When the Court overruled *Chevron*, one effect was to raise a crucial question about how courts should apply NEPA. For decades, courts have deferred to regulations issued by the Council on Environmental Quality (CEQ). The basis for that deference was a bit fuzzy, but now it is much fuzzier. This is a technical issue but one with far-reaching consequences for how NEPA operates. It's also an issue that is likely to be raised in the oral arguments in a current Supreme Court case, although it wasn't raised by the parties in their briefing.

The CEQ rules were first issued in 1978. Until 2020, they were very stable, then they were changed by Trump, and changed again by Biden. Presumably, they will be changed again by Trump. How should courts respond to these shifting rules? The issue was thrown into high relief by a recent D.C. Circuit opinion ruling that CEQ had no power to issue the regulations in the first place. this question requires a deep dive into some complex legal doctrines.

## Does CEQ Have Delegated Power?

We begin with the issue raised in the recent D..C. Circuit opinion: Does CEQ have the power to issue binding regulations? The court's analysis correctly concluded that CEQ does not have explicit statutory authority to do so. But the issue is quite a big more complex than the court of appeals seemed to think.

The Supreme Court's recent decision in *Loper Bright overruled* Chevron and established new standards for considering agency interpretation of statutes. Under *Loper*, when Congress has given an agency discretion, the function of the Court is merely to make sure that the agency didn't go beyond its discretion and that it adequately explained its decision. The situation in terms of CEQ's discretionary power, unfortunately, is a little murky.

1. *Does CEQ have rulemaking authority?* NEPA does not explicitly give CEQ the power to issue rules. Arguably, some NEPA provisions implicitly grant rule making by authorizing CEQ to advise the President and agencies about NEPA-related matters. Rulemaking power could also derive from § 203 of the Environmental Quality Act of 1990, 42 U.S.C. § 4237(d)(5), authorizing CEQ to assist agencies in implementing NEPA. Moreover, under presidential directives, agencies must follow CEQ regulations in issuing their own NEPA regulations. Those agency regulations are enforceable in court even if the CEQ regulations standing along would not be (an issue that the D.C. Circuit concluded wasn't presented by the case before it).

In any event, the Supreme Court has reaffirmed CEQ's authority, including a 2024 opinion by Justice Thomas, and lower court opinions are replete with references to the CEQ regulations. The D.C. Circuit just brushed all that precedent side. And under both Trump

and Biden, CEQ sand agencies seem to have assumed its regulations had legally binding effect to the extent they were consistent with the statute.

*2. The reenactment issue.* Even if the D.C. Circuit was right about the situation when NEPA was originally passed in 1970, the situation might have changed since then. The D.C. Circuit also ignored the reenactment of the statute in 2023. Given the Supreme Court's 2004 pronouncement and what seems like bipartisan agreement on the CEQ side, Congress may have taken CEQ's rule-making power for granted when it amended NEPA in 2023. Indeed, the 2023 amendments give CEQ oversight of some aspects of NEPA implementation such as selecting what agency take the lead when projects involve multiple agencies.

*3.. Delegation by vagueness*. CEQ might also be considered to have discretion, even without rulemaking power, under another theory adopted by the Supreme Court in*Loper Bright*. Where a statute uses broad language, agencies are assumed to have discretion in applying that term. While NEPA is more specific now than it was before the 2023, it still uses broad language about "significant" effects, "reasonably foreseeable" impacts, and "feasible alternatives." CEQ, acting on behalf of the President as the head of the executive branch, presumably has discretion to give agencies guidance about how to apply that language. Even if CEQ guidance is not binding, an agency would be bound to follow its own regulations if they track CEQ's view.

*3. Summary of the delegation issue.* If the 2023 amendments had explicitly empowered CEQ to issue regulations, things would be simpler. Here, the delegation of authority has to be inferred from the breadth of some key parts of NEPA and a combination of its general statutory involvement in NEPA, past executive branch practice and judicial dictum, and a long history CEQ's acceptance. That may be enough to carry the day unless the Court intends to be hyper-formalist in applying *Loper*. If the Supreme Court agrees that CEQ has delegated power, the main task of judges would be whether a specific CEQ regulation overstepped its authority, and if not, whether CEQ reasonably explained its implementation of the statute. Within the bounds of its authority, CEQ could change its position with different administrations on policy grounds without worrying that it was sacrificing its claim to deference.

The D.C. Circuit seems to have thought that if the CEQ didn't have the power to issue binding regulations, it was free to complete ignore the regulations.. That isn't true either.

*Deference without Delegation: The Skidmore Approach*

1. *Supreme Court precedent.* Since the *Andrus* decision in 1979 (well before *Chevron*),

> the Supreme Court has made it clear that courts should give respect to CEQ's views about NEPA The Court said in *Andrus* that:
>
> "CEQ's interpretation of NEPA is entitled to substantial deference. The Council was created by NEPA and charged in that statute with the responsibility 'to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in … this Act …, and to make recommendations to the President with respect thereto.'"

The Court reiterated that CEQ regulations are entitled to deference in the 1989 *Robertson* case. There, the Court cited CEQ's expertise about NEPA practice, the broad input it received in crafting the regulations, and its reasonable analysis as reasons for deference.

This type of deference predates *Chevron* and should not be impacted by *Loper*. The classic articulation of this approach was in the 1944 Skidmore case, where the Court said, "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." The Court added: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

In *Loper*, the Court reaffirmed *Skidmore* and added that that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." The *Loper* Court also said that an agency interpretation" may be especially informative to the extent it rests on factual premises within the agency's experts." CEQ's staff clearly has considerable experience with the implementation of NEPA across the executive branch.

2. *Skidmore* and CEQ. Under this approach particular deference should go to the 1978 CEQ regulations, which were issued only a few years after NEPA was originally passed and remained in effect for over forty years. Some aspects of the 1978 regulations were revised under Trump, but the revised regulations were only in effect briefly before being reversed under Biden. Where the Biden regulations interpret the 2023 statutory amendments, they could get an extra boost from being contemporaneous with the passage of the new law.

The downside of the *Skidmore* test is that it includes multiple factors, which may make judicial rulings less predictable when regulations change. But some language in *Loper* could mean that CEQ won't need to rely on *Skidmore*. The *Loper* opinion provides a separate standard of judicial review when Congress has delegated discretion to an agency in applying a statute.

*3. The upshot. E*ven if it holds up, the D.C. Circuit's rejection of CEQ's power to issue binding legal rules doesn't necessarily mean that CEQ guidelines will be ignored by agencies or disregarded by courts. The Supreme Court is about to hear argument on a NEPA case. That could give the Court the chance to clarify *Loper* as well as the scope of CEQ's authority. Of course, the Court might simply do what it has done in the past: assume CEQ rules are binding without explaining why. Or it might simply ignore the issue. We'll know after the upcoming oral argument.

If the Supreme Court does take the same view as the D.C. Circuit, that would have some ironic effects. First, it would diminish the power ot the Trump CEQ to change existing NEPA practices. And second, it would raise serious questions about executive orders that require agencies to engage in cost-benefit practice. The legal case for those order is actually much weaker than the argument for CEQ's regulatory authority.