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DC Circuit Sua Sponte Holds that CEQ Cannot Impose Binding NEPA Regulations

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On November 12, 2024, the U.S. Court of Appeals for the D.C. Circuit ruled that the White House Council on Environmental Quality (CEQ)—the entity under the Executive Office of the President that has long overseen National Environmental Policy Act (NEPA) policy and implementation—has no statutory authority to promulgate binding regulations. *Marin Audubon Soc'y v. Fed. Aviation Admin.*, No. 23-1067 (D.C. Cir. Nov. 12, 2024). The case originated with a challenge to two federal agencies' plan to regulate tour flights over four national parks near San Francisco, California. The Plaintiffs claimed that the agencies erroneously relied on a NEPA categorical exclusion in lieu of preparing an environmental assessment or environmental impact statement. Both sides relied on CEQ's NEPA regulations to support their positions. The Court agreed with the Plaintiffs that the agencies' NEPA review was inadequate.

The Court did not stop there, however. Although neither party argued the issue and CEQ was not a party to the litigation, the Court explained that the case provided a long overdue opportunity to consider whether CEQ is authorized in the first instance to issue binding regulations "which purport to govern how all federal agencies must comply with [NEPA]." The Court found "compelling reasons for [it] to determine the validity of CEQ regulations once and for all."

The Court concluded that Congress did not grant CEQ such rulemaking authority. The Court traced CEQ's issuance of regulations to Executive Orders, noting that such orders do not confer power on agencies to promulgate rules and regulations. It concluded that "NEPA provide[s] no support for CEQ's authority to issue binding regulations," and that "[n]o statute confers rulemaking authority on CEQ." Ultimately, CEQ's regulations presented fundamental concerns regarding the separation of powers. A partially dissenting opinion mainly questioned the need for the Court to reach the issue in the given case, rather than defending CEQ's authority.

The full import of this ruling remains to be seen. It is unclear what further appellate steps may occur

in the *Marin* case. Moreover, the Court's ordered remedy vacated and remanded the challenged plan but did not expressly vacate any CEQ regulations. The Court briefly considered whether it would have reached the same conclusion had it analyzed an individual agency's adoption of CEQ's regulations in that agency's own regulations implementing NEPA; but these were not the facts before the Court. The extent to which project proponents, agencies, and courts may rely on CEQ's interpretations of NEPA if not codified in regulations is also uncertain. Finally, the impending change of Presidential administrations and possible NEPA and permitting reform in a new Congress, will likely affect these questions. For now, project proponents must continue to comply with the NEPA statute and watch this space.

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