

REGULATIONS

Judge grapples with next steps on Trump NEPA overhaul

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The White House Council on Environmental Quality is at the center of legal wrangling over a Trump-era overhaul of National Environmental Policy Act implementing rules. The White House is pictured. Francis Chung/E&E News

A federal judge yesterday appeared puzzled by environmental groups' request to scrap former President Trump's changes to implementing regulations for the National Environmental Policy Act.

At virtual oral arguments, Judge James Jones of the U.S. District Court for the Western District of Virginia questioned why the green groups hadn't reached an agreement with the Biden administration outside the courtroom to nix Trump's NEPA rule.

"All of you are experienced lawyers. I mean, why would you not try to work out some arrangement?" asked Jones, who was appointed during the Clinton administration.

Kym Hunter, a senior attorney at the Southern Environmental Law Center, which is representing 17 environmental challengers to Trump's NEPA overhaul, responded that the Biden administration has to follow the requirements of the Administrative Procedure Act in order to change the rule.

The White House Council on Environmental Quality will need to go through a notice-and-comment rulemaking to replace Trump's NEPA rule, which could take up to three years, Hunter said. The court could do away with the regulation much more quickly.

"Just like the Trump administration had to follow process, the Biden administration will have to follow process," she said.

At issue in the case is whether CEQ was on solid legal ground when it overhauled NEPA implementation last year.

NEPA, enacted by Congress in 1970, requires federal agencies to weigh the environmental effects of their proposed actions and consider alternatives. In 1978, CEQ issued NEPA implementing rules for federal agencies, directing them to engage with the public during environmental reviews and to reduce paperwork, among other instructions.

Trump unveiled his changes to the NEPA implementing rules last year. Proponents argued that the revisions will accelerate reviews of major infrastructure projects including highways, power plants and pipelines.

But the 17 green groups challenging the overhaul contend that in issuing the changes, the Trump administration skirted the requirements of APA, which governs federal rulemaking. The rule should therefore be wiped from the

books, the groups say.

President Biden's CEQ, which inherited the case from the Trump administration, is asking the court to send the rule back to the agency without axing it outright.

CEQ is taking some time to review the rule with an eye toward climate change and environmental justice, Justice Department lawyers wrote in a recent [court filing](#).

Clare Boronow, a trial attorney in DOJ's environment division, said yesterday that scrutinizing the rule is a top priority for newly confirmed CEQ Chair Brenda Mallory.

"Now with the new chair in place, CEQ does intend to move forward on this reconsideration process with a sense of urgency," Boronow said. "And the agency wants to note that determining next steps for the 2020 rule is in fact one of its highest priorities right now."

Boronow said CEQ had "orally" offered guidance to agencies to continue considering projects' impact on climate change while Trump's NEPA rule is under review. CEQ may issue written guidance in the coming months, she said.

A slew of industry groups including the American Farm Bureau Federation, the American Petroleum Institute and American Fuel & Petrochemical Manufacturers intervened in the case to preserve Trump's NEPA rule.

Arguing on behalf of the industry interests, Michael Kimberly of McDermott, Will & Emery LLP said the environmental groups were trying to have it both ways.

"I know the lawyers representing the plaintiffs in this case have made arguments exactly for this position when the shoe was on the other foot," Kimberly said.

"It was environmental groups in the Clean Power Plan litigation, in the Waters of the United States litigation, who were arguing that the agency had to continue abiding the Obama administration's rules while the Trump administration undertook new rulemaking," he added.

In a note to clients last night, analysts at the research firm ClearView Energy Partners LLC wrote that they expect Jones to send Trump's NEPA rule back to CEQ without scrapping the regulation, as the Biden administration is seeking.

"Based on the questioning from Judge Jones, we think he may remand the rule to CEQ without *vacatur*," they wrote.

'An all-hands-on-deck moment'

Speaking at a virtual event yesterday during the oral argument, Justin Pidot, CEQ's general counsel, said the Biden team is seeking to avoid the Trump administration's failures in court.

During Trump's early years in office, federal agencies suffered frequent courtroom losses after judges found that the government's attempts to scrap or suspend Obama-era environmental rules violated APA.

"This administration is committed to the rule of law, to ensuring we take the time necessary to build records that can support the decisions that we make," Pidot said at an event hosted by NYU School of Law's State Energy & Environmental Impact Center.

"If we rush ahead and do so in a fashion that opens us up to litigation risk that we will not be able to meet, we really haven't leapt forward, we've just simply remained static," he added.

The other speakers at the event were the Democratic attorneys general of Connecticut, Maryland, New York and Wisconsin. Democratic attorneys general joined environmental groups in bringing many of the APA challenges against the Trump administration.

Pidot said the Biden administration will be "looking to states, tribes, local governments, citizens, scientists [and] engineers" as it seeks to "craft federal policy that can withstand the test of time."

He noted that Biden has called on all federal agencies to tackle rising global temperatures and their disproportionate effects on low-income neighborhoods and communities of color.

"This is an all-hands-on-deck moment for climate change, for environmental justice," he said. "It's why the president has articulated a whole-of-government approach, but this is really a whole-of-world approach. This is a moment when each of us has a part to play."

Reporter Niina H. Farah contributed.

This story also appears in Climatewire.

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