A split panel of the U.S. Court of Appeals for the D.C. Circuit landed an unexpected blow on the White House Council on Environmental Quality (CEQ) on November 12, ruling that CEQ lacked authority to promulgate its umbrella regulations interpreting the National Environmental Policy Act (NEPA).

Marin Audubon Society v. Federal Aviation Administration, No. 23-1067 (D.C. Cir. Nov. 12, 2024). The ruling adds to a busy year for the often-litigated federal statute, joining a looming U.S. Supreme Court case on the necessary scope of agency environmental review, a forthcoming change in administrations, and a separate judicial challenge to CEQ's 2024 regulations.

The *Marin Audubon* case arose out of the environmental group's NEPA challenge to agency approval of a revised plan for managing commercial air tour flights over four national parks. The plan authorized the same number of tours but imposed mitigation measures. Relying on a NEPA categorical exclusion, the agencies

concluded that they did not need to prepare an environmental assessment or environmental impact statement for "[c]hanges or amendments to an approved action when such changes would cause no or only minimal environmental impacts," and would, in fact, be beneficial because of the added mitigation measures. Slip op. at 7. All three panel members found the agencies' review of the flight plans inadequate under NEPA, since it assumed the status quo was the relevant environmental baseline.

Two judges—Senior Judge Raymond Randolph and Judge Karen Henderson—went further, ruling that CEQ's NEPA regulations are without legal basis. They also vacated the amended air tour management plan.

NEPA's statutory language calls for federal agencies to provide a "detailed statement" regarding the "reasonably foreseeable environmental effects" of "major federal actions." 42 U.S.C. § 4332(2)(C)(i). CEQ's NEPA regulations were first enacted in 1978 pursuant to executive order and thereafter periodically revised and published at 40 C.F.R. Part 1500. Among other things, the regulations detail the scope of environmental review required to satisfy the "detailed statement" obligation. How much analysis is enough has been fought in the courts in dozens of cases dating to the 1970s.

According to the 2-1 panel majority, CEQ never had authority to do more than advise its sister agencies on NEPA compliance. CEQ's promulgation of rules binding on every agency violates separation of powers and statutory interpretation principles, according to the majority. They found it "quite remarkable that this issue has remained largely undetected and undecided for so many years in so many cases." *Marin Audubon*, slip op. at 15. Perhaps, the majority added, that is because "CEQ publishes its 'regulations' in the Code of Federal Regulations, as if that was a credential." Nevertheless, the majority opined, "The provisions of NEPA provide no support for CEQ's authority to issue binding regulations." *Id.* at 16.

Examining the powers assigned to CEQ by the statute itself (primarily, to make recommendations to the president on national policies), the majority reasoned that CEQ's rulemaking authority, which derives not from the statute but from an executive order issued during the Carter administration, lacks any Congressional basis. Slip op. at 16 ("No statutory language states or suggests that Congress empowered CEQ to issue rules binding on other agencies—that is, to act as a regulatory agency rather than as an advisory agency."). Citing *FDA v. Brown & Williamson*, 529 U.S. 120, 161 (2000), the court stated that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." Slip op. at 9 n.1.

And invoking *Youngstown Sheet & Tube Co. v. Sawyer*, the court reasoned that the Constitution does not permit the executive to arrogate to itself the lawmaking power of Congress. *Id*. at 8–9. The panel examined how CEQ's powers grew from its inception, with the agency enacting ambitious regulations during the Carter administration that purported to be binding, under authority of Executive Order 11991, and ultimately displaced NEPA procedures enacted by 70 other agencies. It also explained that CEQ's exercise of authority cannot be justified under the Constitution's "Take Care" clause, because private parties' rights are affected when litigants seek to enforce the rules as binding obligations against the government. Slip op. at 18. The opinion raised doubts about any agency NEPA regulations that have relied on CEQ's regulations but have not undergone notice and comment.

The majority brushed off the Supreme Court's implicit past endorsements of the CEQ regulations in dicta in several NEPA cases, noting that the Supreme Court had never examined CEQ's authority to issue binding regulations: "[W]e are not bound by every stray remark on an issue the parties neither raised nor discussed in any meaningful way." *Id.* at 17.

They also rebuffed the argument by Chief Judge Sri Srinivasan in dissent that it was unnecessary and improper to reach the issue of CEQ's regulatory authority. No party had challenged the validity of the CEQ regulations or the National Park Service categorical exclusion, and the issue was not briefed. Chief Judge Srinivasan further objected to vacatur of the challenged action, likewise not requested by the petitioners. Nevertheless, the panel

majority found it was required under the Administrative Procedure Act to vacate the plan rather than consider any other form of remedy.

The majority opinion builds on doubts Judge Randolph has long expressed about CEQ's constitutional pedigree. *Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) ("No statute grants CEQ the authority to issue binding regulations.") (Randolph, J., concurring); *see also* slip op. at 10 (citing cases). It picks up on the Supreme Court's signals in *Loper Bright* that for purposes of deferring to agency interpretations, not all agencies are created equal. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2268 (2024) ("*Chevron* applies only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'") (quoting *United States v. Mead Corp.*, 533 U. S. 218, 226–227 (2001)). Perkins Coie's July Loper Bright Update identified the NEPA regulations as the likely focus of a renewed challenge.

It is likely the litigants in this case will seek to blunt the immediate impact by asking for a stay of the mandate and/or seeking rehearing *en banc*. The Supreme Court's docket for this term likely will be full by mid-January, leaving little time to seek relief there. In the meantime, at least in the D.C. Circuit, the opinion could have ramifications for other advisory or quasi-advisory agencies. *See, e.g., McMillan Park Comm. v. Nat'l Cap. Plan. Comm'n*, 968 F.2d 1283, 1287–1288 (D.C. Cir. 1992) (Advisory Council on Historic Preservation is "perhaps not an administrative agency in the sense contemplated by *Chevron*."). It is very likely to be picked up by the 20 states that have challenged the new "Phase II" NEPA regulations in a North Dakota lawsuit. *State of Iowa v. CEQ*, No. 1:24-cv-00089 (D. N.D.). And it likely will inform the pending Supreme Court case involving the interpretation of CEQ's nonstatutory requirement to analyze "cumulative effects," including those an agency has no authority to regulate. *Seven County Infrastructure Coalition v. Eagle County, Co.*, No. 23-975, (U.S. Cert granted June 24, 2024). Argument in that case is set for December 10. Perkins Coie's *Seven County* preview is here.

How this ruling will affect other current and proposed projects will become clearer over the coming days. It is far from certain that other circuits will be persuaded by the D.C. Circuit's analysis, despite its typical influence in the administrative law area. Nevertheless, project proponents undergoing NEPA review should determine whether the lead agencies have their own NEPA regulations or explicit authority from Congress to engage in rulemaking. It would also be prudent to evaluate the relevant circuit's position on the executive-power issues that troubled the *Marin Audubon* majority.

If the ruling holds and is adopted more broadly, the resulting uncertainty could exacerbate NEPA delays. If agencies lack the authority to rely on categorical exclusions to expedite approvals, then the delays may ironically hit smaller projects the hardest. Federal agencies may find that their guidance is binding in some circuits and disregarded in others. Most judicial NEPA opinions have deferred in some measure to the CEQ regulations, casting doubt on the continued viability of that precedent.

All of this could undermine the efforts of numerous administrations—both Republican and Democratic—to streamline environmental review processes, further hampering progress on key infrastructure projects.

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