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The Trump Administration's Latest Unconstitutional Power Grab

Robert L. Glicksman and Alejandro E. Camacho



A revised CEQ rule seeks to limit judicial review of agency action, threatening the separation of powers.

Throughout his time in office, President Donald J. Trump has [boasted](#) about cutting regulations.

His antagonism to environmental regulation has been particularly virulent and incessant. By one count, Trump Administration agencies have [initiated](#) or completed 100 environmental rollbacks. By thwarting often bipartisan legislative environmental protection goals [adopted](#) over the course of 50 years, President Trump's actions [create](#) serious threats to public health and environmental integrity. The Administration's suppression of public participation in regulatory decision-making has also [undercut](#) the ability of people and communities harmed by the Administration's deregulatory frenzy to protect themselves.

These anti-environmental and anti-democratic practices converged in the Administration's recent [revisions](#) to the [Council on Environmental Quality's](#) (CEQ) regulations implementing the [National Environmental Policy Act](#) (NEPA). Often [referred](#) to as the Magna Carta of U.S. environmental law, NEPA has two main goals.

First, it [seeks](#) to force federal agencies to consider the potential adverse effects of their proposed actions before they commit to taking them.

Second, it [requires](#) agencies to disclose the results of these deliberations so the public can assess the merits of agency action and let agencies, the President, and the U.S. Congress know if proceeding in the face of anticipated environmental harms seems ill-considered. This second purpose allows scrutiny of agency decision-making and facilitates public participation in decisions that could adversely affect public health and the environment.

When the Trump Administration's CEQ initially proposed revising NEPA rules, we were not alone in [pointing out](#) that the proposal [threatened](#) to subvert all of NEPA's purposes. The final CEQ regulations have made those threats a reality. CEQ ignored the many [criticisms](#) of its proposed revisions showing that they ran contrary to both NEPA's environmental protection goals and democratic governance ideals.

One troublesome aspect of the CEQ revisions is their impact on the ability of anyone affected by agency projects to seek judicial review. The [Administrative Procedure Act](#) (APA) provides affected individuals an opportunity to have courts review agencies' alleged noncompliance with procedural mandates under both NEPA and CEQ's implementing regulations. Yet the Administration obscures this reality, only pointing out in its revised CEQ rules that NEPA does not explicitly [afford](#) affected individuals an opportunity to seek judicial review.

The CEQ's recent revisions **reflect** the Administration's contempt for—and unabashed efforts to sideline—any institution capable of thwarting its efforts to subvert the law. They **seek** to curtail opportunities for seeking judicial review of NEPA compliance by, for example, limiting such review until after an agency issues final rules or otherwise takes final action. They do so by defining the finality of any NEPA document so that it is coterminous with the final action for which the document was prepared.

Thankfully, the courts have up until now provided exactly that kind of bulwark against lawless behavior by Trump Administration agencies. The Administration's success rate in federal court on regulatory policy issues **is** astonishingly terrible— by one count, only 12 victories out of 96 cases **compared** to the usual government success rate of about 70 percent. And these are in cases decided by judges appointed under Republican and Democratic administrations alike. It is hardly surprising, then, that the Trump Administration's next move is to try to limit the courts as a check on its unlawful acts.

But this effort is a gross overreach. The recent CEQ regulations purport to **limit** the *availability of judicial review* under NEPA. The provisions of the APA remain unchanged, however, and judicial precedents have **established** long ago that such review under the APA is appropriate. The regulations also **require** petitioners to post expensive bonds when bringing a case under NEPA, despite judicial **precedents** to the contrary.

The Trump Administration's rule changes also purport to **narrow** the *scope of judicial review* when it is available, including creating strong presumptions that agency findings concerning their own compliance with NEPA procedural duties are accurate and limiting judicial authority to reverse agency actions caused by minor agency errors. But it is up to the courts, following congressional instructions, to decide such matters—not CEQ.

Finally, the regulations attempt to **limit** the *remedies courts may provide* when agencies violate NEPA or other regulations, even though Article III of the U.S. Constitution vests such authority in the courts. In particular, the regulations attempt to limit the circumstances under which courts may halt an agency's project until it complies with NEPA. Doing so would reduce agency incentives to follow NEPA's directives in the first place.

CEQ's efforts to control how the courts handle NEPA litigation [reflect](#) the Trump Administration's broader disdain for anyone who disagrees with its policy agenda. If those affected by environmentally damaging agency actions want to challenge these actions in court, the Administration's answer is to slam the courthouse doors in their face. If Trump Administration agencies perceive statutory directives as unwarranted obstacles to their goals, the solution is to ignore them. If courts wield the power to block agency actions until they conform to the law, the Administration's response is to hamstring the courts from performing their responsibilities.

The President's authoritarian conception of the scope of presidential power, and his unrelenting attacks on government institutions created to check that power, [pose](#) dangerous threats to the separation of powers built into the U.S. constitutional framework to [safeguard](#) liberty. In reviewing the Administration's latest unlawful attempt to distort the regulatory process and weaken long-standing checks on executive authority, the courts will again be called on to perform their constitutional role and refuse to follow CEQ's decrees.



Robert L. Glicksman is the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School.



Alejandro E. Camacho is Chancellor's Professor of Law at the University of California-Irvine School of Law.

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