



Obscure Flight Plan Case May Bring Down CEQ NEPA Rules

by Christopher Danley and Jeffrey Wood

Since the adoption of the first National Environmental Policy Act (“NEPA”) regulations over four decades ago, few have questioned whether the Council on Environmental Quality (“CEQ”)—an office within the White House itself—has legal authority to adopt regulations binding on federal agency implementation of NEPA. During this time, CEQ has assumed primacy for issuing NEPA regulations. A split three-judge panel of the U.S. Court of Appeals for the D.C. Circuit recently declared that CEQ lacked authority to promulgate NEPA regulations in the first place. *See Marin Audubon Society v. Federal Aviation Administration, et al.*, No. 23-1067 (D.C. Cir. Nov. 12, 2024). Neither side in the case presented this issue in the appeal, and now, both have sought a rehearing of this decision.

While surprising, the outcome in *Marin Audubon Society* can be traced back to the summer of 2021, when Judge Randolph of the D.C. Circuit authored a concurring opinion in *Food & Water Watch v. U.S. Dep’t of Agriculture* in which he identified prior instances where courts have questioned whether CEQ has the authority to issue regulations governing NEPA compliance. While that particular case was dismissed on standing grounds, Judge Randolph spotlighted this fundamental issue “lurking in the appeal.” He expressly noted that “[n]o statute grants CEQ the authority to issue binding regulations.” 1 F.4th 1112, 1119 (D.C. Cir. 2021). While the opportunity to address this issue was lacking in *Food & Water*, it was present in *Marin Audubon Society*.

The D.C. Circuit Unanimously Ruled on the Limited NEPA Issue Briefed by the Parties

In *Marin Audubon Society*, the petitioners challenged an environmental analysis under NEPA by the Federal Aviation Administration (“FAA”) relating to tourist flights over national parks in the San Francisco Bay area. The National Parks Air Tour Management Act of 2000 required the FAA and National Park Service to coordinate on Air Tour Management Plans over national parks. These flight plans were required to comply with NEPA, including the preparation of detailed environmental impact statements (“EIS”). Understanding that the development of such plans would take time, the Act allowed existing tour operators to apply for “interim operating authority” with the FAA so that they could continue to conduct flights.

The final plan for the Bay Area Parks authorized the status quo on the number of air tours with certain measures to mitigate any impact. In considering the environmental impacts of the action, the agencies used existing air tours that were occurring under interim operating authority to set the environmental baseline to assess any environmental impact. Based on CEQ’s NEPA regulations, the agencies did not prepare an environmental assessment (“EA”) or an EIS because they concluded that the final plan would cause no or only minimal environmental impacts when

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compared with the existing air tours that were operating. The Marin Audubon Society challenged FAA's action, contending that the FAA used the wrong "environmental baseline" and that they should have prepared at least an EA, if not an EIS.

In seeking resolution, the parties made their arguments based on various interpretations of the existing CEQ regulations. Specifically, the petitioners alleged that the agencies used an incorrect baseline from which to conclude that no EA or EIS was necessary for the possible impact of the proposed tourist flights. While rejecting broader arguments, the D.C. Circuit agreed with the Audubon Society's "environmental baseline" argument and held that it was arbitrary and capricious for the agencies to rely upon the existing level of tourist flights under the interim operating authority as the baseline for assessing the environmental impacts under NEPA for the proposed flights under the new plan. But it was a bigger point in the decision that garnered all the attention: the panel expressly found that the underlying CEQ regulations, upon which both sides were relying to support their arguments, were beyond CEQ's authority to adopt in the first place.

The "Lurking" Problem with CEQ's NEPA Regulations Surfaces

What was a "lurking" issue in 2021 has now taken center stage. In *Marin Audubon Society*, the panel lowered the hammer three sentences into the substantive opinion: "The CEQ regulations . . . are *ultra vires*." The opinion came in four parts, with Part II centering on whether CEQ has legal authority to adopt binding regulations. Part II, which is the focus of this article, was authored by Judge Randolph with Judge Henderson joining. Judge Srinivasan dissented from Part II.

Notably, neither side advanced an argument that led to this outcome. Rather, the arguments on both sides stayed within the boundaries of CEQ's NEPA regulations. Given the lack of party presentation, the panel equated CEQ's actions as a power grab on the Legislative Branch triggering a separation of powers conflict, which required the Judicial Branch to independently step in to put the other two Branches in their proper place.

The panel found that no statute conferred rulemaking authority on CEQ, much less authority for CEQ to issue rules binding other agencies. Instead, CEQ's alleged rulemaking authority was derived from an Executive Order issued by President Carter and "the President's Constitutional and statutory authority." Executive Order 11991 was intended to authorize CEQ to issue regulations, as opposed to guidelines, on how federal agencies should implement NEPA. Until then, CEQ's role was advisory only. In 1978, CEQ produced uniform NEPA standards that purported to be binding on all federal agencies, but the panel could find no statutory authority for CEQ to issue regulations at all. *Cf.* 42 U.S.C. § 4344 (identifying CEQ's "duty and function" as including, among other things, developing and recommending "national policies" for environmental quality). The panel opined that the Constitution, specifically Article II's "Take Care Clause" (*i.e.*, the President shall "take care" to ensure that all laws are "faithfully executed"), did not vest the Executive Branch with the power to authorize federal agencies in the absence of legislation.

Several factors had caused confusion over the years on whether CEQ's role was advisory or regulatory. First, CEQ "guidance" has been published in the Code of Federal Regulations. However, the panel found that such publication was unable to confer authority where none existed. Second, the Supreme Court, in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004), had commented generally on CEQ's ability to issue NEPA regulations, stating that the CEQ was "established by NEPA with authority to issue regulations interpreting it." The panel viewed this statement in *Public Citizen* to be a "stray remark" without "any accompanying legal analysis".

In most cases, like in *Marin Audubon Society*, no party has an incentive to take down the entire CEQ NEPA regulatory scheme, so the issue of CEQ's authority to adopt regulations is rarely raised.

Similarly, appellants will be better positioned to seek a change based on the existing framework as opposed to creating potential chaos by bringing down an entire regulatory scheme. Indeed, the appellant here did carry its argument that the federal agency’s NEPA analysis was defective. Even more fundamentally, the dissent here questioned whether appellants would be able to challenge the relevant CEQ regulation since it “operates directly on the Agencies, not on a regulated party[.]” Rather than remaining a frustrated bystander, the panel took the opportunity provided by *Marin Audubon Society* to rule on the issue of CEQ’s authority.

Even though the panel declared that CEQ did not have the authority to issue binding NEPA regulations, those regulations were not vacated. Procedurally, the panel vacated only the FAA order while inviting the parties to seek a stay of the vacatur order. Additionally, the parties have already sought rehearing, which further delays the issuance of the court’s mandate in this case. Thus, at the moment, the panel’s decision in *Marin Audubon Society* lacks the force of law itself.

In dissent, Judge Srinivasan emphasized that no party to this case had challenged CEQ’s authority and that the D.C. Circuit had refrained from taking similar opportunities in the past to make such a decision without party presentation on an important issue. Of course, the party-presentation principle assumes that opposing sides of the issue will be presented to a court for resolution. The panel, in casting the issue as a separation of powers conflict, seemed to have anticipated that both sides here would be reluctant to question the question of CEQ’s authority.

Widespread Panic Ensues

On November 27, the petitioners filed a petition for a rehearing by the panel and/or a rehearing en banc on the ruling that CEQ lacks the authority to issue NEPA regulations and signaled that they plan to move for a stay of the court’s mandate. The petitioners believe that CEQ *does* have legal authority here. In their argument, they followed the roadmap set forth by the dissent that the party-presentation principle is necessary to resolve such an important issue. This rehearing request also surveyed the potential damage that could be done to NEPA if CEQ regulations are not there to “make the statute workable.”

On December 5, the Department of Justice (“DOJ”) also moved for rehearing en banc, advocating that the full court should summarily excise Part II of the panel’s ruling because the issue decided in Part II—*i.e.*, CEQ’s authority to adopt binding regulations—was not presented to the panel for determination. More fundamentally, DOJ argued that all three branches view CEQ’s authority as legitimate. The congressional intent of NEPA was to cast CEQ in the central role of ensuring that the statutory scheme was implemented consistently throughout the federal government. According to DOJ’s brief, the President then directed CEQ to promulgate regulations to that effect. Further, Congress has incorporated CEQ regulations into NEPA amendments and other subsequent legislation. As for precedent, DOJ noted several Supreme Court cases overlooked by the panel that viewed CEQ’s regulatory actions approvingly.

What’s Next, Especially After January 20?

Rest assured, the panel’s ruling in *Marin Audubon Society* on November 12 will not be the last word on CEQ’s authority. Both sides have requested a rehearing, and the Supreme Court may have interest in addressing this fundamental question. The panel had to know the firestorm that would ensue, even without the accompanying procedural circumstances. Nonetheless, the panel was able to transform the issue into one that can no longer be ignored, which may have been the main goal all along. Notably, even before the ruling in *Marin Audubon Society*, this issue made its way into Supreme Court briefs recently filed in *Seven County Infrastructure Coalition, et al. v. Eagle County*, a major NEPA case currently pending in the U.S. Supreme Court. *See* Law Professors

Amici Curiae, Seven County Infrastructure Coalition, et al. v. Eagle County, et al., dated September 5, 2024 (“CEQ has no rulemaking authority under NEPA, therefore its Regulations . . . cannot be judicially enforceable.”). However, while the parties referenced CEQ’s role within the NEPA framework several times at the Supreme Court oral argument on December 10, 2024, none of the Justices engaged on that issue.

Two remaining questions looming over the proceedings are, first, how the incoming Trump Administration will address this issue, and second, whether Congress will step in. Both the previous Trump and Biden Administrations have promulgated CEQ regulations that they considered binding, although the Trump Administration viewed CEQ’s NEPA regulations as a “ceiling” that agencies could not exceed as compared to the Biden Administration that treated CEQ’s regulations as a “floor” on which other agencies could stack additional NEPA regulations that went beyond CEQ’s procedures. Whether the next Administration will decide to embrace Judge Randolph’s perspective remains to be seen. Against a backdrop where NEPA reviews are viewed as being entangled in a web of endless red tape, the incoming Trump Administration may welcome the opportunity to start over from scratch, or it may look to Congress to help restore a clear, consistent, predictable process for completing environmental reviews for major federal actions.