Federal and state officials tour the facilities at “Alligator Alcatraz” on July 1, 2025. (Department of Homeland Security, photo by Tia Dufour)

Last week, a divided panel of the 11th Circuit US Court of Appeals stayed the preliminary injunction issued by a District Court halting use of the Everglades detention center the Trump Administration loves to call “Alligator Alcatraz” pending the outcome of NEPA litigation.

The preliminary injunction was a bit aggressive — the trial court had ordered not only that additional construction be halted and no new detainees brought to the site, but that some facilities at the site be dismantled, an unusual interim remedy in a NEPA case, where all the plaintiffs can ultimately get is more process. The majority of the appeals court panel responded even more aggressively, refusing any deference to the lower court’s view of the likelihood of success and the competing equities. Which, of course, may well be in line with the way the current Supreme Court seems to be viewing any and all preliminary injunctive relief contrary to this administration’s wishes.

Litigation on the merits will continue, and as I will explain this decision should not be taken as a clear forecast on the outcome.

The key legal question here is whether the construction or operation of the detention center is a federal action or only a state one. NEPA requires that federal agencies report on the environmental consequences prior to engaging in any “major federal action” significantly affecting environmental quality. It does not apply if the challenged action is not federal.

That’s a tougher question than it might at first seem, since many federal activities are closely intertwined with those of state or local governments or private actors. That’s the case here, as the picture above suggests. The site, which was a training airport, is owned by Miami-Dade County. The state began rapidly constructing the detention facility, at the request, Governor DeSantis said publicly, of the federal government. Multiple state and federal officials issued public assurances that the federal government would reimburse most or all of the cost. The federal Department of Homeland Security brought hundreds of detainees there, where they were overseen by Florida state troopers until federal agents deported them in federal aircraft. Neither the state nor the federal government did any environmental analysis.

Environmental plaintiffs sued to stop construction of the facility, alleging that the federal defendants were required by NEPA to prepare an EIS. Following a four-day hearing, the district court concluded that plaintiffs were likely to succeed on the merits of their NEPA claim and issued the preliminary injunction now stayed by the 11th Circuit.

The appellate decision oozes anti-NEPA vibes, going out of its way to cite the Supreme Court’s recent *Seven County* decision, which has no direct relevance to the issues in this case, for the proposition that courts have improperly turned NEPA into a tool to block desirable infrastructure projects.

Contrary to the District Court’s conclusion, the panel majority writes that the NEPA claim here is unlikely to succeed because there is no major federal action. To reach that conclusion, it construes a 2023 NEPA amendment to exclude from coverage any action that does not have *both* significant federal funding and significant federal involvement. The dissent disagrees, arguing that either federal funding or control can federalize a project for NEPA purposes. I agree with that reading of the statute, but even if one accepts the majority’s interpretation it’s hard to swallow the

conclusion that this project lacks significant federal funding.

The panel majority seems to think that money must actually have changed hands, or at least there must be a binding formal promise to pay, before NEPA obligations kick in. That doesn’t make conceptual sense, and it would be a recipe for gaming the timing of payments or commitments.

In this case in particular, the possibility that no significant federal funding will materialize seems vanishingly small, given the public commitments of multiple administration officials (not just the President, whose statements should never be believed); the mountain of funding Congress has just showered on ICE to increase detention capacity; and the testimony at the evidentiary hearing, which established that nearly $250 million had already been spent on the facility and that the IT systems at least were federally installed. Indeed, it seems quite likely that money will change hands before the merits are resolved. And at that point, it sure looks like the appellate judges will agree with the district court that there is major federal action. And there’s no denying that there will be (already are) significant environmental impacts of this massive paving and construction project.

The ability to get interim relief or not is the entire game in a case like this. Construction creates facts on the ground, in this case more than 18 acres of pavement and associated runoff in a highly sensitive ecosystem. The panel majority manages by sleight-of-hand to prevent interim relief in a case that even on the majority’s terms it seems highly likely plaintiffs will ultimately win. That’s disingenuous. If Congress thinks NEPA is an undesirable barrier to rapid construction of this sort of facility, it can amend NEPA. In the meantime, the judiciary should not bend over backward to undermine the law.