National Environmental Policy Act: U.S. Court of Appeals for the D.C. Circuit Holds Council on Environmental Quality Lacks Authority to Issue Rules

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the District of Columbia Circuit ("Court") issued a November 12th Opinion addressing an issue arising out of the National Environmental Policy Act ("NEPA"). *See Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*, No. 23-1067.

The Court on its own initiative considered whether the Council on Environmental Quality ("CEQ") had the authority to issue regulations.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed environmental impact statement. However, the requirement to produce this document is only triggered in the event of a major federal action that will significantly affect the environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it requires federal agencies to meet procedural requirements such as preparation of an environmental assessment or environmental impact statement in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

Nevertheless, since NEPA's enactment in 1970 it has been the subject of thousands of judicial decisions addressing disputes over the various procedural mandates. NEPA also provided for the establishment of CEQ (as part of the Executive Office of the President). Its duties included oversight of the federal agencies' implementation of NEPA. Since the 1970's CEQ has issued regulations interpreting NEPA's procedural requirement.

The Court in Marin Audubon Society Opinion addressed a dispute between an environmental organization and the Federal Aviation Administration ("FAA") and other agencies. The issue involved NEPA responsibilities associated with the agencies' issuance of an Air Tour Management Plan governing tourist flights over four national parks. The federal agencies had determined there was no need to prepare an environmental analysis under NEPA. This conclusion was challenged by the Marin Audubon Society and others.

The Court noted that the opposing parties believe that the dispute centered on whether the federal agencies had complied with certain CEQ regulations.

The Court on its own initiative stated:

…We will not address these arguments. The CEQ regulations, which purport to govern how all federal agencies must comply with the National Environmental Policy Act, are ultra vires.

This is presumably shocking since federal agencies, litigants, and others have looked to CEQ regulations since their original enactment in the 1970's.

The Court in rendering this decision held that CEQ lacks rulemaking authority. It referenced the fact that CEQ traced its rulemaking authority from a 1971 Executive Order of President Carter as opposed to legislation.

The Court referenced prior concerns in various opinions regarding CEQ's rulemaking authority. It stated:

…What is quite remarkable is that this issue has remained largely undetected and undecided for so many years in so many cases. One apparent reason for the oversight is that CEQ publishes its "regulations" in the Code of Federal Regulations, as if that were a credential. The temptation for litigants and courts is to treat publication in the C.F.R. as equal to publication in the United States Code. Trouble is that publication in the C.F.R. is no measure of an agency's authority to issue rules that appear there…

The Court concluded that NEPA's statutory provisions provide no support for CEQ's authority to issue binding regulations.

A copy of the Opinion can be downloaded here.