NEPA and Independent Regulatory Agencies

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I. Introduction

The National Environmental Policy Act of 1969 (NEPA) is the primary instrument for federal agencies to consider the environmental impacts caused by the decisions that they make pursuant to their statutory authority. NEPA requires all federal agencies to "stop, look, and listen" prior to taking significant actions that could affect the human environment. Agencies must consider the values of environmental preservation for all significant actions and adhere to procedural measures to ensure that those values are fully considered. Federal agencies are further required consider alternative ways of accomplishing their missions in ways which are less damaging to the environment. Section 101(b) of NEPA states that "it is the continuing responsibility of the federal government to use all practicable means, consistent with other essential considerations of national policy" to avoid environmental degradation, preserve historic, cultural, and natural resources, and "promote the widest range of beneficial uses of the environment without undesirable and unintentional consequences." Also, NEPA created the Council on Environmental Quality (CEQ), a division of the Executive Office of the President, which coordinates the environmental efforts of federal agencies and other White House offices in the development of environmental policies and initiatives. NEPA assigns CEQ the task of overseeing the environmental impact assessment process of federal agencies ensuring that agencies meet their obligations under the Act. Further, CEQ mediates disputes from time t time between agencies regarding the adequacy of assessments of environmental impacts.

Ultimately, NEPA makes environmental protection a part of the mandate of every federal agency. Virtually every agency of the federal government has prepared an environmental impact statement, and most agencies have also been subject to NEPA lawsuits. While there are differences among each agency's unique approach to implementing NEPA, these differences are somewhat pronounced among so-called "independent" agencies. This paper examines the approach of one such independent agency: the U.S. Nuclear Regulatory Commission (NRC). This paper addresses the role of CEQ with respect to the NEPA obligations of independent agencies and offer examples of how several independent agencies approach NEPA.

II. Independent Agencies

Before discussing NEPA's unique relationship with independent agencies, we must first define an independent agency. Unfortunately, this is not a straightforward task. As a general matter, independent agencies are those agencies that exist outside of the federal executive

departments (*i.e.*, agencies headed by a member of the president's Cabinet). Independent regulatory agencies were created by Congress in an effort to bring expertise-driven decision making to administrative governance. Constitutionally-speaking, such agencies remain part of the executive branch, but may exercise some independence from executive control. Usually, independent agencies are headed by a multi-membered collegial body with each member serving a staggered term. Although members may be appointed by the president and confirmed by the Senate, the president's power to dismiss the agency head or a member may be limited to removals "for cause." In other words, the president usually cannot remove a member of such an agency because the president disagrees with his or her policies or politics.

The legal support for the existence of independent agencies was first established by the U.S. Supreme Court in *Humphrey's Executor vs. U.S.*, 295 U.S. 602 (1935). This case involved a claim by the executor of a former commissioner of the Federal Trade Commission for the payment of salary for the period of his term after President Roosevelt effectively removed him from office. The Court held that the president lacked the authority to remove the commissioner for the purpose of disagreeing with the commissioner's views. To supports its conclusion, the Court found that Congress, in creating the Federal Trade Commission, had given the agency both legislative and judicial authority, and required the agency to discharge its duties independently of executive control. In holding that such distinction had a constitutional basis, the Court described the agency accordingly:

> "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be *free from executive control*."

295 U.S. at 628 (emphasis added). The *Humphrey's Executor* decision provides some evidence of a constitutional basis for treating independent regulatory agencies somewhat differently than other agencies. However, there is no formal distinction between agencies in the executive branch; rather, there are simply layers of independence that Congress has provided each agency.

III. NEPA's Application to Independent Agencies

Section 102 of NEPA makes it clear that the law applies to "all agencies of the Federal Government." Therefore, NEPA does not make any distinction between independent and

executive agencies. Section 102 further requires all agencies to "identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 USC 4332. Notwithstanding the broad scope of NEPA with respect to federal agencies, the uniform application of NEPA in coordination with CEQ remains a somewhat illusive concept.

NEPA does not address whether CEQ's interpretation of NEPA's requirements are binding upon federal agencies. Following President Nixon's issuance of Executive Order 11514 in 1970 ("Protection and Enhancement of Environmental Quality," 35 Fed. Reg. 4247), which authorized CEQ to provide guidance to federal agencies, CEQ issued guidelines for the preparation of environmental impact statements (EIS). However, federal agencies failed to apply CEQ's guidelines consistently. Federal courts were also quick to point out that the guidelines were not binding upon federal agencies. For example, in *NRDC v. Callaway*, 524 F.2d 79, 86 n.8 (2d Cir. 1975), the court noted that "CEQ Guidelines are only advisory, since the CEQ has no authority to prescribe regulations governing compliance with NEPA." As mentioned above, CEQ lacked the express statutory authority to promulgate binding rules implementing NEPA. In 1977, perhaps in an effort to address CEQ's apparent lack of legislative authority, President Carter issued Executive Order 11991 ("Relating to Protection and Enhancement of Environmental Quality," 42 Fed. Reg. 26967), which expressly required federal agency compliance with CEQ's NEPA regulations. The Executive Order required agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements."

Perhaps not surprisingly, Executive Order 11991 did not end the controversy surrounding CEQ's authority. From a legal perspective, any executive order issued by the president must be based on either statutory authority or inherent constitutional authority. Therefore, in order for an executive order to become binding on an independent agency, Congress must have granted the president the authority to issue an executive order that applies to that agency. In many cases, however, the president will not have the specific statutory authority to include independent regulatory agencies within the scope of an executive order. In such situations, the president will have to rely on his or her authority under Article II of the Constitution to "take Care that the laws be faithfully executed." U.S. CONST. art. II, § 3. Some legal scholars questioned the legal

authority for CEQ's role in legislating NEPA processes for federal agencies. For example, Professor Whitney (1991) argued that CEQ was intended to act primarily in an advisory capacity. He noted that Congress stopped short of granting any authority to the CEQ to control or veto the activities of other agencies, and actually expressly rejected an original version of Section 102(2)(B) providing for CEQ "review and approval" of federal agency methods for giving "appropriate considerations to presently unquantified environmental amenities and values." Rather, Congress simply required that agencies "consult" with CEQ. An example of this reasoning appeared in federal court in *TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006), where the U.S. Count of the Appeals for the D.C. Circuit openly questioned the authority of CEQ to issue binding regulations for any federal agency.

IV. The Nuclear Regulatory Commission

Congress created the U.S. Nuclear Regulatory Commission (NRC) in 1974 as an independent agency in order to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment. The NRC regulates commercial nuclear power plants and other uses of nuclear materials, including nuclear medicine and nuclear fuel cycle activities. The NRC is headed by five commissioners, each appointed by the president and confirmed by the Senate for five-year terms. The president must designated one commissioner to be the chairman and official spokesperson of the Commission.

The NRC's statutory authority and structure establish the agency's independent status. The Atomic Energy Act of 1954, as amended (AEA), provides the NRC with the authority to issue regulations that govern nuclear reactor and nuclear material safety and adjudicate related legal matters. 42 U.S.C. 2011. In other words, the NRC exercises both legislative and judicial functions. In addition, NRC's commissioners enjoy the aforementioned "for-cause" removal protection. The Energy Reorganization Act, Section 102(e), provides that "Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 42 USC 5841. This is in contrast to the concept ingrained in executive branch agencies, whose members serve "at the pleasure of the president" and can be removed for whatever reason the president decides.

V. NRC's Relationship with CEQ

The NRC has held a longstanding policy that CEQ's regulations cannot substantively bind independent agencies. The NRC first expressed this policy in response to CEQ's issuance

of its draft NEPA regulations for public comment. 43 Fed. Reg. 25230 (June 9, 1978). The NRC believed that CEQ's proposed regulations represented an improper interference with the decision-making of an independent regulatory agency. NRC's opinion embodied the concept underlying *Humphrey's Executor*, as Congress had provided NRC with an independent structure in the AEA and therefore had presumably intended the NRC to be free from executive control. In promulgating its NEPA regulations, CEQ did not address in the rule's statement of considerations (SOC) whether its regulations could have a substantive impact on the duties and policies of independent agencies. Therefore, NRC and CEQ remained at a stalemate.

The NRC further articulated its position in the SOCs for NRC's NEPA implementing regulations in 10 C.F.R. Part 51, which added some clarity to its position. In issuing the final rule, the NRC stated that "as a matter of law, the NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature." Environmental Protection Regulations for Domestic Licensing and Related Conforming Amendments (Final Rule), 49 Fed. Reg. 9352 (March 12, 1984). Therefore, NRC had acknowledged that CEQ regulations binding on the NRC, but only to the extent that such rules are "procedural" in nature. Further, the NRC has made attempts to comply with related Executive Orders to the extent possible, while maintaining that the NRC is not necessary bound by them. For example, President Clinton issued Executive Oder 12,898, directing all federal agencies to develop strategies for considering environmental justice in their programs, policies, and activities. "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629 (1995). The NRC sent a letter to the White House confirming its commitment to endeavor to carry out the measures as part of its compliance with NEPA requirements.

VI. NRC Cases Involving CEQ

As discussed above, the NRC has argued that CEQ regulations can only bind the agency where they are procedural in nature. Therefore, the NRC must evaluate on a case-by-case basis whether a particular CEQ regulation is either "substantive" or "procedural." The NRC has confronted this issue infrequently, and only a few cases provide some insight into the NRC's evaluation of concept. These cases are discussed below.

a. *Limerick Ecology Action,* 869 F.2d 719 (3rd Cir. 1989)

Limerick Ecology Action involved a challenge to the NRC's granting of an operating license to the Limerick Nuclear Power Generating Station. The intervening group in the case argued that NRC's NEPA analysis was flawed because it did not comply with CEQ's "worst case analysis" regulation in 40 C.F.R. § 1502.22(b). The NRC had previously declined to adopt this provision in its NEPA implementing regulations at 10 C.F.R. Part 51. 49 Fed. Reg. at 9856-57. Holding that the NRC was not required to conduct a worst case analysis, the U.S. Court of Appeals for the Third Circuit explained that CEQ guidelines are not binding on an agency to the extent that the agency has not expressly adopted them. The court also noted that CEQ had substantially amended its worst case analysis regulation while the case was still pending to eliminate the requirement that a worst case analysis be performed. Instead, CEQ required only "reasonably foreseeable" adverse impacts to be analyzed, even if the probability of such impacts is "low." 51 Fed. Reg. 15,618 (April 25, 1986).

Limerick Ecology Action represents an example where the NRC considered the CEQ regulation at issue to be "substantive" in nature, and therefore could not bind the agency. NEPA contains no express or implicit requirement for the analysis of a worst case scenario. As evidenced by CEQ's amendment of the regulations to more closely track NRC's analysis, NRC's view of NEPA's requirement was likely well-founded and not necessarily at odds with CEQ's ultimately policy views.

b. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427 (2011)

Once again, this case involved CEQ's regulation regarding "Incomplete or unavailable information." This action involved the application to renew operator licenses for Diablo Canyon Nuclear Power Plant Units 1 and 2. The Intervenors, San Luis Obispo Mothers for Peace, argued that CEQ's regulation at 40 C.F.R. § 1502.22 required that a probabilistic analysis of the risks posed by the a fault known as the "Shoreline Fault" was essential to the NRC's environmental analysis and must be included unless the cost would be exorbitant. Section 1502.22 pertains to inclusion in an EIS of incomplete or unavailable information relevant to "reasonably foreseeable significant adverse impacts." The NRC's Atomic Safety and Licensing Board admitted the contention, but the Commission struck the Board's reference to the CEQ regulation. The Commission stated that it may "look to CEQ regulations for guidance, including section

1502.22." However, the Commission reiterated that its "longstanding policy is that the NRC, as an independent regulatory agency, is not bound by those portions of CEQ's NEPA regulations that, like section 1502.22, have a substantive impact on the way in which the Commission performs its regulatory functions." CLI-11-11 at 23 (internal citations omitted).

c. *Brodsky vs. NRC*, 704 F.3d 113 (2nd Cir. 2013)

This lawsuit involved a NEPA challenge to NRC's action, but in a primarily "procedural" context. The plaintiff, Brodsky, challenged NRC's approval of fire-protection exemptions at the Indian Point Energy Center and argued that the NRC should have held a hearing prior to granting the exemptions. The NRC had issued an environmental assessment (EA) finding that Entergy's requested exemption would not significantly impact the environment and swiftly granted the exemption. Revision to Existing Exemptions, 72 Fed. Reg. 56,798 (Oct. 4, 2007). Although the Court of Appeals for the Second Circuit upheld the validity of the exemption, it found that NRC had not provided for any public input during its environmental review and had offered any explanation for why public participation was not required prior to the issuance of its EA.

The court devoted much of its analysis discussing the CEQ's requirements for public participation during the implementing of NEPA. The court noted that CEQ's regulations identify public scrutiny as an "essential" part of the NEPA process in 40 C.F.R. § 1500.1(b). Also, the court noted that CEQ requires agencies to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "solicit appropriate information from the public." 40 C.F.R. § 1506.6(a), (d). Such involvement can include public hearings "whenever appropriate," a determination informed by whether there is "[s]ubstantial environmental controversy concerning the proposed action or substantial interest in holding the hearing." 40 C.F.R. § 1506.6(c). Ultimately, the *Brodsky* court never reached the question of whether CEQ regulations apply to NRC, but found that it could not uphold NRC's action without an explanation of what public participation procedures NRC followed during its NEPA analysis.

VII. The Federal Energy Regulatory Commission

While NRC has attempted to distinguish itself from CEQ in terms of substantive NEPA requirements, the Federal Energy Regulatory Commission (FERC) has arguably taken a more aggressive approach. FERC is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas

terminals and interstate natural gas pipelines as well as licensing hydropower projects. FERC's structure, with five commissioners at the helm of the agency, is very similar to NRC.

Similar to NRC, FERC's NEPA regulations are clear that CEQ regulations are not binding on the Commission. However, FERC noted that it agrees with the policies reflected in CEQ's regulations. Accordingly, FERC structured its NEPA regulations "as closely as practicable to the essential procedures reflected in the CEQ regulations, while ensuring that its regulations are consistent with its independent regulatory duties." 44 Fed.Reg. 50,052 (1979).

a. *Monongahela Power Co. vs. FERC*, 39 FERC 61,350 (1987)

Historically, FERC's policies have been hostile to the concept of environmental review. This hostility was expressed by FERC's Commissioners in *Monongahela Power Co. vs. FERC.* In *Monongahela*, the Allegheny Power System (APS) filed with the Commission, pursuant to section 205 of the Federal Power Act, three interrelated agreements for the sale by several utilities of up to 450 megawatts of firm energy and related capacity through APS. Several groups intervened in the proceeding, including the Natural Resources Defense Council (NRDC). In its petition, NRDC asserted that FERC was required to prepare an environmental impact statement (EIS) because the acceptance for filing and approval of the rates constituted major federal actions that significantly affect the quality of the human environment, for which an EIS is mandated by section 102(2)(c) of NEPA. One of NRDC's primary environmental concerns was that the proposed sale would involve the increased use of existing generating plants that are not currently operating at full capacity. In addition, the plants involved in the sale were grandfathered from certain provisions of the Clean Air Act (42 U.S.C. § 7411) and were not required to meet the current source performance standards for coal-fired generating plants.

FERC concluded that the preparation of an Environmental Impact Statement was not required in *Monongahela* because the acceptance of rates is not an "action" affecting the environment within the meaning Section 102(c) of NEPA and 40 C.F.R. Part 1500. FERC noted that "major federal actions" are defined in 40 C.F.R. § 1508.18 as actions with environmental "effects" that are actually or "potentially subject to federal control or responsibility." Accordingly, FERC proposed a rule in 1987 that would establish as categorical exclusions from NEPA electric rate filings submitted by public utilities and the establishment of just and reasonable rates pursuant to sections 205 and 206 of the Federal Power Act. FERC maintained the position that Congress had not granted the Commission authority to reject rate filings on

environmental grounds. FERC further opined that the provisions of NEPA were not intended to affect the specific statutory obligations of any Federal agency. In other words, in terms of NEPA and the environment, FERC takes power plants as it finds them.

b. Order 888

Subsequent to *Monongahela*, FERC reiterated its position on environmental reviews when it issued Order 888. This action consisted of a final rule requiring public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. FERC initially concluded that no EA or EIS was necessary because the regulation fell within the categorical exclusion for electric rate filings. However, FERC eventually acquiesced to the requests of several commenters, including the U.S. Environmental Protection Agency (EPA), and prepared an EIS. The commenters were concerned that promoting competition among generators could lead to an increase in harmful emissions, especially nitrogen oxides. Although FERC concluded that the order would only affect air quality slightly (if at all) and that the environmental impacts are as likely to be beneficial as negative, FERC resisted on alternative grounds calls for it to adopt mitigation measures. Primarily, it asserted that it lacked the legal authority to adopt mitigation measures. FERC characterized itself as "in essence and by law" an "economic regulator." 61 Fed. Reg. 21,672.

The Administrator of the EPA referred FERC's environmental analysis to CEQ, pursuant to section 309 of the Clean Air Act, 42 U.S.C. § 7609, and 40 C.F.R. Part 1504. Although EPA did not necessarily oppose FERC's underlying action or environmental analysis, EPA was concerned with potential longer term effects of Order 888 and held the position that the nitrogen oxide emissions associated with the rule should be addressed as part of a comprehensive emissions control program developed by EPA and the States under mechanisms available under the Clean Air Act. In essence, EPA was encouraging FERC to incorporate mitigation strategies in its EIS.

FERC disagreed with both the substantive and institutional reasons with EPA's referral to CEQ. In its Order responding to the referral, FERC declined to take part in the process and voiced its disapproval of EPA's interference. FERC stated that it was "inappropriate for EPA to refer this agency's action based upon narrow analytic differences in the absence of strong and

well- tested evidence of environmental harm." FERC noted its greater concern with "the difficulties associated with the referral of an action of an independent regulatory agency." FERC stated that although the regulations of the CEQ are "useful as a mechanism for resolving disputes in the executive branch," they "raise significant questions" with respect to their application to actions of independent regulatory agencies. FERC concluded that it must make its decisions with respect to Order 888 solely based on the record in the proceeding and without the interference from CEQ and the executive branch. FERC noted that, despite its opposition to EPA's referral, it would appropriately engage in consultations and exchanges of information in order to facilitate resolution of disputes with other agencies.

VIII. Conclusion

In light of the foregoing, CEQ's role with respect to independent agencies appears to be limited. However, this is not necessarily the case. In *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), the Supreme Court stated that CEQ's interpretation of NEPA is entitled to "substantial deference" in light of its important role in implementing the statute. The *Andrus* Court resolved a split among the circuit courts over the interpretive authority of CEQ (*i.e.*, whether its interpretations were "merely advisory" or entitled to "great weight"). While *Andrus* may have settled this issue, it did entitle CEQ to the complete deference provided by *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984) because NEPA is administered by all federal agencies (not exclusively CEQ). In other words, CEQ's interpretation of NEPA would not necessarily control where a different agency proffered a different alternative (as in *Limerick Ecology Action*).

While both NRC and FERC have been careful to preserve their respective status as an "independent" regulatory agency, each agency has largely adopted CEQ's guidelines and policies in their own NEPA regulations. Therefore, the only likely tension remaining between these independent agencies and CEQ requirements would involve "substantive" NEPA requirements that interfere with the agency's statutory obligations. The examples discussed above with respect to *Limerick Ecology Action* and Order 888 have been rare. Both NRC and FERC have demonstrated their willingness to work with CEQ as they implement NEPA, which highlights CEQ's position as a valuable resource with special expertise regarding environmental analysis and government decision-making. Based on the lack of major disagreements between independent agencies and CEQ and the alignment of NEPA regulations with CEQ's guidelines,

the future will likely produce further harmony for environmental reviews within the executive branch.

References

Anderson, F.R. (1975). NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act. Baltimore, Maryland: The Johns Jopkins University Press.

Bateman, C., & Tripp, J. (2014) Toward Greener FERC Regulation of the Power Industry. *Harvard Environmental Law Review*, 292-322.

Datla, K., & Revesz, R. L. (2013). Deconstructing Independent Agencies (And Executive Agencies). *Cornell Law Review*, 770-785.

Mandelker, D. R. (2012). *NEPA Law and Litigation* (Second Edition). St. Paul, Minnesota: Thomson Reuters/West.

Pinney, J. (2003). The Federal Energy Regulatory Commission and Environmental Justice: Do the National Environmental Policy Act and the Clean Air Act Offer a Better Way? *Boston College Environmental Affairs Law Review*, 390-397.

Repka, D. A., & Sutton, K. M. (2005). The Revival of Nuclear Power Plant Licensing, *Natural Resources & Environment* (Winter Edition), 43.

Whitney, S. C. (1991). The Role of the President's Council on Environmental Quality. *Environmental Law and Litigation*, 88.