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Legal Sidebar

Marin Audubon Society v. Federal Aviation Administration: D.C. Circuit Challenges CEQ's Authority to Issue NEPA Regulations

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The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) recently made headlines when it declared that the Council on Environmental Quality (CEQ) lacked authority to issue judicially enforceable regulations under the National Environmental Policy Act (NEPA). For more than 40 years, CEQ has issued regulations to implement NEPA, a law requiring federal agencies to integrate environmental considerations into planning and decisionmaking. The original incarnation of CEQ, created by President Nixon via executive order, predates NEPA. When Congress enacted NEPA, it permanently established CEQ as an agency in the Executive Office of the President. In 1978, CEQ issued its first set of regulations setting forth how agencies were to implement NEPA. As NEPA has evolved, CEQ regulations have helped standardize the process by which agencies conduct environmental reviews. The D.C. Circuit, however, stated that NEPA did not give CEQ authority to issue regulations governing NEPA's implementation that were binding on federal agencies, the courts, and private litigants and that CEQ could not rely on an executive order as the sole source of its rulemaking authority.

The D.C. Circuit's opinion was unusual in certain respects. On its face, the case before the court, *Marin Audubon Society v. Federal Aviation Administration*, did not directly allege violations of CEQ regulations, nor did it challenge their validity. Rather, the petitioners claimed that the Federal Aviation Administration (FAA) and National Park Service (NPS) violated the National Parks Air Tour Management Act of 2000 (Air Tour Act) by approving air tour plans for national parks without adequate environmental review. Specifically, the petitioners claimed that the FAA and NPS illegally finalized a plan for tours over national parks around San Francisco without documenting environmental impacts.

All three judges on the D.C. Circuit panel agreed that the agencies acted arbitrarily in approving the challenged plan, known as the Bay Area Parks Plan, without further environmental review. Additionally, two judges declared CEQ's NEPA regulations to be *ultra vires*, although no party challenged those regulations. Ultimately, the court vacated the plan and undercut CEQ's authority without expressly vacating CEQ's regulations. The petitioners and the federal government have sought rehearing, with the government asserting that *Marin Audubon* "undermin[es] Congress's express goal for a unified environmental review process," while petitioners assert that invalidating CEQ's regulations "kicks the

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foundation out from under a statute that agencies across the federal government implement on a daily basis." Given the at least 100,000 agency actions subject to NEPA each year, whether agencies must follow CEQ's standardized process to implement the statute may be of interest to Congress.

The Bay Area Parks Plan and NEPA Review

Two statutes—the Air Tour Act and NEPA—underpin the FAA and NPS's approval of the Bay Area Parks Plan. The Air Tour Act governs how commercial tours operate in the airspace over national parks. It generally requires the FAA and NPS to approve air tour operating plans before the FAA may issue permits to commercial tour operators. In 2012, Congress amended the Air Tour Act to authorize interim air tour operations as such plans were being developed. The FAA interpreted these interim operations as nondiscretionary actions not subject to NEPA's environmental review requirements. At the time the FAA and NPS finalized the Bay Area Parks Plan in January 2023, interim operations had been in place for roughly a decade. Unlike interim operations, air tour management plans are subject to NEPA.

The Air Tour Act requires the FAA and NPS to sign the environmental decision document required by Section 102 of NEPA. Section 102 requires an agency to prepare a detailed statement that analyzes environmental effects and design alternatives for any major federal action significantly affecting the quality of the human environment. This exercise is known as environmental review, a process that the President, agencies, courts, and Congress have refined over decades. This process, much of which Congress codified through 2023 NEPA amendments, requires an agency to prepare an environmental impact statement (EIS) when the environmental effects of a federal action could be significant. An agency may alternatively prepare an environmental assessment (EA) if the effects are insignificant or unknown and the action is ineligible for a *categorical exclusion*. Categorical exclusions are available for categories of actions a federal agency has determined normally do not significantly affect the quality of the human environment.

CEQ's early interpretation of NEPA in the 1970s created a uniform federal process for NEPA compliance. Some agencies maintain separate NEPA regulations supplementing CEQ's framework, while others rely on CEQ's regulations. Congress has also enacted various laws referencing CEQ's regulations (such as creating agency-specific categorical exclusions or determining project eligibility), and it has incorporated some of CEQ's framework into law (such as providing for the designation of a "lead agency," allowing one agency to rely on another's environmental review, and codifying use of an EA or EIS to document NEPA compliance).

For the vast majority of agency actions subject to NEPA, agencies have never prepared EISs or EAs due to widespread use of categorical exclusions. While the Air Tour Act does not mention categorical exclusions—and neither did NEPA before the 2023 amendments—NPS, the FAA, and CEQ each allow for categorical exclusions. For any particular proposed action covered under NEPA, if the agency determines that a categorical exclusion applies and is not subject to any exception based on extraordinary circumstances, it does not prepare an EA or EIS. Agencies maintain lists of available categorical exclusions and in some cases may adopt another agency's exclusion. For example, NPS maintains a categorical exclusion for changes or amendments to an "approved action" that would cause no or minimal environmental impacts. The FAA used this exclusion in reviewing the Bay Area Parks Plan.

At one point, the FAA had planned to complete an EA for the Bay Area Parks Plan. By 2020, the FAA had terminated that process and issued a new notice of intent to finalize plans for 23 parks, including three of the Bay Area Parks. Although no plan had ever been approved, the agency had been allowing tours to operate on an interim basis since 2012. The FAA and NPS did not conduct any environmental analysis of interim operating authorities, nor did they prepare an EA or EIS for the Bay Area Parks Plan. Instead, the agencies limited their environmental review to the application of a categorical exclusion maintained by NPS based on their analysis that the operations authorized in the plan would cause minimal or even

beneficial impacts as compared to the interim operations. The FAA then issued a record of decision allowing the agencies to finalize the Bay Area Parks Plan without preparing an EA or EIS.

The D.C. Circuit's Decision

Marin Audubon Society and others challenged the approval of the Bay Area Parks Plan under Section (b)(5) of the Air Tour Act and the statute granting federal circuit courts jurisdiction to review FAA orders, including a record of decision. The three-judge panel in *Marin Audubon* unanimously disapproved of the FAA's environmental review of the Bay Area Parks Plan. The full panel sided with the petitioners, who argued that the agencies relied on an improper baseline against which to assess environmental effects. The D.C. Circuit found that the agencies acted arbitrarily and capriciously by "enshrin[ing] the status quo" and ignoring existing tour impacts, acting "at odds" with their duties under the Air Tour Act and NEPA.

In addition, Senior Judge Randolph and Judge Henderson determined that CEQ lacked the authority to issue binding regulations implementing NEPA. According to this majority, the Supreme Court's previous deference to CEQ's NEPA instructions "did not result from an examination of CEQ's authority to issue judicially enforceable regulations." CEQ's original NEPA guidance, issued in 1971 and 1973, did not purport to bind other agencies. That guidance, Justice Douglas wrote in an oft-cited Supreme Court chambers opinion, was entitled to "great weight" given that CEQ was "ultimately responsible for the administration of the NEPA and most familiar with its requirements for" EISs. A number of circuit courts stated that the original CEQ guidance was "advisory" and that CEQ lacked "authority to prescribe regulations governing compliance with NEPA" but stated nonetheless that those guidelines "carr[ied] significant weight." Still, some of these same courts cited CEQ guidelines at least in part to uphold or invalidate agencies' NEPA analyses, while others declined to find a NEPA violation solely on the basis of an agency failing to consider the non-binding guidelines.

In 1977, President Carter issued an executive order invoking constitutional and statutory authorities to direct CEQ to issue regulations implementing NEPA's procedural provisions. In an effort to standardize NEPA implementation, the order instructed federal agencies to comply with CEQ's regulations. CEQ issued regulations in 1978 and has regularly updated them, including as recently as 2024. The Supreme Court has repeatedly invoked and applied CEQ's regulations and affirmed that CEQ's interpretation of NEPA is entitled to "substantial deference." Each circuit—including, previously, the D.C. Circuit—has followed suit.

The majority in *Marin Audubon* disagreed. It declared that by requiring other agencies to follow CEQ's NEPA regulations, the 1977 executive order illegally usurped Congress's lawmaking authority. CEQ could not exercise "quasi-legislative authority" by issuing regulations binding on agencies, courts, and private litigants without statutory authorization, the court reasoned. Finding no statute granting CEQ such powers, the court determined that the President exceeded his authority by requiring CEQ to issue regulations that other agencies were required to follow. "[A]n executive order is not law within the meaning of the Constitution," the court stated, and "the Constitution does not permit the President to seize for himself the law-making power of Congress by issuing an order that, like a statute, authorizes a government official to promulgate rules and regulations." (Alterations omitted.)

Numerous legal principles and lines of judicial precedent inform the relationship between executive orders and an agency's regulatory authority. Executive orders commonly structure the internal affairs and procedures of the executive branch or require agencies to issue interpretive guidance. As the D.C. Circuit has acknowledged, executive orders serving as internal management tools are often unenforceable by private parties (though private parties may still challenge agency actions or regulations implementing those executive orders based on underlying statutory requirements). Executive orders can, however, have "the force and effect of laws"—that is, they can be binding and enforceable—when, among other circumstances, they are issued pursuant to appropriate congressional delegations of authority. Executive

orders sometimes direct agencies to engage in rulemaking. Long-standing Supreme Court precedent holds that when the President orders an agency to issue binding regulations—commonly referred to as "legislative" regulations—the ultimate question for a reviewing court is whether Congress granted the agency such authority.

The Supreme Court has not developed a clear framework by which to determine whether statutory authorization exists for an agency to issue legislative regulations. The Court has found that an agency may promulgate legislative rules when Congress gives it "broad power to enforce all provisions of the statute." Under current precedent, statutory language providing that an agency may "prescribe such rules and regulations as may be necessary … to carry out the provisions of the Act," or similar, effectuates such a delegation.

Whether express statutory authorizing language is necessary is not clear. In the 2000 decision *United States v. Mead*, the Supreme Court held that courts may infer that Congress intended an agency to have legislative rulemaking authority from statutory context. *Mead*'s precedential strength is uncertain. *Mead* is, or was, part of the framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Under *Chevron*, courts were to at times defer to agencies' reasonable interpretations of ambiguous statutes. *Mead* established that *Chevron* deference applied only when an agency exercised its authority to issue rules with the force of law. The Court overturned *Chevron* in *Loper Bright Enterprises v. Raimondo*. Additionally, in recent years the Supreme Court has disfavored implied grants of authority to administrative agencies, particularly where agencies claim power over matters of "vast economic and political significance." In *Loper Bright*, the Court recognized that Congress at times delegates interpretative authority to agencies. All of the examples cited by the Court involved express delegations. The Court has not stated whether implicit grants to agencies to engage in rulemaking with force of law survive these developments.

For its part, the *Marin Audubon* court examined the statutes cited in the 1977 executive order and determined that none on their face granted CEQ authority to issue legislative regulations. The court in particular examined the portion of the statute that outlined CEQ's duties and functions and did not find that it expressly authorized CEQ to issue binding regulations. Instead, the court explained, Congress intended CEQ to be an "advisory agency," not a "regulatory agency." The D.C. Circuit dismissed the precedent accepting the CEQ regulations as binding, referring to earlier Supreme Court pronouncements as "*Chevron*-like" and unsustainable in light of *Loper Bright*. It did not analyze whether any statute implicitly granted CEQ the authority to issue legislative rules, and no party briefed that question.

Judge Srinivasan dissented from the majority's ruling on CEQ's authority. Emphasizing that the majority's opinion on that matter was unnecessary to the disposition of the case, Judge Srinivasan argued that reaching that issue contravened the principle of party presentation, which provides that courts should serve as arbiters of questions presented and argued by parties before them. Judge Srinivasan pointed to repeated statements from the D.C. Circuit declining to interrogate CEQ's authority when litigants accepted CEQ's regulations as binding.

The federal government has petitioned the D.C. Circuit for rehearing *en banc*. In its petition, the government argued that the court disregarded Congress's statutory mandate that all agencies follow NEPA and the "central role" NEPA designates for CEQ in standardizing NEPA implementation. The 1977 executive order appropriately implemented NEPA, the government contended, by ensuring that all agencies conduct environmental reviews as directed by the agency with the primary responsibility to "guide" federal NEPA policy. The government disputed the panel's rejection of Supreme Court and circuit court precedent that appears to accept CEQ's regulatory authority. Congress has "ratified" this understanding of CEQ's authority by adopting various NEPA regulations into law and referencing them in other statutes, the government concluded. Marin Audubon Society also petitioned for a rehearing, arguing that the panel went too far in deciding issues that no party raised and that the decision would cause "severe doctrinal and practical disruption" to the environmental review process.

Implications of the Remedy Ordered

Ultimately, the D.C. Circuit vacated the FAA's decision to finalize the Bay Area Parks Plan and remanded the matter to the agency for further consideration. The court did not vacate the CEQ regulations themselves. For now, the D.C. Circuit's decision leaves open the question of what role CEQ should play in NEPA implementation. The court did not rule on the President's authority to direct CEQ to issue interpretive rules (or CEQ's authority to issue such rules under its own power), and such guidance may still play a role in standardizing NEPA implementation across the government. Relatedly, the CEQ regulations may still be entitled to the substantial deference courts consistently extended to CEQ's initial non-binding NEPA guidelines. As such, CEQ regulations could continue to play a role in litigation over whether an agency has implemented NEPA in an arbitrary and capricious manner.

The D.C. Circuit's opinion has received attention in other venues. A week after *Marin Audubon* was decided, a North Dakota federal court asked for supplemental briefings in a case considering a challenge by 22 states to certain 2024 CEQ regulations.

Considerations for Congress

Should the panel decision in *Marin Audubon* opinion stand, courts may revisit whether and how CEQ's interpretation of NEPA affects their review of agency compliance with the statute. To some extent, however, events may have overtaken the question of whether CEQ's regulations are binding: Congress amended NEPA three months after the FAA issued the record of decision at issue in *Marin Audubon*. In the 2023 amendments, Congress codified much of CEQ's long-standing NEPA implementation framework into statute for the first time. Following *Marin Audubon*, courts may be asked to resolve to what extent agencies can continue to rely on any portion of CEQ's implementation framework not expressly authorized by Congress. There is also a question as to the extent to which agencies could incorporate CEQ's regulations in their own NEPA procedures or whether agencies have the authority to issue NEPA regulations in the first place.

NEPA has always required agencies to work with CEQ to give environmental matters "appropriate consideration in decisionmaking," and agencies' regulations and policies must be consistent with NEPA "to the fullest extent possible." As noted above, CEQ's NEPA procedures have helped standardize NEPA implementation across the government. If CEQ's regulations are allowed to stand as interpretive rules, or if CEQ issues new guidance, the regulations or any new guidance may continue to play that role. On the other hand, in the absence of judicially enforceable standards, agencies may take divergent approaches to questions left unsettled by NEPA's statutory language. If Congress is concerned about inconsistencies in agency implementation of NEPA, it could expressly authorize CEQ or other agencies to issue regulations implementing NEPA, or it could otherwise standardize NEPA procedures through legislation.

Categorical exclusions such as the one referenced in *Marin Audubon* provide one example where CEQ and agency regulations may mandate a nuanced analysis: Although Congress has adopted several dozen laws authorizing specific categorical exclusions for certain agencies, most categorical exclusions originate from agencies pursuant to CEQ's framework. In 2023, Congress amended NEPA to codify CEQ's instruction allowing agencies to adopt other agencies' categorical exclusions, but it did not expressly authorize agencies to create new categorical exclusions. Courts may be asked to address whether agencies may create categorical exclusions beyond those that are expressly statutorily authorized and, if so, what process may be used.

Decisions such as *Loper Bright* and *Marin Audubon* highlight the importance of clarity in statutory delegations of rulemaking authority to agencies. *Loper Bright* held that courts are the final authority on statutory meaning. Nevertheless, the Supreme Court also recognized that, at times, the best interpretation of a statute is that Congress has delegated to an agency discretion to interpret its terms. When reviewing

an agency's interpretation of a statute, *Loper Bright* thus focuses a court's inquiry in part on the scope of the agency's power as directed by statute. Clarity regarding that scope may therefore be particularly important for legislative drafting in years to come—particularly if, as in *Marin Audubon*, courts do not consider implied delegations of authority. *Marin Audubon* also underscores that, in the absence of a clear statutory mandate, agency rules may face increasing scrutiny if issued in reliance on only executive orders.

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