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Marin Audubon Should Not Upend the NEPA Process

D.C. Circuit majority opinion that CEQ regulations constitute ultra vires action should be considered dicta if the decision is allowed to stand.

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On November 12, 2024, the D.C. Circuit, in a split 2-1 decision in *Marin Audubon Society v. Federal Aviation Administration* stated that the Council on Environmental Quality (CEQ) lacked the authority to issue rules, dating back to 1978, implementing the National Environmental Policy Act (NEPA).[1] Tracing the history of the CEQ regulations to their origins, the court described the sole bases as a Nixon 1970 executive order authorizing the agency to issue guidelines and a Carter 1977 executive order empowering CEQ to issue regulations.[2] But executive orders, the court concluded, cannot be the genesis of an agency's authority to promulgate rules; only Congressional statutes may do so.

The court's discussion of remedy did not need to rely on CEQ's authority to promulgate rules. Rather, the court addressed a separate arbitrary-and-capricious claim to the adequacy of the agencies' NEPA analysis. This arguably renders the court's analysis of CEQ rulemaking authority dicta rather than a holding and, as explained below, the decision should not be read more broadly. Reasonable solutions exist for federal agencies' and the regulated community's ongoing compliance with NEPA.

Background

The National Parks Air Tour Management Act of 2000 requires the Federal Aviation Administration and National Park Service (NPS) to collaboratively develop plans regulating tourist flights over national parks throughout the United States.[3] The environmental group petitioners attacked a joint plan addressing four national parks in California's San Francisco Bay Area, arguing that the Agencies failed to adequately consider the environmental consequences of the plan.[4]

NEPA requires that an agency prepare a detailed statement assessing the environmental impacts of, and alternatives to, all “major federal actions significantly affecting the quality of the human environment.”[5] The CEQ—created under NEPA—is assigned responsibility to coordinate federal environmental programs among the executive branch.[6] Executive orders granted CEQ's authority to issue guidelines and promulgate regulations to avoid discrepancies between and set requirements for the various agencies, which were required to develop environmental regulations under NEPA.[7]

Although, similar to other agencies, NPS has adopted its own NEPA regulations, the majority opinion focuses on CEQ's NEPA regulations.

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CEQ's rules define environmental assessments (EAs), which are streamlined environmental analyses.[8] An EA determines whether the action will have no significant environmental impact or if the action will require a more thorough analysis by way of an environmental impact statement (EIS).[9] CEQ's regulations also direct federal agencies to define categorical exclusions (CEs) for particular sets of actions, which allow an agency to bypass the need to prepare an EA or EIS.[10] Although the majority opinion does not make mention of it, Congress recently expressly recognized the authority of agencies to adopt and define CEs, demonstrating such agency authority independent of the CEQ regulation.[11] Moreover, Congress defined in NEPA how and when an EA and EIS should be prepared.

The Agencies here finalized the tour flights plan based on reliance on a CE, rather than on issuance of an EA, concluding that the new plan would reduce the current aerial tourism's environmental impact over the four parks through a series of mitigation measures.[12] Importantly, the Agencies treated interim operating authority as the status quo and, with thousands of air tours conducted pursuant to that interim operating authority serving as the baseline for comparison, concluded the Plan had “no or minimal” environmental impacts. In determining that no EA or EIS was required, the Agencies relied on an NPS CE applicable to “[c]hanges or amendments to an approved action when such changes would cause no or only minimal environmental impacts.”[13]

Narrow Holding

The court held that reliance on the interim operating authority without prior NEPA analysis was arbitrary and capricious requiring vacatur and remand.[14] Because of this holding, the Court declined to consider several other of the Petitioners' arguments. The court did not vacate the CEQ regulations as *ultra vires,* nor was that a necessary analysis to the court's actual holding. Indeed, the issue of the validity of the CEQ regulations had not been briefed or raised by the parties, as the dissent noted.

Discussion of CEQ Authority and Regulations

The court also addressed whether CEQ lacked the authority to issue binding rules implementing NEPA and, therefore, declined to address the merits of the parties' arguments about whether the agencies complied with CEQ's regulations.[15] Defining this as a separation-of-powers issue between the legislative and executive branches, the court identified no valid authority allowing CEQ to implement such rules.[16] Rather, the court declared that CEQ had only the authority to act in an advisory capacity akin to the Council of Economic Advisors.[17] Tracing CEQ's history to its origins, the court found that a Nixon-era executive order created CEQ's power to issue guidelines.[18] A Carter-era executive order then required CEQ to promulgate the framework of CEQ's contemporary rules.[19] But executive orders, the court concluded, cannot be the genesis of an agency's authority to promulgate rules, only Congress may confer such power by statute.[20]

In arriving at this conclusion, the majority addressed several

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counterarguments, some of which appear in the dissent. First, it noted the import of the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which eliminated judicial deference to agencies' interpretations of its own statutes.[21] Second, it concluded that the Supreme Court has never affirmatively concluded that CEQ had valid authority to promulgate NEPA-implementing rules.[22] Third, it concluded that the president had no inherent constitutional, Article-II-Take-Care-Clause authority to validly grant CEQ such authority through executive fiat.[23] The dissent joined in the holding rejecting the Agencies' use of the existing level of flights under interim operating authority as the baseline for measuring the environmental effects of their Air Travel Management Plan but dissented from Part II of the opinion considering whether CEQ has the authority to issue binding NEPA regulations. The dissent observed that it was not necessary to decide the CEQ regulations' validity as the parties never presented CEQ's authority as an issue, which is generally a precondition for courts to address an issue.[24] Furthermore, the dissent noted that the D.C. Circuit had consistently refrained from unnecessarily deciding this issue.[25]

The court concluded that the remedy of vacating the approved plan was compulsory because "remand without vacatur" is allowed "only if an agency's error is curable. . . . [Here], the Agencies' actions were *ultra vires* when they determined that their Plan would have no environmental impact as compared with the existing tour flights permitted on an interim basis. The Agencies will now need to take a completely different tack to complete their NEPA review."[26] The "completely different tack" can be read as referring to the agency's fundamental baseline error necessitating the remand given the majority's remedy decision focused on that baseline error. The court did not vacate CEQ's rules, nor did the court give any weight to the fact that the Agencies relied on a CE found in NPS's NEPA rules, not the CEQ regulations, in deciding not to prepare an EA or EIS.[27]

Prior Case Law and Treatment of CEQ Regulations

The rejection of the legality of the CEQ regulations, first issued 46 years ago, by the D.C. Circuit in *Marin Audubon Society* represents a seismic departure from prior NEPA jurisprudence. Following President Carter's 1977 Executive Order requiring CEQ to adopt regulations on preparation of environmental impact statements, courts treated CEQ's NEPA regulations with considerable deference.[28] In *Andrus v. Sierra Club*, the United States Supreme Court stated that "CEQ's interpretation of NEPA is entitled to substantial deference."[29] Thereafter, the Supreme Court reiterated this sentiment in *Roberston v. Methow Valley Citizens Council*.[30] In *Robertson*, the Court considered whether an amended CEQ regulation was binding despite the fact its preceding iteration was more demanding.[31] On review, the Court recognized the deference set forth in *Andrus* and further concluded "substantial deference [to be] appropriate if there appears to have been good reason for the change."[32]

Following these decisions, CEQ regulations became regarded as "the bible for the federal establishment and for the reviewing courts."[33] Lower courts, have continually found CEQ regulations to be controlling.[34] The D.C. Circuit previously stated that "[n]ot only are the CEQ regulations binding on

those federal agencies which they affect, but they are also entitled to substantial deference by the courts,"[35] though this deferential approach has been undermined by the Supreme Court's decision in *Loper Bright*.[36] Similar statements have been made in other jurisdictions.[37]

Initial Takeaways & Potential Implications

Marin Audubon Society pertained to an environmental group's relatively narrow NEPA compliance challenge, which may limit application of the court's discussion. Still, the ruling does raise questions regarding the validity of CEQ regulations that have guided NEPA compliance, in one form or another, since 1978.[38] Below we identify some initial takeaways and implications.

The *Marin Audubon Society* majority indicated that the CEQ regulations are *ultra vires* because they purport to be binding, but CEQ itself should only act in an advisory capacity.[39] As such, this and other courts may allow federal agencies to rely on the CEQ regulations as guidance only, while looking solely to the statute and their own regulations promulgated through notice-and-comment rulemaking procedures as binding. Broadly construing the decision to provide that any reliance by an agency on CEQ regulations renders the agency's decision *ultra vires* because the CEQ regulations themselves "are *ultra vires"* is questionable and unnecessary and could lead to disastrous chaos for our country's permitting and construction of critical infrastructure, energy, transmission, and mineral development critical to national security.[40]

It is not clear whether the court would have allowed the Agencies to rely on their own CEs without citing the CEQ regulations or whether the majority believes that any reliance on CEs constitutes an *ultra vires* act because the majority appeared to consider an agency's CEs to be based solely on authority found in the CEQ regulations. In that regard, it is troubling that the court ignored the fact that Congress referenced CEs in the 2023 NEPA amendments, allowing agencies and the regulated community to rely on them.[41] Thus, Congress not only acquiesced to the use of CEs not found in the original NEPA statute but expanded their use, providing authority for CEs independent of the CEQ regulations at issue in the case.

What's Next?

First, the reasoning of *Marin Audubon Society* could influence the relief sought and outcome of other pending NEPA cases, including the pending challenge to the CEQ Phase 2 rules in *Iowa v. CEQ*[42] and the *Seven County Infrastructure Coalition v. Eagle County* case pending before the Supreme Court with oral argument scheduled on December 10, 2024, in which an amicus briefed the *ultra vires* issue even though the parties did not.[43]

Second, Congress could amend NEPA, as it did last year, to expressly grant CEQ rulemaking power or confirm that agencies' NEPA regulations are valid and effective without CEQ regulations. While it is difficult to envision either the Republican-controlled Congress or the new administration—which has promised to focus on deregulation—

empowering an environmental agency, clarification could be sought to avoid unnecessary litigation.

Third, we will closely monitor how future litigants and courts apply *Marin Audubon Society*. It could have a short life if the mandate is stayed or subject to rehearing *en banc* or if the validity of the CEQ regulations is addressed by the Supreme Court in *Seven County Infrastructure Coalition*. If the decision stands, other circuits could narrowly construe the decision or limit its applicability to the D.C. Circuit. If project opponents attempt to parlay the decision to challenge agency reliance on CEQ regulations in other cases, as explained above, the best reading of *Marin Audubon Society* is to narrowly construe the discussion of the validity of CEQ regulations as dicta.

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[1] Marin Audubon Soc'y v. Fed. Aviation Admin., No. 23-1067 (D.C. Cir. Nov. 12, 2024); 2024 WL 4745044 (D.C. Cir. Nov. 12, 2024); 2024 U.S. App. LEXIS 28621 (D.C. Cir. Nov. 12, 2024).

[2] Marin Audubon Soc'y, slip op. at 11–12.

[3] *Id*. at 2.

[4] *Id*. at 3.

[5] *Id*. at 4.

[6] *Id*. at 4–5.

[7] *Id*. at 11.

[8] *Id*. at 4–5.

[9] *Id*. at 5.

[10] *Id*. at 5.

[11] *See* Fiscal Responsibility Act of 2023, Pub. L. 91–190, title I, §§ 106, 109, as added Pub. L. 118–5, div. C, title III, § 321(b), June 3, 2023, 137 Stat. 43; NEPA §§ 106, 109, 42 U.S.C. § 4336 (procedure for determining level of review); *id.* § 109, 42 U.S.C. § 4336c (expanded use of categorical exclusions).

[12] *Id*. at 8.

[13] *Id*. at 7, 14.

[14] *Id.* at 25.

[15] *Id*. at 8.

[16] *Id*. at 9.

[17] *Id*. at 16, n. 4.

[18] *Id* at 11.

[19] *Id*. at 12.

[20] *Id*. at 9.

[21] *Id*. at 17.

[22] *Id*. at 11.

[23] *Id*. at 18.

[24] Dissent at 1–3.

[25] Dissent at 3–4.

[26] Marin Audubon Soc'y, slip op. at 27–28.

[27] *Id*. at 7, 14. The NPS categorical exclusion relied upon by the Agencies in this case can be found at DOI Manual, Part 516, Chapter 12, § 12.5.A(1), available *here*.

[28] Daniel R. Mandelker, et al., NEPA Law and Litigation § 2:11 (2d ed. 2024).

[29] Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

[30] Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

[31] *Id.* at 355.

[32] *Id.* at 355–56.

[33] James E. Colburn, *Administering the National Environmental Policy Act*, 45 Envtl. L. Rep. News & Analysis 10287, 10316 (2015) (citing Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1518 (2012)).

[34] Mandelker, *supra* note 28, § 2.11.

[35] Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1302 (D.C. Cir. 1984).

[36] Marin Audubon Soc'y, slip op. at 17 (citing Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)).

[37] *See* Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1041 (2nd Cir. 1983); Sierra Club v. Sigler, 695 F.2d 957, 972 (5th Cir. 1983); Nat'l Indian Youth Council v. Watt, 664 F.2d 220, 225 (10th Cir. 1981).

[38] *See* 43 Fed. Reg. 55978 (Nov. 29, 1978).

[39] *Id.* at 10 ("Over many years, our court has expressed serious concerns about whether CEQ's regulations had any "binding effect" because it is "far from clear" that CEQ had any "regulatory authority under [NEPA]."); *id.* at 11 (comparing the original CEQ "guidelines" and early court statements that CEQ's role is "advisory" with CEQ's "quite different view" because it "considered its guidelines to be mandatory…").

[40] Marin Audubon Soc'y, slip op. at 11–12.

[41] *See supra* note 11.

[42] On May 21, 2024, the attorneys general in 20 states filed a lawsuit in the U.S. District Court for the District of North Dakota challenging the CEQ Phase 2 rules. In that case, plaintiffs made similar *ultra vires* claims. *See* Complaint, *Iowa v. CEQ,* No. 1:24-cv-89-CRH (filed May 21, 2024) available *here*.

[43] *See* Brief of Law Professors as Amici Curiae in Support of Petitioners in *Seven County Infrastructure Coal. v. Eagle County*, No. 23-975 (Petition for Cert. filed Mar. 4, 2024) available *here*.
