationship with the natural environment and natural resources.<sup>1</sup> It was a shift from a perspective of natural resources endlessly available for exploitation to a perspective that natural resources are finite, and conservation and preservation are necessary to ensure that these resources are available for future generations.<sup>2</sup> The accumulation of chronic environmental degradation, such as the unchecked proliferation of pesticides and other toxic chemicals, pollution to the nation's waters, loss of land to erosion, the loss of public open spaces to development, etc. as well as major events such as the oil spill in Santa Barbara and the Cuyahoga River fire, spurred this shift in perspective.<sup>3</sup> This elevated concern for the environment and natural resources led to the passage of the National Environmental Policy Act of 1969 ("NEPA"), which President Nixon signed into law on January 1, 1970 to launch the Decade of the Environment.<sup>4</sup>

NEPA declares that it is the national policy for the federal government to use "all practical means and measures" to ensure a sustainable balance between humans and the environment for "present and future generations,"<sup>5</sup> and it requires all federal agencies to examine the environmental impacts of their actions, to consider alternative actions, and to make that information available to the public.<sup>6</sup> NEPA also established the Council on Environmental Quality ("CEQ") under the Executive Office of the President to lead research and policy on environmental quality issues and to ensure federal agencies are meeting their requirements under NEPA to consider the environmental impacts of their actions.<sup>7</sup>

Since its passage, Congress, the courts, and, most recently, the Trump Administration have undermined and weakened NEPA.<sup>8</sup> Shortly after passing NEPA, Congress began chipping away at it legislatively.<sup>9</sup> In 1973, following litigation to enjoin the construction of an Alaskan pipeline for violations of NEPA and the Mineral Leasing Act, Congress passed legislation exempting the project from NEPA requirements.<sup>10</sup> Since then, Congress has passed a multitude of legislation exempting individual projects, as well as entire types of projects, from the NEPA requirements.<sup>11</sup> Most recently Congress passed the Infrastructure Investment and Jobs Act in 2021 containing provisions designed to "streamline" and restrict the application of NEPA.<sup>12</sup>

Over the past fifty years, there have been numerous court cases interpreting the application of NEPA and the CEQ NEPA regulations, many of which have eroded NEPA's effectiveness in ensuring that the congressional intent and spirit of the national policy is met.<sup>13</sup> The courts have interpreted NEPA to be limited to setting procedural requirements to ensure that federal agencies make informed decisions by taking a "hard look" before they act, rather than imposing any substantive requirements for the federal government to make wise decisions.<sup>14</sup> The courts have also barred the application of NEPA to non-discretionary federal actions and narrowly interpreted when a non-federal action with a federal component, such as grant funding or permitting,

triggers NEPA requirements.<sup>15</sup> Perhaps the most damaging of all, the courts have held that even when failure to meet NEPA requirements is the basis of a challenge, the plaintiff must meet four additional requirements to obtain a preliminary injunction.<sup>16</sup> This ruling sets a precedent under which defendants are encouraged to hurry-up-and-build while the court case is proceeding.<sup>17</sup>

The Trump Administration dealt NEPA a further blow when it initiated a rulemaking to revise the CEQ NEPA regulations.<sup>18</sup> The new rulemaking codified many of the previous court decisions weakening the effectiveness of NEPA and undertook to further "streamline" its implementation.<sup>19</sup> Major changes include eliminating the requirement for federal agencies to look at the cumulative impacts of the proposed action, limiting what is considered a major federal action for the purposes of NEPA, limiting the requirement for consideration of alternatives to the proposed projects, allowing the project proponents rather than the federal agency to develop the required NEPA Environmental Impact Statement ("EIS"), and setting hard limits on the page length of EISs.<sup>20</sup> The Biden Administration has subsequently issued an interim final rulemaking extending the deadline by which federal agencies must develop or revise their NEPA procedures to comply with the 2020 Trump Administration NEPA Rule.<sup>21</sup> The Biden Administration has also initiated the first phase of a two phased NEPA rulemaking process with the objective of "restoring basic community safeguards" in the NEPA process.<sup>22</sup>

This article argues that congressional legislation, court decisions, and the Trump Administration's 2020 rulemaking weakened the effectiveness of NEPA and undermined Congress' intent under the national policy set out by NEPA. Part I discusses the history, purpose, and key provisions of NEPA. Part II analyzes the impacts of subsequent congressional legislation on NEPA's effectiveness to meet Congress's original intent under the national policy. Part III covers major court decisions that have weakened the implementation of NEPA. Part IV examines the major impacts of the Trump Administration's rulemaking revising the CEQ regulations. Part V considers two options—setting aside the Trump Administration rulemaking through judicial review<sup>23</sup> and reversing the changes under the Trump Administration rulemaking and addressing the court and congressional decisions that have limited the scope and available remedies under NEPA through the Biden Administration's two phased rulemaking process.<sup>24</sup>

## I. THE NATIONAL ENVIRONMENTAL POLICY ACT: HISTORY, PURPOSE, REQUIREMENTS, PROCESS, AND KEY PROVISIONS

### A. THE HISTORY AND PURPOSE OF NEPA

Following a decade of increased environmental awareness and major environmental disasters, President Nixon signed NEPA into law on January 1, 1970.<sup>25</sup> NEPA is often called the Magna Carta of environmental law because it declares that it is the national policy for the federal government to use "all practical means and measures" to ensure a sustainable balance

between humans and the environment for “present and future generations.”<sup>26</sup> NEPA further requires all federal agencies to examine the environmental impacts of all “major [f]ederal actions significantly affecting the quality of the human environment,” to consider alternatives, and to make that information available to the public through the existing agency public notice-and-comment process under the Administrative Procedure Act (“APA”).<sup>27</sup> NEPA also established the Council on Environmental Quality (“CEQ”) under the Executive Office of the President to conduct and advise on environmental quality issues and review federal programs and activities to ensure they are meeting the goals of NEPA.<sup>28</sup>

On March 5, 1970, President Nixon issued Executive Order 11,514 directing CEQ to establish guidelines for federal agencies on NEPA’s requirement to provide a thorough statement on the environmental impacts of proposed legislation and federal actions.<sup>29</sup> CEQ issued guidelines on how to “assist agencies in implementing not only the letter, but the spirit, of the Act”—emphasizing NEPA’s objective to ensure informed decision making.<sup>30</sup>

In 1977, President Carter strengthened CEQ’s role through Executive Order 11,991, which directed CEQ to establish standard regulations for all federal agencies to guide their implementation of NEPA procedures.<sup>31</sup> CEQ initiated a rulemaking process and finalized the NEPA regulations in 1978, establishing binding regulation upon the federal agencies for implementing the procedural requirements under NEPA.<sup>32</sup> The binding regulations ensure that all federal agencies are meeting minimum environmental review requirements under NEPA.<sup>33</sup> CEQ made minor amendments to the NEPA regulations in 1986 and again in 2005.<sup>34</sup>

More recently, the Trump Administration issued Executive Order 13,807 directing CEQ to review the NEPA regulations to modernize, simplify, and accelerate the NEPA process.<sup>35</sup> To accomplish this, CEQ initiated a rulemaking process and released an Advanced Notice of Proposed Rulemaking<sup>36</sup> and later a Notice of Proposed Rulemaking.<sup>37</sup> The regulations were finalized on July 16, 2020 with the issuance of a Final Rule, which went into effect on September 14, 2020.<sup>38</sup> In its efforts to “streamline” NEPA implementation, the new rulemaking significantly weakens the effectiveness of NEPA by eliminating or restricting key provisions of the 1978 binding regulations, which had been well engrained in the NEPA processes and court precedent.<sup>39</sup>

## B. PROCESS, REQUIREMENTS, AND KEY PROVISIONS OF NEPA

The foundational provision of NEPA, Section 102, requires all federal agencies to develop a detailed statement analyzing the impact and potential alternatives for all proposed legislation or other major actions which have a significant effect on the environment.<sup>40</sup> The 1978 CEQ regulations expanded upon this language by defining key terms and outlining when NEPA requirements are triggered as well as the processes for meeting the requirements under this section.<sup>41</sup> The 1978 CEQ regulations

clarify that NEPA is triggered when there is an actual proposal for a major federal action and define “major [f]ederal action” as one “with effects that may be major and which are potentially subject to federal control and responsibility.”<sup>42</sup> The regulations further elaborate that a major federal action may include federal rules and regulations, formal plans, the creation of new programs, and specific projects, among other actions.<sup>43</sup>

Once a proposal for a major federal action triggers NEPA, the CEQ regulations require the federal agency to assess whether the action requires the development of an EIS, a lesser Environmental Assessment (“EA”), or if it falls under a Categorical Exclusion (“CE”) and does not require an EIS or an EA.<sup>44</sup> The CEQ NEPA regulations require federal agencies to submit for approval to CEQ criteria for identifying actions that they take which require an EIS, EA, or neither under a CE.<sup>45</sup>

In determining whether an EIS, EA, or CE applies, the federal agency must look at whether the proposed major federal action will or may *significantly* affect the quality of the human environment or “the natural and physical environment and the relationship of people with that environment.”<sup>46</sup> The analysis of “significantly” is critical to determining whether a major federal action falls under a CE, requires an EA, or requires an EIS.<sup>47</sup> A CE will apply when there is no significant effect, while an EA may be prepared—to determine if an EIS is required—if there may be a significant effect, and an EIS is required if there will be a significant effect.<sup>48</sup>

To determine if there is or may be a significant effect, the federal agency must consider both the context of the proposed action as well as the intensity of the effect.<sup>49</sup> The CEQ regulations outline ten factors that the federal agency should evaluate in assessing intensity including assessment of impacts on endangered or threatened species and their habitat, effects on unique geographical areas, effects on public health and safety, and whether the action is controversial, will set a precedent for future actions with significant effects, or the action combined with other actions may have a cumulatively significant impact.<sup>50</sup> CEQ defines these cumulative impacts as “impact[s] on the environment [that] result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”<sup>51</sup>

If a federal agency determines that a proposed action does not fall under a CE but is unsure if there will be a significant effect, it may develop an EA prior to a full EIS to determine if there will be a significant effect.<sup>52</sup> An EA requires only a brief analysis of evidence sufficient to determine whether the agency must prepare an EIS.<sup>53</sup> While the CEQ regulations state that federal agencies in the development of EAs must involve “to the extent practicable” environmental agencies, applicants, and the public, each agency may set their own procedures.<sup>54</sup> Therefore, in many cases the public is unable to review and comment on the EA, unlike the more substantive EIS which requires public review.<sup>55</sup> After a federal agency completes an EA, it must decide either that there is a significant effect and develop an EIS or that there is not a significant effect and make available to the public a Finding Of No Significant Impact (“FONSI”).<sup>56</sup>

## II. CONGRESS ACTS TO RESTRICT NEPA

If the agency determines that an EIS must be developed, with or without a preceding EA, it must prepare an EIS that includes the purpose and need for the proposed action, an analysis of the environmental impacts of the proposed action, and a comparison with the environmental impacts of all reasonable alternatives to the proposal; including a no action alternative and alternatives outside of the agency's jurisdiction.<sup>57</sup> This analysis must address the areas that will be affected by the proposed action and alternatives and the direct and indirect environmental consequences of each, including whether they will affect long-term productivity of the environment or will have any irreversible impacts.<sup>58</sup>

The NEPA EIS requirements ensure that all federal agencies take a "hard look" at the environmental impacts of their actions before acting.<sup>59</sup> A "hard look" requires the federal agencies to consider the impacts of their proposed action and all reasonable alternatives; however, it does not impose a substantive requirement to select options with fewer environmental impacts or to implement measures to mitigate foreseeable environmental impacts of the selected option.<sup>60</sup> Ultimately, the NEPA EIS only imposes a requirement on the federal government to make an informed decision, not to make a decision that will have the best environmental outcome.<sup>61</sup>

Throughout the EIS process, there are numerous points where the public has an opportunity to comment on proposed federal actions.<sup>62</sup> When it is determined that an EIS must be developed, the federal agency must publish a notice of intent in the Federal Register to begin the scoping process for the EIS.<sup>63</sup> The agency must also provide notice of related hearings and public meetings related to the preparation of the EIS.<sup>64</sup> The agency must circulate the draft EIS for public comment, and assess and consider all comments individually and collectively, then issue responses to the comments in the final EIS.<sup>65</sup> The agency must publicly circulate the final EIS and may request public comment on it prior to issuing a final decision.<sup>66</sup> Additionally, if the agency makes a substantial change to the proposed action or there is significant new information or circumstances impacting the proposed action and its impacts, the federal agency must prepare and circulate for public comment a supplemental draft or final EIS.<sup>67</sup>

Upon completion of the final EIS and at the time of decision, the federal agency must prepare and publish a public record of decision ("ROD") and notify the public of their rights to appeal the decision.<sup>68</sup> Additionally, the CEQ regulations set out minimum timing requirements on the mandated public comment periods.<sup>69</sup> The substantial requirements for public notice-and-comment make clear that the purpose of NEPA is not only to require agencies to consider the environmental impacts of their proposed actions, but also to inform the public, other agencies, and Congress about the environmental impacts of the actions to hold agencies accountable for the impacts of their actions.<sup>70</sup>

Shortly after passing NEPA, Congress began to chip away at the newly enacted law with blanket and project specific exemptions.<sup>71</sup> The first exemption to NEPA occurred in 1973, just three years after its enactment.<sup>72</sup> Following a legal challenge to the trans-Alaska pipeline for violation of NEPA and the Mineral Leasing Act, Congress passed the Trans-Alaska Pipeline Authorization Act, which exempted the project from NEPA and "judicial review under any law."<sup>73</sup> Senator Henry Jackson, who introduced NEPA, opposed the exemption, stating that it set a dangerous precedent under which requests for, and issuances of, exemptions on a project-by-project basis would be numerous.<sup>74</sup>

Senator Jackson was indeed correct that the Trans-Alaska Pipeline legislation would set a precedent for exemptions with many more to come.<sup>75</sup> For example, in 1980, Congress passed legislation exempting the construction of the Tellico Dam in Tennessee from NEPA requirements after it had stalled due to the threat the project posed to an endangered species.<sup>76</sup> In 1986, Congress exempted the construction of the H-3 highway in Hawaii from NEPA.<sup>77</sup> Then in 1988, Congress exempted the construction of an observatory for the University of Arizona on Mount Graham from NEPA review, notwithstanding the listing of the Mount Graham red squirrel on the endangered species list.<sup>78</sup>

In addition to project specific exemptions, Congress has enacted numerous broad exceptions covering entire types of activities.<sup>79</sup> Many of the exemptions have been applied under other environmental statutes, for example, exemptions for actions taken by an agency in accordance with the Clean Water Act and Clean Air Act.<sup>80</sup> However, others are driven by commercial or national security interests.<sup>81</sup>

For example, under the Interstate Commerce Commission Termination Act of 1995, the licensing of commercial space launch vehicles is not considered a major federal action as long as the Department of the Army issues a permit and the Army Corps of Engineers finds that the activity has no significant impact.<sup>82</sup> An example of a national security interest exemption is the exemption of the Secretary of any military department from having to prepare an EIS for low-level flight training under the Fiscal Year 2001 National Defense Authorization Act.<sup>83</sup> Also exempted for national security interests are NEPA requirements for decisions on the construction of segments of the U.S.-Mexico border wall under the Illegal Immigration Reform and Immigration Responsibility Act of 1996.<sup>84</sup>

More recently, Congress added additional restrictions to NEPA under the Infrastructure Investment and Jobs Act.<sup>85</sup> The law includes several provisions designed to "streamline" and restrict the application of NEPA including codifying some of the provisions under the Trump Administration's CEQ NEPA Regulations.<sup>86</sup> The law includes provisions to limit the time and level of review under NEPA by establishing a presumptive 200-page limit for the alternative analysis portion of an EIS, reducing the time lead agencies have to invite other agencies to participate in the environmental review, restricting the time for

NEPA review to two years from publication from the notice of intent, requiring issuance of a ROD within ninety days of the final EIS.<sup>87</sup> Other provisions limit when NEPA review applies by establishing new CEs for oil and gas pipeline gathering lines on federal and Tribal lands, excluding projects that receive less than six million dollars in federal assistance and are less than thirty-five million dollars for the entire project, and authorizing project sponsors and federal land management agencies to use Federal Highway Administration CEs.<sup>88</sup>

The exemption of specific projects and exemptions of entire types of activities from NEPA review requirements undermine the intent of NEPA to ensure that federal agencies are considering the impacts of *all* major federal actions before taking the actions.<sup>89</sup> It further denies the public the opportunity to review and comment on the actions which is one of the fundamental purposes of the NEPA review process.<sup>90</sup>

### III. THE COURTS RESTRICT THE SCOPE OF NEPA APPLICATION AND AVAILABLE REMEDIES

For over fifty years, the courts have been interpreting and applying NEPA and the CEQ NEPA regulations.<sup>91</sup> In many of these cases, the courts have strengthened and reinforced NEPA with their holdings, while in others they have dealt substantial blows to the applicability, enforcement, and ultimately the effectiveness of NEPA.<sup>92</sup>

Over the years, there have been decisions that have ensured that NEPA has teeth, but also numerous decisions which have blunted the strength and effectiveness of the law and the CEQ regulations.<sup>93</sup> The courts have affirmed that the procedural provisions of NEPA mandate that all federal agencies must take a “hard look” at the environmental impacts of their actions, while at the same time dismissing any requirement of the federal agencies under NEPA to uphold the substantive goals of the national policy.<sup>94</sup> Similarly, the courts have held that the federal agency must consider all reasonable alternatives, that this is not limited solely to alternative measures within the agency’s jurisdiction, and that mitigation measures should be considered; however, the courts have also held that there is no substantive requirement to select an alternative with less environmental impact nor to require the implementation of mitigating measures.<sup>95</sup> Additionally, the courts have held that NEPA does not provide for a private cause of action; however, injured individuals may bring a cause of action for NEPA violations under the APA.<sup>96</sup> Under the APA review, the court looks at whether the federal agency has adequately considered the environmental impacts of the proposed action and whether its action was arbitrary and capricious, which has added some additional strength to the procedural requirements under NEPA.<sup>97</sup> The courts have also given strength to key provisions of NEPA and the CEQ regulations, such as the requirement for the consideration of cumulative impacts, stating that when considering cumulative impacts of a project, the federal agency must consider *all* reasonably foreseeable contemplated actions, not only those that are actually occurring or proposed.<sup>98</sup>

There are two key areas where the courts have made decisions that significantly weakened the effectiveness of NEPA: decisions on when NEPA applies and decisions limiting access to preliminary injunctions.<sup>99</sup>

#### A. COURT DECISIONS RESTRICTING WHEN NEPA APPLIES

Court decisions that have restricted NEPA’s application, weakening its effectiveness, can be split into two categories: decisions determining that NEPA does not apply to an entire type of action and “small federal handle” decisions limiting the application of NEPA where the federal action only covers a small portion of a larger project.<sup>100</sup>

Under the first category, there are several ways in which the courts have decided that NEPA does not apply to an entire type of action. First, the court has exempted from NEPA non-action or status quo decisions of federal agencies, even if they may have significant environmental effects.<sup>101</sup> Thus, an agency’s decision to not take an action does not trigger NEPA requirements.<sup>102</sup> Additionally, agency decisions maintaining the status quo, including the decision to continue activities—such as continuing a coal leasing program under an old EIS or rebuilding an existing bridge that has collapsed—do not trigger NEPA requirements.<sup>103</sup>

The courts have also determined that when an agency lacks discretion on an action, such as when Congress directs it to take action, the agency does not need to conduct NEPA reviews.<sup>104</sup> While an agency taking a non-discretionary action is unable to alter its decision based on the findings in the EIS, the exemption of nondiscretionary actions still subverts two purposes of NEPA—to ensure that the federal agencies are informed about the environmental impacts of their actions and that the public is informed about the environmental impacts of federal actions.<sup>105</sup>

The “functional equivalency” doctrine further limits the scope of NEPA’s application to certain types of agency action.<sup>106</sup> Under this doctrine, courts have found that several environmental statutes require analysis that are similar enough to those of NEPA and an EIS that they are functionally equivalent to these requirements.<sup>107</sup> Where a statute, such as the Endangered Species Act, Ocean Dumping Act, Resource Conservation and Recovery Act, and Safe Drinking Water Act, requires its own environmental review actions that are functionally equivalent to those under NEPA; the court has found that the federal agency does not additionally need to conduct a NEPA review, even though these statutes do not explicitly waive NEPA review.<sup>108</sup> The exemption of non-action, status quo, non-discretionary, and functional equivalent actions—which may have significant environmental impacts—from NEPA review requirements, similar to congressional legislative exemptions, undermine the intent of NEPA to ensure that federal agencies are considering the impacts of these actions before taking the actions.<sup>109</sup> It further denies the public the opportunity to review and comment on the actions.<sup>110</sup>

Under the second, “small federal handle” category, courts have restricted when actions with a federal component are

considered a major federal action.<sup>111</sup> Small federal handle analysis looks at whether a federal action in a state or local project provides a sufficient nexus to require NEPA review and, if so, whether that review should cover the entire project, “federalizing” the project, or whether it should be limited solely to the federal action.<sup>112</sup>

In determining whether a federal action “federalizes” the project, the court uses the “enablement theory” and analyzes: “(1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether ‘the overall federal involvement with the project (is) sufficient to turn essentially private action into federal action.’”<sup>113</sup> In determining whether a federal action is sufficient to federalize an entire project, the courts have tended toward a high bar of federal involvement to trigger NEPA requirements.<sup>114</sup>

When the courts have found that a federal action does not federalize an entire project, the courts often determine that the federal action by itself is not a major federal action requiring NEPA review.<sup>115</sup> For example, in *Save the Bay, Inc. v. USACE*,<sup>116</sup> the court looked at whether the approval of a federal permit for an effluent pipeline into a local marsh from a titanium dioxide manufacturing facility would define the federal action as the permit for the pipeline only or would include the construction of the entire facility.<sup>117</sup> The court determined that the federal action was only the federal permit for the pipeline and that this was not in itself significant enough to constitute a major federal action.<sup>118</sup> The high bar for determining when a federal action federalizes an entire project, and the finding that on its own a federal action may not be significant enough to constitute a major federal action, essentially exempts numerous projects with a federal role and significant environmental impact from environmental review under NEPA, undermining the purpose of the national policy. This allows agencies to avoid consideration of the environmental impacts of these actions before taking them and denies the public an opportunity to review and comment on these actions.<sup>119</sup>

The court precedent restricting when NEPA applies to major federal actions significantly impacting the environment is directly in conflict with the language and intent of the statute.<sup>120</sup> NEPA does not say that environmental impact review is required for major federal actions which significantly affect the environment *except* if it is an action maintaining the status quo, it is being reviewed under another environmental statute, is an action mandated by Congress, or is not substantially enabling a private action.<sup>121</sup> NEPA says that *all* major federal actions that significantly impact the environment must be reviewed.<sup>122</sup> Thus, the court decisions discussed here are carving out exceptions unintended by Congress that undermine the intent and ultimately the application of NEPA.<sup>123</sup>

## B. COURT DECISIONS RESTRICTING THE USE OF PRELIMINARY INJUNCTIONS

The 1978 CEQ regulations have made clear that actions that should be covered under an EIS should not proceed absent the completion of the EIS and ROD.<sup>124</sup> The regulations provide that a federal agency shall not take any action concerning a proposed action that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to the issuance of the ROD.<sup>125</sup> It provides that a federal agency shall not take any major federal actions covered under a programmatic EIS while such statement is being developed unless the action can be independently justified, is accompanied by its own EIS, and will not affect the ultimate decision on the programmatic EIS.<sup>126</sup>

While the regulations clearly imply the intent that no major federal action should go forward prior to completion of the NEPA process, the regulations are silent as to whether a major federal action may proceed while the question of whether there has been a NEPA violation is being considered in the courts; possibly because the drafters did not contemplate that there would continue to be substantial NEPA litigation following the issuance of the 1978 CEQ regulations.<sup>127</sup> This silence has left the courts to impose their own interpretation and, rather than aligning with the general precedent of the CEQ regulations that a major federal action should not proceed prior to final determination; the Supreme Court in *Winter v. Natural Resources Defense Council*<sup>128</sup> applied the standard requirements for preliminary injunction.<sup>129</sup> These standard preliminary injunction requirements are based on the belief that an injunction, even preliminary, is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”<sup>130</sup>

Prior to *Winter*, a preliminary injunction was the standard while the courts determined if there was a NEPA violation and until any discovered violation was cured.<sup>131</sup> This standard applied an equitable balancing, or a sliding scale test which presumed that environmental injury is an irreparable injury and thus would favor the issuance of a preliminary injunction.<sup>132</sup> Post *Winter*, the plaintiff must show: 1) they are likely to succeed on the merits of the case; 2) without the injunction they would suffer irreparable harm; 3) the balance of equities is in their favor; and 4) the injunction is in the public interest.<sup>133</sup> While there was initially a presumption of irreparable damage when an agency failed to thoroughly evaluate the environmental impacts of its proposed actions, the Supreme Court overturned this presumption in *Amoco Production Co. v. Village of Gambell, AK*.<sup>134</sup> In *Amoco*, Alaskan Native Villages sought an injunction against exploratory oil and gas activities in Norton Sound and the Navarin Basin, arguing that the Secretary of Interior in authorizing the activities had failed to comply with requirements under the Alaska National Interest Lands Conservation Act.<sup>135</sup>

The Court determined that the presumption of irreparable damage where there is a violation under a statute requiring an

environmental evaluation goes against traditional equitable principles of an injunction. The Court further determined that allowing such a violation to continue would not undermine the purpose of the statute so there should be no presumption of irreparable damage and the traditional equitable principles should apply.<sup>136</sup> Many courts have interpreted the Supreme Court's decision in *Winter* as precluding the equitable or sliding scale standard and requiring a strict application of the four factor test,<sup>137</sup> while other courts maintain that *Winter* did not displace the equitable or sliding scale approach or that this flexible approach is consistent with *Winter*.<sup>138</sup> *National Parks Conservation Association v. Semonite*<sup>139</sup> exemplifies how the application of standard preliminary injunction requirements, absent the flexible equitable or sliding scale approach, weakens NEPA.<sup>140</sup> In this case, Virginia Electric and Power Company applied to the Army Corps of Engineers for a permit to construct an electrical switching station, transmission lines, and numerous steel transmission towers stretching across the James River, through the middle of the Jamestown historic district, and through other historic resources managed by the National Park Service.<sup>141</sup> The Army Corps of Engineers issued the permit after conducting an EA and determining that there would be no significant environmental effect on the human environment, so an EIS was not required.<sup>142</sup> The National Parks Conservation Association (NPCA), on behalf of its members, brought suit for violation of NEPA and the APA and sought a preliminary injunction.<sup>143</sup> The preliminary injunction was denied, with the court holding that NPCA "failed to establish a likelihood of irreparable harm prior to this case being decided on the merits."<sup>144</sup> The court then granted the Army Corps of Engineers' motion for summary judgment.<sup>145</sup> NPCA filed an appeal seeking a preliminary injunction, which was again denied, with the court holding NPCA had failed to establish that they were likely to succeed on the merits, that there was a likelihood of irreparable harm, and that the public interest strongly favored an injunction.<sup>146</sup>

Less than a year and a half after the initial request for a preliminary injunction was denied, the appeals court determined that the Army Corps of Engineers did violate NEPA in issuing the permit and reversed and remanded to the district court with instructions to vacate the permit and direct the Army Corps of Engineers to prepare an EIS.<sup>147</sup> However, because there was no preliminary injunction in place while the case was being litigated, Virginia Electric and Power Company proceeded under the permit to construct the project, and by the time the court had determined that the Army Corps of Engineers had violated NEPA, the entire project had already been completed.<sup>148</sup> The court was faced with a completed project in violation of NEPA, and having relied on the argument that the towers could and would be removed if they were found to be in violation of NEPA when denying the preliminary injunction on appeal, determined that it would be inappropriate to vacate the permit and require the towers to be removed.<sup>149</sup> The court only required the Army Corps of Engineers to complete an EIS for the already completed project.<sup>150</sup> The outcome of this

case demonstrates how the current application of preliminary injunctions entirely subverts the purpose of NEPA to ensure that federal agencies take a "hard look" at the environmental impacts *prior* to taking action.<sup>151</sup> The Supreme Court in *Amoco* stated that "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable" but by denying a preliminary injunction, federal agencies and their non-federal partners are encouraged to hurry up and build while NEPA claims are being litigated and betting that vacatur will not be awarded if a NEPA violation is found after the project is completed.<sup>152</sup> Without a preliminary injunction where it is argued that there is a violation of NEPA, the plaintiff's case may prove futile because the damage to the environment will already be done.<sup>153</sup> By denying preliminary injunction and subsequently denying vacatur, the holding in this case essentially reduces NEPA to an exercise in paperwork rather than an action to ensure that federal agencies do not act prior to analyzing the impacts on the environment of the action.<sup>154</sup>

#### IV. THE TRUMP ADMINISTRATION ELIMINATES AND RESTRICTS KEY NEPA PROVISIONS

After nearly forty years of implementation and precedent based on the 1978 CEQ NEPA regulations with only relatively minor revisions, the Trump Administration initiated an overhaul of the regulations with the objective of simplifying and "streamlining" them.<sup>155</sup> On August 24, 2017, President Trump issued Executive Order 13,807 directing CEQ to review the NEPA regulations and modernize, simplify, and accelerate the NEPA process.<sup>156</sup> CEQ then began the rulemaking process, releasing an Advanced Notice of Proposed Rulemaking ("ANPR") with a thirty-day comment period.<sup>157</sup> CEQ received over 12,500 comments on its ANPR and extended the comment period.<sup>158</sup> CEQ then published a Notice of Proposed Rulemaking with a sixty-day comment period.<sup>159</sup> During the comment period CEQ held two public hearings, one in Washington, and one in Colorado.<sup>160</sup> CEQ received approximately 1,145,571 comments on the proposed rule, including hundreds of requests for extension of the comment deadline and additional hearings in additional locations, neither of which were granted.<sup>161</sup> The Final rule was issued on July 16, 2020 and went into effect on September 14, 2020.<sup>162</sup>

The new rulemaking makes numerous and significant changes to the 1978 CEQ regulations. This Part covers several of those changes which have most significantly weakened the effectiveness of NEPA.<sup>163</sup>

##### A. LIMITING THE APPLICATION OF NEPA

The Trump Administration CEQ rulemaking codified many of the court jurisprudence restrictions on the application of NEPA under a new Part 1501.1 NEPA Thresholds.<sup>164</sup> Under this section, the new regulations outline considerations for determining whether NEPA applies, including if the proposed action is in whole or part non-discretionary and if it falls under another statute which has requirements that serve the function of



compliance with NEPA.<sup>165</sup> These two provisions are essentially equivalent to the court precedent that non-discretionary actions and actions subject to functionally equivalent review are exempt from NEPA requirements.<sup>166</sup>

The Trump rulemaking revisions to the definition of “major [f]ederal action” also codify judicial precedent restricting the application of NEPA.<sup>167</sup> The new definition states that nondiscretionary decisions are not major federal actions.<sup>168</sup> It further states that non-federal projects with minimal federal funding or involvement, as well as loans and other forms of financial assistance where the federal agency does not exercise sufficient control and responsibility over the outcome of a project, are not major federal actions.<sup>169</sup> This definition reflects an intent to cement and codify the courts’ jurisprudence regarding “small federal handle” to limit when NEPA applies to projects with federal and non-federal components.<sup>170</sup> The definition also goes a step further and states that extraterritorial activities or decisions with effects located entirely outside of the United States are not major federal actions.<sup>171</sup> This definition goes against court precedent that NEPA does apply to major federal actions when they occur outside of the U.S.<sup>172</sup> The codification of the courts’ jurisprudence on functional equivalence, non-discretionary, and “small federal handle” exemptions together with the expansion of exemptions to include extraterritorial federal actions combine to cement harmful precedent that goes against the intent of NEPA for federal agencies to review the impacts of *all* major federal actions significantly affecting the environment and denies the public the opportunity to review and comment on these actions.<sup>173</sup>

## B. REVISION OF THE REQUIREMENTS TO CONSIDER ALTERNATIVES

The Trump Administration CEQ rulemaking significantly modifies the consideration of alternatives in an EIS.<sup>174</sup> The new regulations modify the provision from a requirement to “rigorously explore and objectively evaluate all reasonable alternatives” to requiring only that agencies “evaluate reasonable alternatives to the proposed action” and to “limit their consideration to a reasonable number of alternatives.”<sup>175</sup> The new regulations further define “reasonable alternative,” a term that was previously undefined in the regulations, as “a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and where applicable meet the goal of the applicant.”<sup>176</sup> These changes will restrict the consideration of alternatives in EISs, overturning decades of court precedent and weakening “the heart” of the EIS, which is for federal agencies to take a “hard look” by considering the impacts of their proposed action and *all reasonable* alternatives.<sup>177</sup>

## C. REMOVAL OF THE DEFINITION OF CUMULATIVE IMPACTS AND REDEFINING “SIGNIFICANTLY AFFECTING”

The Trump Administration CEQ rulemaking reverses decades of court precedent requiring the consideration of cumulative impacts when assessing the environmental impacts of a

proposed action.<sup>178</sup> The new regulations not only remove the definition of cumulative effects but also state that effects are not significant if they are “remote in time, geographically remote, or the result of a lengthy causal claim.”<sup>179</sup> This new regulatory language will restrict consideration of longer term environmental impacts or impacts which occur as a composite of multiple independent actors, such as how the action will contribute to climate change and its environmental impacts.<sup>180</sup>

## D. REVISIONS TO ENCOURAGE THE USE OF CATEGORICAL EXCLUSIONS

The 1978 CEQ regulations provided for the use of CEs for categories of actions that do not individually or cumulatively have a significant impact.<sup>181</sup> However, a normally categorically excluded activity might require an EA or EIS if it may have a significant environmental impact.<sup>182</sup> For example, federal coastal habitat restoration projects which do not involve debris removal or substantial sediment placement are categorically excluded but may still require an EA or EIS if they are done in an area with endangered species critical habitat such as nesting grounds for endangered sea turtles.<sup>183</sup> The Trump Administration rulemaking seeks to expand the use of CEs by allowing actions that would normally fall under a CE but may have a significant impact to still be categorically excluded if the “agency determines that there are circumstances that lessen the impact or other conditions sufficient to avoid significant effects.”<sup>184</sup> The increased emphasis on the use of CEs allows for activities that would normally undergo more substantial review under an EA or EIS to be exempted from such review.<sup>185</sup> Similar to the congressional and court established exceptions, the expanded use of CEs creates additional carve outs of activities which do not require review further undermining the intent of NEPA for *all* major federal actions with significant environmental effects to undergo review and for the information to be made available to ensure that federal agencies are making informed decisions.<sup>186</sup>

## V. RECOMMENDATIONS

NEPA has been dealt many blows over the past fifty years from Congress and the courts, but it has survived as a critical procedural tool to ensure that federal agencies consider the environmental impacts of their actions and to provide a platform for informing and meaningfully engaging with the public on actions affecting the environment.<sup>187</sup> The Trump Administration has added a new blow with its Final CEQ rulemaking, which both codifies court jurisprudence which has weakened NEPA and introduces additional changes, in some cases reversing decades of court precedent.<sup>188</sup> These changes have ultimately weakened NEPA and have hampered the ability for it to achieve the national policy that the federal government use “all practical means and measures” to ensure a sustainable balance between humans and the environment for “present and future generations.”<sup>189</sup> To preserve the intent of NEPA, the courts and the Biden Administration should take action to reverse the Trump Administration CEQ NEPA regulations and, where

possible, consider actions to reverse the harmful precedents set by both Congress and the courts.<sup>190</sup>

There are two possible avenues by which the Trump Administration NEPA regulations may be overturned. The first is through litigation in the courts to determine that the rulemaking was “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law” under the APA and the second is for the Biden Administration to revise the regulations to reverse the Trump Administration changes as well as to implement additional improvements through the initiated NEPA rulemaking process.<sup>191</sup> This Part discusses both of these options and ultimately recommends that the Biden Administration reverse the Trump Administration changes and implement additional NEPA improvements through the initiated two phased NEPA rulemaking process.

#### A. CONSIDERATION OF COURT RULING OVERTURNING THE TRUMP ADMINISTRATION RULEMAKING

The court should set aside the Trump Administration CEQ NEPA rulemaking for violations under the APA.<sup>192</sup> Litigants are bringing both substantive claims that CEQ is not entitled to *Chevron* deference because the revisions made are in direct conflict with the express intent of Congress and court precedent, as well as claims that the rulemaking was arbitrary and capricious under the APA for failing to consider relevant factors during the rulemaking process.<sup>193</sup> The litigants should succeed on both claims.

Under *Chevron*, the first question is whether Congress’ intent was clear.<sup>194</sup> If so, then there is no room for discretion; however, if Congress is unclear, then the agency has discretion to make a reasonable interpretation of the statute.<sup>195</sup> In this case, the new regulations are clearly in direct conflict with both the 1978 NEPA regulations and the court precedent interpreting NEPA and these regulations, particularly regarding the requirement for agencies to take a “hard look” at the environmental impacts of proposed actions and to consider all reasonable alternatives to such action and to consider cumulative impacts.<sup>196</sup> In addition, the rulemaking contradicts court precedent that NEPA does apply to extraterritorial major federal actions.<sup>197</sup> The Supreme Court has continually held that where there is *stare decisis* it trumps any deference to the agency under *Chevron* so the court should find that where the Trump Administration rulemaking conflicts with *stare decisis*, the rulemaking is not valid.<sup>198</sup>

In addition, the litigants’ assertions that CEQ acted arbitrarily and capriciously in failing to consider relevant factors during the rulemaking process should succeed.<sup>199</sup> In making its decision, CEQ relied upon a goal of reducing delay and fostering an economic benefit, rather than advancing the purposes of NEPA to ensure that both the federal government and the public are informed about the environmental impacts of major federal actions contrary to its legal requirement.<sup>200</sup> It failed to consider the impacts of the rulemaking as a major federal action, which will significantly harm the environment and failed to adequately consider alternative actions.<sup>201</sup> It also failed to take

into consideration reliance on the 1978 regulations and court precedent, and it failed to provide sufficient explanations to justify its actions and decisions throughout the decision making process.<sup>202</sup> It further failed to meet its requirement to respond to all significant comments raised in the public comment processes and to address these concerns in the final rule.<sup>203</sup> The plaintiffs in the pending cases have provided significant evidence in the record to support these claims, and the courts should find that CEQ acted arbitrarily and capriciously.<sup>204</sup>

Should the NEPA rulemaking be found to be arbitrary and capricious by the courts, the rulemaking would be set aside but the congressional and court precedent will still stand, including the new provisions under the Infrastructure Investment and Jobs Act.<sup>205</sup> Ultimately, only a new rulemaking by the Biden Administration would both overturn the harmful impacts of the Trump Administration rulemaking and enable action to address harmful court precedent. As of publication of this article, the Biden Administration has issued an interim final rulemaking extending the deadline by which federal agencies must develop or revise their NEPA procedures to comply with the 2020 Trump Administration NEPA Rule.<sup>206</sup> The Biden Administration has also initiated the first phase of a two phased NEPA rulemaking process with the objective of “restoring basic community safeguards” in the NEPA process.<sup>207</sup> As a result, the courts have stayed the majority of the cases pending Biden Administration action.<sup>208</sup> While one of the cases was dismissed by the district court as unripe and the plaintiffs have subsequently appealed.<sup>209</sup>

#### B. RECOMMENDATION THAT THE BIDEN ADMINISTRATION INITIATE A NEW NEPA RULEMAKING PROCESS

The Biden Administration should reverse the Trump Administration rulemaking and strengthen NEPA by filling in the gaps left by the 1978 regulations through its two phased NEPA rulemaking process.<sup>210</sup> The Biden Administration interim rule delaying implementation requirements provides a temporary reprieve from the harmful effects of the Trump Administration NEPA rule. However, the Biden Administration can, and should, directly and comprehensively address the Trump Administration rule’s harmful provisions and problematic court precedent.<sup>211</sup>

President Biden initiated consideration of the rulemaking process with the issuance of Executive Order 13,990, which rescinded the former President Trump’s Executive Order 13,807 directing CEQ review of NEPA.<sup>212</sup> Executive Order 13,990 also directed CEQ and the Director of the White House Office of Management and Budget to determine if a replacement executive order, and subsequently a replacement rulemaking should be issued.<sup>213</sup> Subsequently, the Biden Administration initiated a two phased rulemaking process with the publication of a Notice of Proposed Rulemaking (“NPRM”) to “restore basic community safeguards” in the NEPA process.<sup>214</sup>

The Biden Administration states in the NPRM that the objective of the first phase of the rulemaking process is to address provisions that “pose significant near-term interpretation or implementation challenges” which would impact agencies

during the period before the second phase is completed, provisions that should be reverted to the 1978 NEPA regulations approach, and provisions that likely will not be further revised under the second phase.<sup>215</sup> The proposed changes in the first phase include restoring the language requiring federal agencies to look at the cumulative impacts of proposed decisions,<sup>216</sup> to allow agencies to establish their own NEPA procedures with the CEQ Regulations as the minimum requirements,<sup>217</sup> and to remove language restraining consideration of alternatives.<sup>218</sup> In the second phase, the Administration will take a more broad look at the 2020 NEPA regulations to assess further revisions necessary to ensure an effective and efficient NEPA process while maintaining the intent of NEPA.<sup>219</sup>

In the new two phased rulemaking, the Biden Administration should reverse the revisions made by the Trump Administration rulemaking and consider additional revisions to strengthen NEPA. In addition to reversing the 2020 NEPA provisions eliminating cumulative impacts, restricting the consideration of alternatives, and restricting agencies from implementing additional NEPA procedures in the first phase of rulemaking, the Biden Administration should consider the following additional reversions and revisions for the second phase.<sup>220</sup>

First, the Biden Administration should reverse the codification exemptions for non-discretionary actions and further require the review of non-discretionary actions to ensure that both the federal agency and the public are informed about the impacts of these actions. This will ensure that the intent of NEPA for federal agencies to look at the environmental impacts of *all* major federal actions before they act and to inform the public are met.<sup>221</sup> The Biden Administration should also provide clear direction on when a non-federal action with a federal component is federalized, both to provide clarity on when a federal action federalizes a project and to ensure that projects with federal components that have significant environmental impacts are not being exempted from NEPA review. The new rule should require: 1) when a project cannot go forward without the federal action, the project is federalized; and 2) if the project under the NEPA significant effect analysis or the results of an EA is determined to have a significant environmental effect, then it is federalized and considered a major federal action no matter the size of the federal agency's role.<sup>222</sup> These changes would counter existing court precedent and may be challenged in the courts as contrary to the principle of *stare decisis*.<sup>223</sup> However, such challenge would likely not succeed because while the general rule is that *stare decisis* trumps *Chevron* deference, the Supreme Court has also recognized that *stare decisis* is not an "inexorable command" and precedent may be overturned by rulemakings by administrative agencies where they are properly exercising their delegated authority to interpret statutes they administer and the interpretation is "neither arbitrary, capricious, nor in clear conflict with the meaning of the statute."<sup>224</sup> In this case CEQ has the delegated authority to interpret NEPA, the change is neither arbitrary nor capricious, and it adheres to the clear intent of

NEPA; therefore, the court should give CEQ *Chevron* deference to issue this regulation.<sup>225</sup>

The Trump Administration rulemaking was driven by a desire to "streamline" and simplify the NEPA processes, and this is likely to remain a strong interest of industry; thus, the Biden administration should consider revisions that will provide options for reducing the burden of NEPA while maintaining the requirements to take a hard look at the environmental impacts of federal actions.<sup>226</sup> For example, programmatic EISs are authorized under both the 1978 and 2020 NEPA regulations.<sup>227</sup> Rather than promoting and expanding the use of CEs, which eliminate the requirement to look at environmental impacts, the Biden Administration should promote and expand the use of programmatic EISs, which conduct a review of the environmental impacts of a variety of activities and undergo the public notice-and-comment process.<sup>228</sup> Once the EIS is completed, the activities that fall within the programmatic EIS do not require further review unless they differ from the actions assessed under the programmatic EIS.<sup>229</sup> However, regulatory action to limit the use of CEs as newly required under the Infrastructure Investment and Jobs Act since Congress has clearly spoken in this case and CEQ would not have deference under *Chevron*.<sup>230</sup>


In addition, the Biden Administration should issue regulations providing for injunctive relief to restrict major federal actions from proceeding while decisions on NEPA violations are pending in litigation.<sup>231</sup> This change would clarify an ambiguity in court precedent arising after *Winter* regarding the weight given to the irreparable harm to the environment likely to occur without a preliminary injunction and where money damages cannot adequately remedy the injury.<sup>232</sup> This will provide clarity across jurisdictions, adhere to the intent of NEPA that major federal actions should not proceed *prior* to completion of required environmental reviews, and ensure that there is not an incentive to "hurry up and build" while litigation is ongoing.<sup>233</sup> Such a change may be as contrary to the principle of *stare decisis*.<sup>234</sup> However, because there is ambiguity in the rulings on the issue across jurisdictions, CEQ has the delegated authority to interpret NEPA, the change is neither arbitrary nor capricious, and it adheres to the clear intent of NEPA, CEQ should be given *Chevron* deference to issue this regulation.<sup>235</sup>

## CONCLUSION

NEPA provides a critical procedural tool to ensure that federal agencies take a hard look at the environmental impacts of their actions to provide the public with information and opportunities for meaningful engagement.<sup>236</sup> The effectiveness of NEPA has been weakened over the past fifty years by congressional actions, court decisions, and most recently the Trump Administration's CEQ NEPA rulemaking limiting when NEPA applies, and the extent of the environmental analysis required when it does.<sup>237</sup>

Actions should be taken by the Courts and the Biden Administration to reverse the damage done by the Trump Administration rulemaking and, where possible, to provide for provisions to strengthen NEPA to ensure it is able to achieve

the national policy that the federal government use “all practical means and measures” to ensure a sustainable balance between humans and the environment for “present and future generations.”<sup>238</sup> While the courts may be able to set aside the rulemaking as arbitrary and capricious, this will only serve to reverse the most recent harm inflicted by the Trump Administration.<sup>239</sup> To accomplish both this reversal and to strengthen NEPA by addressing actions taken by Congress and decisions of the court

that have weakened NEPA, the Biden Administration should use the initiated two phased rulemaking process to both reverse the harmful provisions of the 2020 Trump Administration NEPA rulemaking and consider provisions to eliminate exemptions and restrictions which have hampered the application of NEPA and to restrict, if possible, the ability for projects to move forward while litigation is ongoing regarding NEPA violations.<sup>240</sup> 

## ENDNOTES

<sup>1</sup> See *The Modern Environmental Movement*, EARTH DAYS, <https://www.pbs.org/wgbh/americalexperience/features/earth-days-modern-environmental-movement/> (last visited Oct. 29, 2021) (outlining a timeline of major events resulting in increased concern regarding the environment including the health impacts from air pollutants and toxic chemicals, increased ocean exploration, and publication of seminal environmental works).

<sup>2</sup> Adam Rome, *Conservation, Preservation, and Environmental Activism: A Survey of the Historical Literature*, NAT'L PARK SERV. (Jan. 16, 2003), <https://www.nps.gov/parkhistory/hisnps/NPSThinking/nps-oah.htm>.

<sup>3</sup> 115 CONG. REC. S19,008, 19,010 (daily ed. July 10, 1969); Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times->

<sup>4</sup> Denis Binder, *NEPA at 50: Standing Tall*, 23 CHAP. L. REV. 1, 6 (2020); Michael C. Blumm, *Environmental Law at 50: A Cutting-Edge Journal Examining the Central Issues of Our Time*, 50 ENV'T L. REP. 1, 3–4 (2020); see also Fitzhugh Green, *From the FSJ Archive: Decade of the Environment*, FOREIGN SERV. J. (July/Aug. 2017), <https://www.afsa.org/fsj-archive-decade-environment> (discussing the objective of the Decade of the Environment to bring attention to environmental issues nationally and on international platforms as well as accomplishments attributed to the Decade of the Environment).

<sup>5</sup> See Blumm, *supra* note 4, at 4–5; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); National Environmental Policy Act (NEPA), 42 U.S.C. § 4331(a).

<sup>6</sup> See NEPA, 42 U.S.C. § 4332(c) (stating that agencies must make the environmental impact statements (EIS's) required under NEPA available to the public pursuant to the Administrative Procedure Act); Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. (providing requirements for agencies to make information available to the public); 115 CONG. REC. S19,008 § 102 (daily ed. July 10, 1969) (stating the requirements of federal agencies under NEPA); 115 CONG. REC. S14,860 (daily ed. June 5, 1969) (statement of Sen. Jackson).

<sup>7</sup> NEPA, 42 U.S.C. §§ 4341–47 (including additional requirements for CEQ to develop recommendations on national policies to foster environmental quality, to document and define changes in the natural environment, to analyze trends and underlying causes, and to provide an annual report on the state of the environment); 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson).

<sup>8</sup> Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 ENV'T L. REP. 10,398 (2020).

<sup>9</sup> *Id.* at 10,403–04, 10,406 (discussing Congress passing legislation limiting NEPA review requirements for types of projects and individual projects).

<sup>10</sup> Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENV'T L. REV. 435, 438–40 (1991).

<sup>11</sup> *Id.* at 435–52 (analyzing multiple situations in which Congress passed legislation to exempt projects from NEPA requirements, such as construction of the Alaska Pipeline and logging of the Siuslaw National Forest).

<sup>12</sup> See Infrastructure Investment and Jobs Act, Pub. L. No. 117–58 (2021); Reza Zarghamee et al., *Biden's Infrastructure Bill and Promise of NEPA Reform*, PILLSBURY LAW (Aug. 23, 2021), <https://www.pillsburylaw.com/en/news-and-insights/biden-infrastructure-bill-nepa-reform.html>.

<sup>13</sup> See Binder, *supra* note 4, at 14; NEPA, 42 U.S.C. § 4331.

<sup>14</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 409–10 (1976); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–53 (1989) (requiring agencies to take a “hard look,” which requires the federal agencies to consider the impacts of their proposed action and all reasonable alternatives without imposing a substantive requirement to select options with less environmental impacts or to implement measures to mitigate foreseeable environmental impacts of the selected option).

<sup>15</sup> See *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 791 (1976); *Save the Bay, Inc. v. USACE*, 610 F.2d 322, 327 (5th Cir. 1980); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272 (8th Cir. 1980); *Macht v. Skinner*, 916 F.2d 13, 19–20 (D.C. Cir. 1990).

<sup>16</sup> See *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) (outlining the requirements for injunctive relief—the plaintiff must show: 1) they are likely to succeed on the merits of the case; 2) without the injunction they would suffer irreparable harm; 3) the balance of equities is in their favor; and 4) the injunction is in the public interest).

<sup>17</sup> See *Nat'l Parks Conservation Ass'n v. Semonite*, 2018 WL 3838809, at \*3 (D.D.C. 2018) (denying preliminary injunction); *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019) (holding that the Army Corps of Engineers violated NEPA); *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92 (D.D.C. 2019) (holding that since Virginia Electric and Power Company already completed the project, vacatur was inappropriate).

<sup>18</sup> See Kalen, *supra* note 8, at 10,406; see also Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. §§ 1500–18).

<sup>19</sup> *CEQ NEPA Regulations*, COUNCIL ON ENV'T QUALITY, <https://ceq.doe.gov/laws-regulations/regulations.html> (last visited Oct. 28, 2021); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, 1700 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. §§ 1500–18).

<sup>20</sup> Michael Hazel et al., *NEPA Overhaul: Trump Administration Finalizes Landmark Rule Reform*, JDSUPRA (July 20, 2020), <https://www.jdsupra.com/legalnews/nepa-overhaul-trump-administration-19845/>.

<sup>21</sup> See Maya Weber, *Eyeing Changes, White House Gives Agencies Two-Year Extension on NEPA*, S&P GLOBALPLATTS (June 28, 2021), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/062821-eyeing-changes-white-house-gives-agencies-two-year-extension-on-nepa>; Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021) (to be codified 40 C.F.R. § 1507).

<sup>22</sup> See Press Release, The White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>; National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) (to be codified 40 C.F.R. §§ 1502, 1507–08) (providing notice of the phase one proposed rulemaking).

<sup>23</sup> *Wild Va. v. CEQ*, 2020 WL 5494519, at \*4 (D.W.D. Va. Sept. 11, 2020) (noting the following three other cases challenging the rule: *California v. CEQ*, No. 3:20-cv-06057-RS (N.D. Cal. filed Aug. 28, 2020); *Env't Just. Health All. v. CEQ*, No. 1:20-cv-06143-CM (S.D.N.Y. filed Aug. 6, 2020);