

Publications

D.C. Circuit Issues Ruling that Could Affect NEPA Compliance

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Clients regulated by, or who have contracts with government agencies regulated by, the National Environmental Policy Act (NEPA) should be aware of a major, recent court decision. On November 12, 2024, the D.C. Circuit Court decided *Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*¹ This decision held that the White House's Council on Environmental Quality (CEQ) lacked rulemaking authority to issue regulations implementing the National Environmental Policy Act (NEPA). If the decision stands, it may stop or delay NEPA approvals for regulated projects. The 2-1 decision, which follows recent U.S. Supreme Court decisions weakening judicial deference to regulatory agency decisions, may be subject to review by the full D.C. Circuit and/or the U.S. Supreme Court. Because NEPA regulations impact a wide variety of projects and contracts, this is a significant decision.

Background

NEPA, enacted in 1969,² requires all major federal actions that significantly affect the environment to include an analysis of actual or potential environmental impacts.

Since 1977, CEQ has issued NEPA regulations under an Executive Order issued by President Carter.³ CEQ's NEPA regulations have been followed by federal agencies for decades.⁴ These regulations identify if, when and how detailed Environmental Impact Statements (EIS), and more concise Environmental Assessments (EA), are required, as well as defining "categorical exceptions" from detailed NEPA regulation. The application of the categorical exclusion rule was at issue in *Marin Audubon*.

Marin Audubon Society, et al., v. Federal Aviation Administration, et al.

In *Marin Audubon*, the petitioners challenged a plan devised by the Federal Aviation Administration (FAA) and National Park Service (NPS) to comply with requirements under the National Parks Act for tourist flights over national parks (the Plan).⁵ The Plan's NEPA analysis determined no environmental assessment or environmental impact

statement need be conducted due to the Park Service's categorical exclusion.⁶

While the petitioners challenged the FAA and NPS's use of the categorical exclusion, the Court instead determined that the CEQ regulations were *ultra vires* (acting beyond powers or authority), and thus were unlawful.⁷ In other words, NEPA regulations are not enforceable. The Court found that:

1. CEQ could not trace its regulation-issuing power to any NEPA text or other statute;
2. A Presidential Executive Order cannot, without statutory authority, result in regulations governing the administration of statutes;⁸ and
3. Prior U.S. Supreme Court, and D.C. Circuit, decisions holding that CEQ's NEPA regulations were "entitled to substantial deference" could not be followed after the recent U.S. Supreme Court decision in *Loper Bright Enterprises v. Raimondo*,⁹ which substantially weakened the so-called "judicial deference doctrine."

Potential Impacts

The decision means that federal agencies cannot use or rely on CEQ's NEPA regulations to administer NEPA. Following the Court's logic, NEPA would need to be amended to either grant and/or individual agencies the authority to issue valid NEPA regulations. How long this could take, in light of a new President and Congress, is unclear. Because NEPA governs everything from interstate highway bridge replacements to flights over national parks, the decision may have many implications.

There is the possibility the decision will be stayed, revised or reversed by the full Circuit Court, or the U.S. Supreme Court. A stay could happen relatively quickly, but further judicial review is likely to be delayed for many months.

Even if this decision stands, a variety of outcomes are possible. As noted above, Congress could amend NEPA to resolve the issue of statutory authority. Alternatively, some existing NEPA regulations may be sufficiently authorized in order to allow part of NEPA to continue to be implemented. There is the possibility that some agencies may seek to apply a "categorical exception" to NEPA-governed activities under the statute rather than CEQ regulations—although the likelihood that this happens is hard to predict due to the upcoming change in administration.

As the D.C. Circuit noted, the NEPA regulations that many agencies have adopted are not sufficient on their own. Since the CEQ regulations provided the framework for all federal agencies, federal agencies were not adopting CEQ's regulations. Rather, the agencies were merely supplementing CEQ's overarching framework. Thus, Congressional action may be required. In the interim, NEPA administration and enforcement may go into limbo.

If federal agencies are authorized to issue, and then adopt, their own complete NEPA regulations, it is unclear how (and when) new regulations will replace or conflict with CEQ's regulations (outside of what was codified in 2023). Moreover, it is unknown whether each agency would adopt the same set of regulations, or if there will be a patchwork of NEPA regulations, with one agency's regulations substantively different from another agency. Sorting this out may take years. All of this may create major confusion for organizations that receive federal funding, directly or through contracts, or who interact with

federal agencies or work on federal lands.

If your organization is regulated by NEPA, has contracts with government agencies regulated by NEPA, or you have questions about the *Marin Audubon* decision, contact Kristin Watt, David Edelstein, Nat Morse, or your Vorys lawyer.

¹ The decision can be read at this url: <https://law.justia.com/cases/federal/appellate-courts/cadc/23-1067/23-1067-2024-11-12.html>.

² 42 USCS § 4321

³ *Marin Audubon* at 12 (citing to Executive Order 11991, 42 Fed. Re. 26,967 (May 26, 1977)).

⁴ *Marin Audubon* at 12 (citing to 43 Fed. Reg. 55,978-79 (Nov. 29, 1978))

⁵ *Marin Audubon* at 3.

⁶ *Id.*

⁷ *Id.* at 8.

⁸ *Id.* at 8-22.

⁹ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024)