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DC Circuit Questions Validity of Longstanding Council for Environmental Quality Regulations Implementing NEPA

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In a departure from past jurisprudence, a recent DC Circuit decision questioned whether the White House Council on Environmental Quality (CEQ) had the legal authority to issue key regulations under the National Environmental Policy Act (NEPA). The decision, which evaluated federal planning related to tourist flights over national parks, interpreted CEQ's NEPA regulations, which prescribe how federal agencies must comply with NEPA and have set the standards for federal agencies' consideration of the environmental impacts of major federal actions for decades. The decision could impact how many agencies conduct and interpret environmental assessments in areas including biotechnology and agriculture.

The case, *Marin Audubon Society v. FAA*, Case No. 23-1067, reviewed a Federal Aviation Administration (FAA) and National Park Service (collectively, the Agencies) Air Tour Management Plan governing tourist flights over four national parks near San Francisco, California. Marin Audubon Society's suit challenged the Agencies' determination that the Agencies were not required under NEPA to prepare an environmental analysis because the plan would cause minimal additional or no environmental impact and would, in fact, cause less harm than the status quo.

"Deregulation," of course, has been a hot topic for some time. We have previously written on the potential impacts of the US Supreme Court's decisions in both *Loper Bright v. Raimondo* (see here) and *Corner Post v. Board of Governors of the Federal Reserve System* (see here).

The panel's decision in this case opens the door to new litigation, including a facial challenge that seeks vacatur of CEQ's NEPA regulations in their entirety. The ruling will also likely factor into NEPA-

related reforms pursued by the incoming Administration, including reforms to individual federal agencies' NEPA-implementing regulations that have historically been based on CEQ's directives.

Background on NEPA and CEQ

NEPA is a procedural environmental statute that requires federal agencies to evaluate the potential environmental impacts of major decisions before acting and also provides the public with information about the environmental impacts of potential agency actions. CEQ, an agency within the Executive Office of the President, was created in 1969 to advise the president and develop policies on environmental issues, including ensuring that agencies comply with NEPA by conducting sufficiently rigorous environmental reviews. Pursuant to an executive order issued by President Jimmy Carter, in 1978 CEQ promulgated NEPA-implementing regulations that set forth "uniform standards applicable throughout the Federal government" for how federal agencies consider the environmental impacts of their actions (43 Fed. Reg. 55,978-79 (Nov. 29, 1978)). These regulations describe the "detailed statement" NEPA requires for proposed agency actions "significantly affecting the quality of the human environment" and criteria for agencies to consider in making that determination. Many federal agencies have promulgated their own NEPA-implementing regulations based on CEQ's guidance.

In the intervening decades, parties have litigated both NEPA and federal agencies' NEPA-implementing regulations as applied to certain agency actions. The Supreme Court is slated to hear argument on one such case from the DC Circuit on December 10, in which the Court will decide whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the agency's specific action. *See Seven County Infrastructure Coalition v. Eagle County, Colorado*, No. 23-975.

The DC Circuit's Decision

The DC Circuit panel concluded that the Agencies' NEPA analysis was flawed because their use of existing air tours as the baseline for assessing the plan's environmental assessment was erroneous, given that the environmental impacts under existing air tour conditions had never previously been assessed. Critically, notwithstanding that no party raised a facial challenge to CEQ's regulations, a majority of the panel decided on their own to address the validity of CEQ's NEPA regulations themselves and held that the regulations were *ultra vires.*

Specifically, the panel concluded that the court has "the independent power to identify and apply the proper construction of governing law," and that there were "good reasons" for the court to "determine the validity of the CEQ regulations once and for all." *Marin Audubon Society v. FAA*, No. 23-1067, — F.4th —, 2024 WL 4745044, at *4 (DC Cir. 2024).

The panel concluded that CEQ lacks the requisite authority to issue binding NEPA regulations because neither NEPA itself nor any other federal statute expressly confers CEQ with rulemaking authority. The panel further held that the US Constitution does not permit a president to grant a federal agency authority to pass binding regulations because that delegation violates separation of powers principles.

Chief Judge Sri Srinivasan partially dissented from the majority opinion on the facial review of CEQ's regulations. Chief Judge Srinivasan noted that the court should not have opined on the CEQ's authority to issue binding regulations because it violates the "principle of party presentation," in which appellate courts consider only the issues presented by the parties arguing before them. Courts in the DC Circuit have repeatedly declined to decide CEQ's authority to issue NEPA regulations on

these grounds.

While the DC Circuit's ruling did not expressly vacate CEQ's regulations, it is likely to influence ongoing legal challenges. For example, the Biden Administration's recent amendments to CEQ's NEPA regulations are currently the subject of litigation brought by several states seeking to vacate the final rule. After the *Marin Audubon Society* decision, the plaintiff states filed a notice of supplemental authority with the court in their case, acknowledging that the plaintiff states "did not make an argument regarding CEQ's general rulemaking authority in their summary judgment briefing," but suggesting that "the Court may find the DC Circuit's recent holding to be relevant to this case challenging CEQ's final rule." *See State of Iowa, et al. v. Council on Environmental Quality, et al.*, Case No. 1:24-cv-00089, ECF No. 114 (D.N.D. Nov. 13, 2024).

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