The D.C. Circuit Undermines CEQ's Regulatory Authority Under NEPA

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On Nov. 12, 2024, the U.S. Court of Appeals for the D.C. Circuit raised and answered the question of whether the White House Council on Environmental Quality (CEQ) has the authority to issue regulations that bind other agencies under the National Environmental Policy Act (NEPA). In doing so, the court rejected longstanding precedent and principles to resolve a question of law that neither party had briefed and was not necessary to resolve the case. The decision thus adds to a growing trend of courts taking steps to narrow administrative agencies' authority and undermine reliance on longstanding regulatory approaches that have been consistently upheld by the courts until now.

In this case, *Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*, plaintiffs challenged two federal agencies' environmental analysis of an air tour management plan over four national parks. The plaintiffs argued that the agencies improperly relied on current operations as the baseline for that analysis, and thus improperly found they did not need to prepare a more complex environmental assessment (EA) or impact statement (EIS). All three judges on the D.C. Circuit panel agreed, holding that the agencies' determination was arbitrary and capricious under NEPA and the National Parks Air Tour Management Act (NPATMA).[1] Though the court's holding narrowly applies to the agencies' plan, and neither party questioned the validity of CEQ's NEPA regulations in their briefs or at oral argument, Judge Randolph, joined by Judge Henderson, also found that CEQ lacks the authority to issue binding NEPA regulations. For close to fifty years, the executive branch and private parties have operated on the understanding that CEQ's regulations implementing NEPA bind other federal agencies, and Congress and the courts have repeatedly affirmed this framework. The *Marin Audubon* decision threatens to disrupt this understanding.

Judges Randolph and Henderson also advanced a restrictive reading of the Administrative Procedure Act (APA), finding that the APA *requires* courts to strike down (*i.e.*, vacate) actions found to be arbitrary and capricious regardless of the practical outcome. In doing so, the court rejected longstanding D.C. Circuit precedent that allows courts to weigh the pros and cons of vacating an unlawful action, and to keep the action in place while the agency resolves the identified issues if doing so would benefit the parties or the environment. Based on this reasoning, the court struck down the air tour management plan — a remedy neither party requested — leaving both parties worse off and resulting in weaker environmental protections for the covered national parks.

The *Marin Audubon* panel majority's decision is already having an impact. On Nov. 19, a district court judge in North Dakota reviewing a challenge to CEQ's Phase II NEPA regulations ordered a supplemental briefing on the question of CEQ's regulatory authority.

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[1] *See* No. 23-01067 (D.C. Cir. Nov. 12, 2024).

Litigants have also raised questions of CEQ's authority in pending cases. The plaintiffs in *Marin Audubon* have asked the court to rehear the case.

Below we summarize the *Marin Audubon* decision, provide background on agency implementation of NEPA and courts' remand authorities, and discuss the case's legal significance and emerging and potential consequences.

Summary of the *Marin Audubon* Decision

In *Marin Audubon Society v. Federal Aviation Administration et al.*, plaintiffs challenged the Federal Aviation Administration (FAA) and the National Park Service's (NPS) environmental analysis of tourism flights over four national parks in California.[2] The agency defendants determined that a proposed tourism flight plan authorizing 2,548 overflights per year would reduce the environmental impact on the covered parks. That conclusion, however, was based on comparing the effects of the proposed tourism flight plan to the same number of flights already conducted under the agencies' interim operating authority. Because the proposed plan included environmental mitigation measures, the agencies found that the proposed flight plan would have "no or only minimal [adverse] environmental impacts" as compared to the status quo.[3]

Relying on this determination, the agencies then invoked a categorical exclusion (CE) established in NPS's NEPA Handbook that exempts the agency from preparing a more complex environmental assessment (EA) or environmental impact statement (EIS) when the proposed action "would cause no or only minimal environmental impacts."[4] Marin Audubon, Public Employees for Environmental Responsibility, and others alleged that the agencies did not adequately consider the plan's environmental impact as required by NPATMA and NEPA, and thus unlawfully invoked the CE.

The three-judge D.C. Circuit panel unanimously held that the agencies arbitrarily treated interim operating authority as the baseline for purposes of assessing environmental effects as required under NEPA and NPATMA. Both statutes, the court determined, are clear that interim operating authority is not meant to serve as a baseline for environmental review.

Judge A. Raymond Randolph, joined by Judge Karen LeCraft Henderson, also addressed a legal question that the parties did not raise, brief, or argue: whether CEQ has authority to issue rules that bind other federal agencies under NEPA. Judge Srinivasan dissented from this section of the opinion.[5] The majority's decision to address CEQ's regulatory authority is troubling for two reasons. First, in reaching the question, the court violated the fundamental principle of party presentation: courts should only decide the issues raised and briefed by

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[2] *See* No. 23-01067, slip op. at 22 (D.C. Cir. Nov. 12, 2024).
[3] *Id*. at 14. *See also id.* at 3 (explaining that the objective of any tourism flight plan is "to mitigate or prevent the significant adverse impacts").
[4] Slip op. at 15.
[5] *See* No. 23-01067, slip op. at 1 (D.C. Cir. Nov. 12, 2024) (Srinivasan, C.J., dissenting in part).

the parties.[6] They should not, per the Supreme Court, "sally forth each day looking for wrongs to right."[7] Second, in deciding that CEQ lacked express or implied authority to issue rules implementing NEPA, Judges Randolph and Henderson overlooked decades of executive branch practice, congressional endorsement, and court decisions treating CEQ regulations as binding.

Despite the majority's broad discussion of CEQ's authority, the *Marin Audubon* opinion should be confined to its holding — that the agencies' flight plan violated NEPA and NPATMA. The plaintiffs have requested a rehearing to "provide [the court] with an opportunity to receive a directed briefing and hear argument before endorsing a decision with such far-reaching consequences."[8] As we discuss below, the panel's unanimous holding vacating the agencies' air tourism plan does not rely on Judge Randolph and Judge Henderson's discussion of CEQ's regulatory authority. Therefore, the panel or an *en banc* (i.e., all nine judges) court could review and affirm the original holding without casting doubt on the validity of CEQ's regulations implementing NEPA.

Background: How Agencies Implement NEPA

Enacted in 1969, NEPA requires federal agencies to prepare a statement assessing the environmental impacts of, and alternatives to, all "major federal actions significantly affecting the quality of the human environment."[9] In passing NEPA, Congress declared a "national environmental policy" to "achieve a balance" between human activity and environmental priorities for "present and future generations."[10] NEPA's environmental review requirements are therefore designed to ensure "that environmental concerns be integrated into the very process of agency decision-making."[11]

Congress authorized federal agencies to adopt their own regulations implementing NEPA.[12] Congress also created CEQ under the Executive Office of the President to assess and facilitate the integration of environmental considerations across the federal government.[13] While NEPA does not expressly delegate regulatory authority to CEQ, a series of executive orders, court opinions, and Congressional actions spanning 50 years have consistently affirmed and clarified CEQ's responsibility to coordinate federal agencies in their

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[6] *See* U.S. v. Sineneng-Smith, 590 U.S. 371, 376 (2020) ("as a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief") (citations omitted).
[7] *Id.* (internal citations omitted)
[8] Pet. for Panel Reh'g or Reh'g *En Banc,* 3 No. 23-1067 (D.C. Cir. Nov. 25, 2024).
[9] 42 U.S.C. § 4332(C).
[10] 42 U.S.C. § 4331.
[11] Andrus v. Sierra Club, 442 U.S. 437 (1979).
[12] *See* Slip op. at 11 (citing 42 U.S.C. § 4332(2)(B)).
[13] 42 U.S.C. § 4344.

implementation of NEPA procedures, including through the issuance of binding regulations.[14]

CEQ first issued regulations implementing NEPA in 1978.[15] Those regulations were largely undisturbed until CEQ's first substantial revision in 2020, with subsequent revisions finalized in 2022 and 2024.[16] Congress amended NEPA in 2023 and did not disturb CEQ's longstanding regulatory authority. In fact, Congress endorsed the existing NEPA regulatory scheme when it, among other provisions, codified provisions included in CEQ's 2020 rules allowing an agency to adopt another agency's CEs — categories of actions that an agency determines do not have a significant effect on the human environment, and therefore do not require a more complex EA or EIS.[17] CEQ's 2024 rules implement changes made in the 2023 amendments, including clarifying what steps agencies must take to adopt another agency's CE to cover a proposed action. CEQ's 2024 rules also facilitate interagency action required under the 2023 amendment, including the adoption of joint CEs and clarifying the designation and role of lead and cooperating agencies.[18]

The Supreme Court has historically given CEQ's NEPA regulations considerable deference.[19] The D.C. Circuit has likewise stated that CEQ is "the body established by NEPA to implement that statute,"[20] and consistently deferred to and applied CEQ's regulations under NEPA, recognizing CEQ is the "officer or agency charged with [NEPA's] administration."[21]

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[14] *See* Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 7, 1970) (authorizing CEQ to establish guidelines for federal agencies); Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977) (empowering CEQ to issue standard regulations for all federal agencies, after consultation with agencies and public hearing, to guide their implementation of NEPA procedures); Executive Order 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017) (directing CEQ to review its NEPA regulations to simplify and accelerate the NEPA process); Executive Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (rescinding Executive Order 13,807 and directing CEQ to review its rules for consistency with new policy).

[15] National Environmental Policy Act, 43 Fed. Reg. 55,990 (Nov. 29, 1978) (codified at 40 C.F.R. pts. 1500–08).

[16] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,204 (July 16, 2020) (codified at 40 C.F.R. 1503); National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (codified at 40 CF.R. pts. 1502, 1507, 1508); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024) (codified at 40 C.F.R. pts. 1500–08).

[17] *See* Slip op. at 4 (Srinivasan, C.J., dissenting in part).

[18] *See* Hannah Perls, *Key Changes in CEQ's Phase 2 Regulations Implementing NEPA*, HARV. ENV'T & ENERGY L. PROGRAM (Aug. 8, 2024), https://eelp.law.harvard.edu/nepa-phase2-final/.

[19] *See, e.g.*, U.S. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 757 (2004); Andrus v. Sierra Club, 442 U.S. 347, 347–48 (1979) (explaining that CEQ's interpretation of NEPA "is entitled to substantial deference"); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 372 (1989) (providing that the Army Corps of Engineers' reading of NEPA "is supported by . . . CEQ's regulations, which we have held are entitled to substantial deference [and] impose a duty on all federal agencies").

[20] Sierra Club v. Andrus, 581 F.2d 895 (D.C. Cir. 1978).

[21] *See, e.g.*, *id.* at 901 n.18; Sierra Club v. Morton, 514 F.2d 856, 870–71 (D.C. Cir. 1978), *rev'd on other grounds*, 724 U.S. 390 (1976) (explaining that CEQ is "the body established by NEPA to review agency compliance with [sections] of the Act" and deferring to its interpretation).

The Court's Discussion of CEQ's Authority Under NEPA

All three judges on the D.C. Circuit panel agreed with the petitioners and unanimously held that "it was arbitrary and capricious for the Agencies to treat interim operating authority as

the status quo for their NEPA analysis … [and] that outcome stands at odds with the Agencies' duties under the [NPATMA] and NEPA." This holding did not include consideration of CEQ's rules or regulatory authority under NEPA.

Judge Randolph, joined by Judge Henderson, also considered whether CEQ lacked the authority to issue rules binding other federal agencies under NEPA. Judge Randolph framed his inquiry as raising a "separation of powers" issue, finding that Congress failed to grant CEQ implicit or explicit authority to issue NEPA regulations that other federal agencies are obligated to follow.[22] The majority dismissed precedent from the D.C. Circuit and Supreme Court deferring to agency implementation of CEQ's regulations, instead finding that those cases did not bind the court because they did not include "accompanying legal analysis" evaluating CEQ's regulatory authority.[23] The court was similarly unpersuaded by recent congressional action implicitly endorsing the existing regulatory scheme.[24]

The Administrative Procedure Act and Courts' Remand Authority

When a court finds that an agency action was deficient, Section 706(2) of the APA states that the reviewing court "shall . . . set aside" that action.[25] In practice, federal courts will often, but not always, vacate the action and send it back to the agency (i.e., remand) to address the issue.[26] Courts, however, may decide to leave the action in place after balancing the legal deficiencies of that action — the nature of the error — against the hardship that vacating the action may cause to the parties and the public at large — the consequences of remand.[27] This is known as the *Allied-Signal* test.[28] In the environmental context in particular, the D.C. Circuit has ruled that the court's equitable powers authorize remand without vacatur where the action's defects are curable, and where vacatur would defeat the "enhanced protection of the environmental values at stake."[29] The authority to

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[22] *Id.*
[23] Slip op. at 17 ("we are not bound by every stray remark on an issue the parties neither raised nor discussed in any meaningful way") (citations omitted).
[24] Slip op. at 15 (citations omitted).
[25] 5 U.S.C. § 706(2).
[26] Bhd. Of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin., 972 F.3d 83, 117 (D.C. Cir. 2020).
[27] Slip op. at 5 (Srinivasan, C.J., dissenting in part) (explaining the *Allied-Signal* test). *See also* Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993); Nat. Res. Def. Council v. EPA, 808 F.3d 556, 584 (2d Cir. 2015); Black Warrior Riverkeeper v. U.S. Army Corps of Engr's, 781 F.3d 1271, 1289-90 (11th Cir. 2015).
[28] Slip op. at 5 (Srinivasan, C.J., dissenting in part) (explaining the *Allied-Signal* test). *See also* Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993).
[29] Slip op. at 5 (Srinivasan, C.J., dissenting in part) (citing *Ctr. For Biological Diversity v. EPA*, 861 F.3d 174, 188-89 (D.C. Cir. 2017); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008)).

remand without vacatur is not without controversy,[30] however, and Judge Randolph has been a longstanding critic of this remedy.[31]

The Court Reads the APA to Always Require Vacatur of Flawed Agency Action

In *Marin Audubon*, Judge Randolph, joined by Judge Henderson, read Section 706(2) of the APA to *require* that courts vacate deficient agency action, regardless of the impact on the parties.[32] The majority concluded that the court was compelled to vacate the agencies' air tour management plan because "remand without vacatur" is allowed "only if an agency's error is curable."[33] The majority reasoned that because the "[FAA's and NPS's] actions were *ultra vires* [exceeded the agencies' authority] when they determined that their Plan would have no environmental impact as compared with the existing tour flights permitted on an interim basis . . . [t]he agencies will need to 'take a completely different tack' to complete their NEPA review."[34] While the majority's "completely different tack" language is vague, this statement does not rely on the court's discussion of CEQ's authority, nor does it suggest the court intended to vacate CEQ's regulations implementing NEPA.

In response, Judge Srinavasan wrote in dissent that vacatur "would leave petitioners worse off than the status quo" and "would be unjust because it would only increase air tours' environmental effects on the [parks]."[35] Noting that neither party sought vacatur, Judge Srinavasan instead urged the court to "exercise its equitable discretion by leaving the Plan in place while the Agencies conduct more NEPA analysis."[36] He further noted that "[w]hen confronted with similar circumstances, [the D.C. Circuit] has repeatedly remanded to an agency without vacating a flawed but environmentally protective agency action."[37]

Consequences of the *Marin Audubon* Decision

The court's consideration of CEQ's authority under NEPA raises several concerns. As discussed by Chief Judge Srinivasan in his partial dissent, taking up the issue of CEQ's regulatory authority when no party raised, briefed, or argued the issue violates the fundamental principle of party presentation. The D.C. Circuit has "specifically and steadfastly adhered to the party presentation principle in declining to address [this] exact issue … Time and time again, we have refrained from questioning the CEQ's authority to

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[30] *See, e.g.*, Samuel L. Bray, *The Truth of The Truth of Erasure*, YALE. J. REG. (Nov. 7, 2024) (listing legal academics who have weighed in on the specific question of whether the APA authorizes remand without vacatur).
[31] *See, e.g.*, Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 70 F.4th 582, 602 n.4 (D.C. Cir. 2023) (citing *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (Randolph, J., concurring) ("In cases governed by the Administrative Procedure Act, I have long believed that the law requires us to vacate the unlawful agency rule.")).
[32] Slip. op. at 27 (citations omitted).
[33] *Id.*
[34] Slip op. at 27–28.
[35] Slip op. at 5 (Srinivasan, C.J., dissenting in part).
[36] *Id.* (citations omitted).
[37] *Id*.

adopt binding NEPA regulations because the parties did not raise the challenge."[38] Furthermore, as noted in the dissent, it was not necessary for the court to decide the validity of CEQ's regulations to reach its holding striking down the agencies' air tourism flight plan. Judge Randolph's insistence on raising and addressing CEQ's regulatory authority under NEPA aggrandizes the judiciary at the expense of the parties before the court and the balance of power struck by Congress, the president, and regulated entities.

The court's characterization of its remedial authority under Section 706(2) of the APA also raises legal concerns. Foreclosing remand without vacatur creates new uncertainty about when to apply the *Allied-Signal* test. The decision also creates more uncertainty for regulated parties as they navigate a shifting judicial framework that had previously considered effects on the parties before setting rules aside.

In addition to the legal issues raised by the *Marin Audubon* decision, there are important practical consequences. CEQ's NEPA regulations, which remain in effect, provide a uniform framework for environmental reviews across federal agencies, enhancing the predictability and efficiency of the NEPA process. For example, CEQ's regulations provide timelines for the designation of lead agencies, the application of CEs, community engagement, and environmental review, among other considerations. While other federal agencies issue their own NEPA rules, the ability to rely on CEQ's regulations ensures project proponents do not have to grapple with divergent, or even conflicting, agency permitting procedures, requirements, and timelines. Additionally, CEQ rules enable agencies to comply with NEPA as amended, which requires agencies to establish streamlined procedures for the adoption of joint CEs or "borrowing" a CE from another agency.[39]

What's Next?

While the *Marin Audubon* holding is limited to striking down the FAA's and NPS's environmental review of the challenged air tourism plan, the rest of the court's opinion raises questions regarding the validity of CEQ's NEPA regulations and courts' remand authority. Judge Randolph's reasoning may influence the issues that petitioners in other pending NEPA cases raise, including the pending challenge to CEQ's Phase II rules, in which Judge Daniel M. Traynor has requested supplemental briefing on the issue of CEQ rulemaking authority in light of the *Marin Audubon* decision.[40] Judge Traynor's request is notable because, like in *Marin Audubon*, the issue of CEQ's authority to issue binding regulations was not presented or briefed by any party to the case, and the *Marin Audubon* decision is not binding on another circuit. The question of CEQ's regulatory authority was also raised by amici in *Seven County Infrastructure Coalition v. Eagle County*, currently before the Supreme Court, though it was not raised by the parties. Additionally, private parties are already requesting that judges consider the *Marin Audubon* decision in cases

[38] Slip op. at 2 (Srinivasan, C.J., dissenting in part).
[39] *See* 40 C.F.R. § 1506.3.
[40] *See* State of Iowa v. CEQ, No. 1:24-cv-89-CRH (D.N.D.).

where the court previously rejected a project for failure to comply with CEQ's NEPA regulations.[41]

Parties in the *Marin Audubon* case have petitioned for rehearing. If the court grants the petition, the *Marin Audubon* opinion will be vacated, and the case will be reheard by the same three-judge panel or by the full court. If the rehearing petition is denied, parties could seek a writ of certiorari from the Supreme Court within 90 days. If the mandate is stayed or subject to rehearing, the consequences of *Marin Audubon* may be limited.

EELP will continue to monitor this and other cases affecting agency implementation of NEPA on our Regulatory Tracker page.

[41] *See, e.g.*, Petitioners' Reply Brief at 25, Appalachian Voices et al. v. Fed. Energy Regulatory Comm'n, 2024 WL 4799807, Nos. 24-1150, 24-1094 (D.C. Cir. Nov. 14, 2024); Letter, City of Port Isabel v. Fed. Energy Regulatory Comm'n, Nos. 23-1174, 23-1221 (D.C. Cir. Nov. 13, 2024) (submitting *Marin Audubon* as supplemental authority and contending that "[i]n light of *Marin Audubon*, the Court should . . . reinstitute FERC's authorization of the Rio Grande project" because the "minor purported errors in FERC's environmental justice analysis . . . being enforced by the panel derives from executive orders and CEQ's regulations only—both sources which lack statutory grounding and, under *Marin Audubon*, do not provide a basis to reject a project authorization"); Letter, Healthy Gulf v. Fed. Energy Regulatory Comm'n, No. 23-1226 (D.C. Cir. Nov. 14, 2024).