One of the many EOs issued by the new administration revokes the authority of the Council of Environmental Quality (CEQ), an office within the White House, to issue regulations implementing the National Environmental Policy Act (NEPA) that bind agencies in terms of what they must do for NEPA compliance. The EO follows on the heels of a DC Circuit decision (subsequently characterized as nonbinding dicta by the DC Circuit en banc) holding that CEQ does not have the power to issue binding NEPA regulations, and a District Court of North Dakota decision to the same effect. Various commentators have made sweeping assertions about the impact of the end of CEQ issuance of binding NEPA regulations – usually with those skeptical of NEPA cheering, and those supportive of NEPA critiquing. Given the predilections of this administration, it's safe to assume that it believed the EO would reduce the burdens of NEPA compliance for individual agencies

Count me as skeptical as to the impact of the change, at least in terms of making NEPA compliance easier. In fact, my guess is that eliminating the CEQ regulations will make it harder for agencies to comply with NEPA, though I'm also skeptical that this will produce better environmental outcomes.

The important thing to consider here is that the CEQ regulations can be thought of as coordinating mechanisms – an effort by the White House to coordinate, and therefore control, the range of outcomes in terms of NEPA for both agencies and courts. For agencies, the coordination mechanism is obvious – by having CEQ issue regulations that are binding on agencies, the White House can better control, with less effort, what those agencies do in terms of NEPA implementation. Indeed, if those CEQ regulations are judicially enforceable, then the job of coordination is even easier, since agencies need to worry not just about White House supervision, but supervision by courts and third parties.

Thus, the decision by this administration to wipe out the CEQ regulation is odd – the administration has made no secret of its desire to dramatically rework NEPA's implementation. It could have used the CEQ regulations to accomplish that goal. So why didn't it? I can only speculate, but there might be at least two possibilities. One is the White House believed that the legal complications of CEQ revision of its regulations, followed by individual agency updating of their own regulations and processes to comply, would take much longer than simply withdrawing the CEQ regulations and having the agencies implement changes directly. And two, the administration might believe that individual agencies, once freed from the shackles of the CEQ regulations would be happy to issue much weaker agency-specific guidance on NEPA compliance, especially if those agencies are encouraged/ordered

by the White House to issue weaker guidance.

Whatever the merits of this thinking, the fact is that while the elimination of CEQ regulations might increase the coordination and supervision costs for the White House for agency NEPA compliance, the White House still has a range of tools at its disposal to drive particular outcomes at the agency level. So coordination can still occur, albeit perhaps with higher cost.

It's coordination with the courts that I think is the real problem here. It is true that the Supreme Court has never explicitly deferred to the CEQ regulations in interpreting NEPA, and post-Loper Bright, any such deference is even more unlikely. But while the Supreme Court (and to some extent lower courts) may never have deferred to CEQ's regulatory interpretations of NEPA, they definitely have cited them, a lot. And if courts cite the CEQ regulations, they are at least implicitly relying on them to help make their decisions. That can play an important role in providing greater consistency in how to interpret and apply NEPA. And greater consistency matters when you have two things: First, a statute that, even with the revisions from 2023, is extremely vague in when and how it should be applied; and, second, well over 1,000 federal judges, all with different perspectives about how to interpret that vague statute. It is no accident that there is a lot of NEPA caselaw, and that it is notoriously fact dependent on how cases turn out, producing a lot of variance in terms of outcomes.

Losing the NEPA regulations likely increases the variance of those outcomes. And that is bad news for agencies. Even if on average, courts become more sympathetic to less stringent NEPA compliance without the CEQ regulations (something I'm not sure will actually occur), if the variance of outcomes goes up enough, agencies may actually be faced with more cases in which they are subject to extremely stringent NEPA review then they were before. And if agencies are risk-averse, seeking to avoid negative outcomes from courts, then they will do NEPA compliance to address those worst-case judicial situations. Which means even more bullet-proofing of NEPA documents, more extended analyses, more compliance on average. The exact opposite of what the administration purports to want. We will see what actually plays out on the ground and in court, but don't be surprised if the end result is not a revolution in NEPA implementation by agencies.