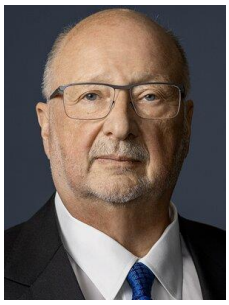
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NEPA Repeal Could Slow Down Environmental Review

By **Avi Kupfer, Timothy Bishop and Timothy Leake** (May 5, 2025, 6:53 PM EDT)


Avi Kupfer


Timothy Bishop


Timothy Leake

Businesses with projects that require National Environmental Policy Act review face significant regulatory uncertainty. The Trump administration rescinded the Council on Environmental Quality's long-standing NEPA regulations and reportedly directed agencies first to replace their NEPA regulations with nonbinding guidance, and then to consider updating those rules instead.

Expediting environmental review to accelerate the federal permitting process is a laudable goal with bipartisan support. But further congressional action and agency rulemaking is necessary to minimize unpredictability, expedite permitting decisions and reduce litigation risk over the long term.

NEPA requires federal agencies to evaluate the environmental impacts of major federal actions. Before permitting energy and infrastructure projects, funding airports and highways, or authorizing mining projects and timber sales, agencies must assess the potential environmental effects.

For over 50 years, NEPA's process requirements have been used by plaintiffs as a cudgel to try to halt projects that they oppose, and agencies have responded with increasingly lengthy environmental reviews that can take years to complete. In fact, this dynamic has spawned an entire cottage industry of consultants that specialize in conducting NEPA review for agencies on behalf of project proponents.

Against that backdrop, NEPA regulations have provided some measure of predictability. In 1977, President Jimmy Carter signed Executive Order No. 11991 directing the CEQ to issue binding NEPA regulations that apply across the federal government.

The CEQ, in turn, has encouraged agencies to adopt supplemental NEPA regulations to streamline the permitting process by providing direction on agency-specific issues.

For instance, the U.S. Department of Transportation's NEPA regulations includes examples of the types of construction projects that normally require a full environmental impact statement and lists dozens of common railroad, highway and transit actions that rarely require environmental review.

The CEQ's regulations remained largely unchanged for decades. Following successive revisions under

President Donald Trump's first administration and President Joe Biden's administration, however, Congress stepped in. The Fiscal Responsibility Act of 2023 set forth rules aimed at streamlining environmental review. Among other things, the act:

- Codified the distinction between environmental assessments of action without reasonably foreseeable environmental effects and environmental impact statements on action expected to have such effects;

- Established a two-year deadline for completing environmental impact statements and a one-year deadline for completing environmental assessments;

- Limited environmental impact statements to 150 pages, or 300 pages in complex cases, and environmental assessments to 75 pages, not including appendices;

- Codified the rules that an agency need not review actions that are nonfinal, nondiscretionary or fall within categorical exclusions that agencies may establish, or when doing so would conflict with another provision of law; and

- Set forth procedures for designating a lead agency to coordinate environmental review when multiple agencies participate in the process.

Regulatory change soon followed, albeit from an unexpected source. Last year, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the CEQ's regulations, holding in Marin Audubon Society v. FAA that the CEQ lacks statutory authority to issue binding NEPA rules.

The panel also suggested that agency-specific NEPA regulations lack stand-alone force if they were written to supplement the CEQ regulations. The court was discussing U.S. Department of the Interior and Department of Transportation regulations, but its logic applies equally to the many other agencies that have drafted NEPA regulations to supplement, and for use in conjunction with, the CEQ regulations.

And although a majority of active D.C. Circuit judges framed Marin's discussion of CEQ rulemaking authority as nonbinding dicta when they declined in January to rehear the case en banc, the U.S. District Court for the District of North Dakota in Iowa v. Council on Environmental Quality has since agreed with the Marin panel that the CEQ lacks the power to issue binding NEPA rules. The district court's decision is currently on appeal in the U.S. Court of Appeals for the Eighth Circuit.

The final nail in the coffin of the CEQ's NEPA rules came from the executive branch. A week after inauguration, Trump issued Executive Order No. 14154, which revoked Executive Order No. 11991 and instructed the CEQ to replace its NEPA regulations with guidance and coordinate the revision of agency-specific NEPA regulations.

The CEQ followed suit with an interim final rule that removed its NEPA regulations and explained that agencies "remain free to use or amend" their NEPA procedures.[1] And recent reporting indicated that the CEQ had directed agencies to revoke their NEPA regulation and issue guidance, before reversing course to clarify that agencies could update their NEPA rules instead.

These reported pivots will not stem the flow of NEPA litigation, and they could create a less predictable regulatory environment. The distinction between regulations and guidance matters greatly in administrative law, especially in the context of judicial review.

Regulations have legal force: They structure how agencies exercise discretion, providing predictable standards against which businesses plan major investments and courts review agency decisions.

Guidance, by contrast, is advisory. It leaves regulators with substantial discretion — discretion that courts, applying NEPA's notoriously vague language ("major" federal action, "significantly affecting" the environment, "reasonably foreseeable" effects, etc.), will scrutinize without guardrails that channel decision-making and provide a degree of consistency to businesses that rely on federal permits.

Consider, for example, the long-standing judicial doctrine requiring agencies to conduct a hard-look review under NEPA. Courts reviewing federal actions for NEPA compliance examine whether agencies thoroughly evaluated potential environmental consequences and responded to public comments.

The CEQ and agency-specific NEPA regulations provide binding criteria for determining whether environmental impacts are reasonably foreseeable or significant.

Without these regulatory benchmarks, there is a risk of regulators conducting unnecessarily extensive review of even minor projects. Nor is judicial review a guarantee of uniformity.

Even setting aside the costs and delays inherent in litigation, judges acting without clear guidelines will be forced to develop the kind of NEPA common law that U.S. Supreme Court Justice Thurgood Marshall foresaw in Kleppe v. Sierra Club in 1976, where judicial interpretation evolves unpredictably, project by project and lawsuit by lawsuit.

Indeed, the Supreme Court has warned of the sporadic and ad hoc nature of a common-law approach to environmental regulation.[2] Clear standards are necessary in this context so that businesses need not feel their way to compliance on a case-by-case basis.[3]

In short, the rescission of the CEQ regulation, and the possibility that agency-specific rules could be pared back, risks deepening the morass of NEPA litigation.

Challengers operating free from the constraint of binding regulations will likely test the boundaries of agency guidance before courts free to engage in increasingly wide-ranging hard-look review, undermining progress toward much-needed energy, infrastructure and transportation development.

Given these risks, it is more important than ever to implement regulatory safeguards like NEPA categorical exclusions — classes of actions that do not have significant environmental effects and thus do not require detailed review.

Agency regulations list dozens of categorical exclusions that have been carefully developed, backed by data, subject to public comment and approved by the CEQ. Projects that fit within these categorical exclusions normally are quickly approved and less likely to be subject to litigation.

Recognizing the value of this process, Congress recently made it easier for agencies to adopt categorical exclusions in their NEPA regulations. The Fiscal Responsibility Act of 2023 authorizes agencies to adopt each other's categorical exclusions following interagency consultation and public disclosure.

Eliminating agency rules or reducing their scope may undermine the goal of streamlining the permitting process, as it could prolong deliberations and increase the regulatory load. Those decisions will be more

susceptible to litigation risk without the safe harbor of preapproved categorical exclusions and other regulatory protections.

Even when agencies eventually prevail — as they do in most NEPA suits — years of legal wrangling will add costs and delays, discouraging long-term planning and investment.

Congress and executive agencies should therefore focus on additional legislative reform and amendments to agency-specific regulation to streamline the NEPA process and provide clear standards for the exercise of agency discretion and judicial review.

Stakeholders should see this moment as an opportunity to provide comments and direction to enhance existing agency-specific NEPA regulations. Amended, clearer regulations could reduce unnecessary complexity and improve predictability.

For instance, agencies could establish genuine page limits for environmental analysis, impose strict deadlines, expand categorical exclusions, encourage tiering of environmental reviews, and adopt unified documentation covering compliance responsibilities under NEPA and other environmental and land-use statutes, such as the Clean Water Act, Endangered Species Act and National Historic Preservation Act.

Additionally, to speed permitting while mitigating litigation risk, agencies should clarify what constitutes an adequate hard look, and standardize purpose-and-need statements and the requirements around alternatives analysis.

These changes can ensure robust environmental protection while significantly enhancing permitting efficiency — an outcome that both supporters of the Green New Deal and advocates of Trump's Unleashing American Energy initiative can rally around.

Ultimately, effective environmental regulation requires predictability and clarity. Adjusting NEPA compliance through congressional action and regulatory reform is the best path forward to ensure long-term certainty and put into practice the delicate balance that Congress struck between environmental protection and economic development.

Avi Kupfer and Timothy Bishop are partners, and Timothy Leake is an associate, at Mayer Brown LLP.

Disclosure: Mayer Brown filed an amicus brief on behalf of national agricultural organizations supporting the petitioner in Sackett v. EPA.

[1] 90 Fed. Reg. 10610, 10614 (Feb. 25, 2025).

[2] City of Milwaukee v. Illinois, 451 U.S. 304, 325 (1981).

[3] Sackett v. EPA, 598 U.S. 651, 681 (2023).