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12 Climate Wins From the National Environmental Policy Act

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Tackling Climate Change and Environmental Injustice, Clean Energy, Conservation

The National Environmental Policy Act requires the federal government to consider the impacts of climate change for proposed projects. The Trump administration has dismissed this condition—and it has come back to haunt them in the courts.

New Mexico's Chaco Culture National Historic Park, May 2015. (Getty/Mladen Antonov/AFP)

This column contains a correction.

In March 2017, President Donald Trump directed the White House Council on Environmental Quality (CEQ) to rescind its previous guidance that showed federal agencies how to consider the effects of climate change in their decision-making. The Obama administration's CEQ issued this climate guidance in 2016 in response to court decisions that determined that the National Environmental Policy Act (NEPA) required agencies to calculate changes in carbon pollution that would result from major federal projects. Rescinding this guidance was typical of Trump's pro-fossil fuel, anti-climate agenda, which has since included withdrawing the United States from the Paris climate agreement, rolling back the Clean Power Plan, and undermining common-sense clean car standards.

But now, more than two years and at least 12 court losses later, it's clear: Rescinding the CEQ's climate guidance was misguided, ineffective, and ironically counterproductive to the Trump administration's professed "energy dominance" agenda. In their effort to cut through what they perceived as red tape, the Trump administration merely created more uncertainty in federal permitting for industry, which has ultimately slowed fossil fuel development across the country.

This column first discusses the history of NEPA, the bedrock environmental law that requires that climate effects be considered in federal decision-making. It then includes a brief summary of 12 court cases during the Trump administration in which NEPA upheld the requirement for federal agencies to consider projects' environmental consequences. These cases all point to one thing: The federal government needs to issue new guidance on how to consider climate impacts under NEPA.

Climate consideration under NEPA

With the passage of NEPA in 1969, Congress recognized the "profound impact of man's activity" on the natural environment. For the first time, there existed a mandate for how people and nature could "exist in productive harmony" for current and future generations. NEPA is also one of the only statutes that allows for public participation and input into major federal decisions, and it remains a critically important way for communities to have their voices heard.

Under NEPA, federal agencies are required to consider and disclose the potential effects of their actions on the surrounding environment. Thanks to court rulings centering on NEPA's climate consideration requirements, the Obama administration issued climate guidance in 2016 to supplement how federal agencies conduct environmental reviews as required under NEPA. This guidance sought for the first time to clarify, for the suite of federal agencies, how to consider potential greenhouse gas emissions from federal projects under the NEPA process and to provide a consistent approach across agencies. Prior to the guidance's existence, each agency considered changes in carbon pollution differently, and some did not consider it at all. With the guidance, however, industries applying for federal permits—such as the oil and gas industry—could be sure that agencies were taking a consistent approach in their environmental review.

Upon entering office, President Trump rescinded this guidance in a sweeping executive order designed to stop federal agencies from disclosing how the government's actions contribute to climate change. Since this decision, however, federal courts have repeatedly held that NEPA does require the federal government to consider the effects of a project's carbon pollution when proceeding with major federal actions such as leasing public lands for drilling to oil and gas companies or issuing permits to industry to build pipelines.

As the Trump administration continues its efforts to bolster fossil fuels as part of its "energy dominance" agenda, NEPA has been one of its strongest legal roadblocks. Recently, for example, former oil and gas lobbyist and current U.S. Secretary of the Interior David Bernhardt begrudgingly conceded to members of the House Committee on Natural Resources that NEPA requires his agency, among others, to consider the effects of climate change.

When President Trump withdrew the CEQ climate guidance, his administration set itself up to fail in the courts—and that's exactly what has occurred. Even the fossil fuel industry has asked for the guidance. Time and time again, courts are ordering agencies to consider the effects of climate change in their environmental reviews. Now, the Trump administration is trying to quietly reissue climate guidance because, quite simply, the courts will not let them ignore climate change.

12 court cases that affirm NEPA's climate review role

Since President Trump took office, NEPA has upheld the federal requirement to consider climate—specifically greenhouse gas emissions—at various levels in courts across the country at least 12 times. Below are brief summaries of each of those cases, starting with the most recent decision through the oldest.*

1 **Oil and gas leases in New Mexico (*Dine Citizens Against Ruining Our Environment v. David Bernhardt*):** In May 2019, the court held that NEPA had been violated because climate impacts were not considered when the U.S. Department of the Interior (DOI) issued oil and gas leases around New Mexico's Chaco Canyon in the San Juan Basin.

2 **Federal coal moratorium (*State of California v. U.S. Department of the Interior*):** In April 2019, the court held that the Trump administration's rescission of a DOI moratorium on all new federal coal leases constituted a major federal action sufficient to trigger NEPA analysis.

3 **Leases in Wyoming, Utah, and Colorado (*Wildearth Guardians v. Ryan Zinke*):** In March 2019, the court held that oil and gas leases in Wyoming, Utah, and Colorado included an inadequate NEPA analysis because "NEPA required more robust analyses of GHG [greenhouse gas] emissions from oil and gas drilling and downstream use."

4 **Master Development Plan** in Colorado (*Citizens for a Health Community v. U.S. Bureau of Land Management*):** In March 2019, the court held that the Bureau of Land Management (BLM) violated NEPA when it attempted to rely on production estimates when permitting an oil and gas project in Colorado but refused to rely on the projected greenhouse gas emissions from those same estimates.

5 **Pipeline in Virginia (*National Parks Conservation Association v. Todd T. Semonite*):** In March 2019, the court held that the U.S. Army Corps violated NEPA when it granted a permit allowing a utility company to build a series of electrical transmission towers across the James River without taking a hard look at the transmission project's environmental impacts.

6 **Mining expansion for Montana's Spring Creek Mine (*Wildearth Guardians v. Ryan Zinke*):** In February 2019, the court held that the Office of Surface Mining Reclamation and Enforcement's (OSM) decision not to

prepare an environmental impact statement under NEPA was arbitrary and capricious because the OSM didn't fully analyze certain environmental impacts, including greenhouse gas emissions.

7 **Appalachian Trail pipeline across the Southeast (*Cowpasture River Preservation Association v. U.S. Forest Service*):** In December 2018, the court held that the U.S. Department of Agriculture's Forest Service violated NEPA by failing to consider the effects—including those related to climate—of authorizing a 600-mile natural gas pipeline that crossed two national forests and part of the Appalachian Trail.

8 **Keystone XL pipeline across the Great Plains (*Indigenous Environmental Network v. U.S. Department of State*):** In November 2018, the court held that the U.S. Department of State failed to complete an adequate environmental review under NEPA when it disregarded prior factual findings related to the Keystone XL pipeline and climate change.

9 **Colorado River Valley Resource Management Plan*** in Colorado (*Wilderness Workshop v. U.S. Bureau of Land Management*):** In October 2018, the court held that the BLM violated NEPA when it attempted to apply an environmental impact statement that did not consider the impacts of greenhouse gas pollution to a resource management plan.

10 **Coal leases in Montana (*Western Organization of Resource Councils v. U.S. Bureau of Land Management*):** In March 2018, the court held that the BLM failed to consider reasonable alternatives for coal leasing by failing to calculate greenhouse gas emissions resulting from the coal leases, as required under NEPA.

11 **Southeast Market Pipelines Project across the Southeast (*Sierra Club v. Federal Energy Regulatory Commission*):** In March 2018, the court held that the Federal Energy Regulatory Commission's environmental impact statement for the Southeast Market Pipelines Project failed to adequately take into account greenhouse gas emissions that would result from burning the natural gas carried by the pipeline.

12 **Mining modification in Montana's Bull Mountains (*Montana Environmental Information Center v. U.S. Office of Surface Mining*):** In November 2017, the court held that the OSM failed to adequately consider the need for an environmental impact statement and to take a hard look at the indirect, cumulative, and foreseeable effects of a proposed coal mine expansion in central Montana. The court went so far as to suggest the use of the social cost of carbon protocol tool from the Obama administration's 2016 NEPA climate guidance.

Conclusion

The courts have made it eminently clear that the Trump administration must consider greenhouse gas emissions when conducting the environmental review of a federal project under NEPA. Recently, the DOI responded to one of these court-mandated environmental reviews by releasing a haphazard, insufficient analysis with a deeply truncated public comment period of just 15 days. Given recent national and international reports on the dire nature of the climate crisis, the CEQ should now issue robust guidance consistent with the 2016 version, lest Trump administration agencies continue to ignore or rush court-mandated environmental reviews. This would require, for example, codifying that

iteration's social cost of carbon tool, to be used in calculating the climate effects of a given project.

Whether by intention or not, NEPA has become the strongest climate policy in the Trump era. Congress should protect it—even if and when they develop more targeted climate legislation—and in the meantime, the CEQ must issue its climate guidance for federal agencies as soon as possible.

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**Author's note: Many of these cases continue to move through the federal court system, as the Trump administration has appealed some of the decisions.*

***Correction, June 3, 2019:* This column has been updated to accurately refer to the Master Development Plan in Colorado.*

****Correction, June 3, 2019:* This column has been updated to accurately refer to the Colorado River Valley Resource Management Plan as well as the environmental impact statement that the BLM applied to the plan.*

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