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CEQ Pushes To Sink Environmentalists' NEPA Rule Suit On Argument's Eve

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On the eve of oral arguments, the White House Council on Environmental Quality (CEQ) is stepping up efforts to dismiss environmentalists' challenge to the Trump-era National Environmental Policy Act (NEPA) rule, citing a recent appellate ruling finding that GOP states lack standing to challenge the Biden administration's interim social cost of carbon (SCC) metric.

In **an Oct. 24 notice of supplemental authorities**, CEQ told the U.S. Court of Appeals for the 4th Circuit that the 8th Circuit's ruling in *Missouri v. Biden* finding that GOP states lack standing to challenge the SCC means that environmentalists similarly lack standing to challenge the NEPA rule because both measures do not by themselves have any effect until they are applied to a specific agency action.

However, environmentalist plaintiffs in the NEPA case, *WildVirginia v. CEQ* argue in their **Oct. 25 opposition** that the SCC case, over interim numbers the administration set to monetize climate change regulations, has no impact on the challenge here.

The dueling notices to the court come on the eve of Oct. 26 oral arguments where environmentalists are appealing a federal district court ruling dismissing their case as unripe.

Environmentalists across the country filed multiple challenges to CEQ's 2020 NEPA rule, which dramatically scaled back what federal agencies must consider when conducting NEPA reviews of their major actions under the bedrock environmental disclosure law.

WildVirginia is the only one to have reached a decision in a district court.

All of the other cases -- in federal courts for the Southern District of New York, the District of Columbia and the Northern District of California -- remain stayed at the Biden administration's request and with little opposition from litigants.

The Biden CEQ in April **finalized its phase 1 rewrite** of the Trump-era rule that restores three major provisions: that agencies consider "direct," "indirect" and "cumulative" impacts of their projects including climate change impacts; that the CEQ rules are a floor, rather than a ceiling, for agencies' review; and that the scope of a project's "purpose and need" is not the applicant's decision.

However, CEQ has yet to propose a broader phase 2 NEPA rule, and environmentalists argue many negative provisions of the Trump rule remain in effect, causing them harm.

Industry and other opponents of the Biden CEQ rule did not challenge it in court, but the Senate in August narrowly passed a Congressional Review Act (CRA) **resolution of disapproval** to repeal the regulation. Sen. Joe Manchin (D-WV) joined nearly all other Republicans in voting for the CRA in a 50-47 vote, but the House will almost certainly not act on the measure in the current Congress.

CEQ also cited its final phase 1 NEPA rule as justification for upholding the lower court's decision here, saying in **an Oct. 12 supplemental notice** that the adoption of the rule "nullifies many of the harms that Plaintiffs' declarants speculated may occur if a federal agency in a future NEPA document applies the 2020 Rule in a matter that declarants feared. The Phase 1 rule's adoption thus supports a finding that this matter is prudentially moot."

'Claims Of Harm Were Not Concrete'

CEQ adds in its Oct. 24 notice that **the 8th Circuit held** that states lacked standing to challenge the interim SCC, "and the Court's application of standing principles is consistent with CEQ's argument here that Plaintiffs lack sta

CEQ notes that the 8th Circuit explained that the Republican states' "claims of harm were not concrete because they rested on a speculative chain of inferences about how other federal agencies may apply the challenged policy in the future. The same is true here."

In addition, CEQ notes, the 8th Circuit also "observed that the challenged policy could only cause the harm the States feared if and when the policy was applied in a future separate agency action and the proper subject for judicial review is that future action."

Further, the court concluded that the prospect of an abstract procedural injury does not create a justiciable controversy, the notice says.

But environmentalists in their Oct. 25 opposition argue that the government seeks to avoid judicial review of the rule "by attempting to liken states' generalized grievances about an interim estimate that could be used in future regulations to Plaintiffs' concrete and place-specific injuries caused by CEQ's final agency action that is already being implemented."

They add that the 8th Circuit's ruling is "neither binding nor relevant to this case. Injury from the 2020 Rule does not depend on other agencies' future actions. The Rule already automatically exempted certain federal actions from NEPA entirely."

This includes exempting from NEPA review of federal loan guarantees for large animal feeding operations, weakening requirements for categorically excluding timber harvests and other actions, imposing onerous new technical commenting requirements on plaintiffs and removing restrictions on the types of activities and investments that can occur prior to NEPA review.

"These changes, which bind all federal agencies, in no way resemble the challenged estimates in *Missouri*," the letter adds. "Accordingly, Plaintiffs here are concretely injured by the changes put in place by the challenged rule."

The case has been fully briefed since February, when environmentalists filed a reply to CEQ's Jan. 18 answering brief urging the court **to reject the appeal** and dismiss the case because of the replacement rules it is developing. Environmentalists filed their opening brief last October, arguing the case is ripe that the court can resolve their objections to the 2020 rule, which "is being applied by agencies across the country."

The appeal was filed in July over **a June 21, 2021 opinion** by Judge James Jones of the U.S. District Court for the Western District of Virginia dismissing the challenge as unripe.

The 4th Circuit will not announce the three-judge panel hearing the case until Oct. 26. -- *Dawn Reeves* (**dreeves@iwpnews.com**)

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