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DC Circuit Invalidates NEPA Rules

Maureen Bayer
Tonkon Torp LLP

On November 12, 2024, the D.C. Circuit in *Marin Audubon Society v. FAA et al.* held that the White House Counsel on Environmental Quality ("CEQ") was never granted authority by congress to create rules under the National Environmental Policy Act of 1969 ("NEPA"). As a result, CEQ's long-standing NEPA regulations are void and unenforceable. This is yet another landmark decision affecting core environmental law following the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) ("*Loper Bright*"), in which deference to agency decision-making was significantly curtailed.

NEPA requires federal agencies to assess environmental consequences of "major federal actions significantly affecting the environment." "Major federal actions" including things like issuing permits to discharge air emissions or wastewater; constructing bridges; actions affecting endangered species; timber harvesting; and livestock grazing. Types of NEPA analysis include:

- Categorical Exclusions - those actions which normally do not significantly affect the quality of the human environment. Agencies can develop their own lists categorical exclusions.

- Environmental Assessments - a brief analysis the agency conducts to see if an activity will have a significant impact on the environment. An EA is conducted on proposed actions that have a reasonably foreseeable significant effect on the quality of the human environment. The result of an EA is either a Finding of No Significant Impact, or if significant impacts are likely, an environmental impact statement must be conducted.
- Environmental Impact Statement - a more extensive analysis of the impact the proposed action and reasonable alternatives will have on the environment. An EIS requires a 45-day public comment period, after which a record of decision is prepared containing the actions the agency must take.

While the *Marin Audubon* case was brought to challenge an Air Tour Management Plan governing tourist flights over national parks in California for failing to have analyzed environmental impacts under CEQA and CEQ regulations, the D.C. Circuit addressed the validity of CEQ's rules and CEQ's rulemaking authority before addressing the merits. Neither party challenged the validity of CEQ's rules or CEQ's power to conduct rulemaking, but the court nonetheless found that it had the independent power to identify the governing law and examine its validity.

In a 2-1 opinion, the DC Circuit held that all CEQ-enacted CEQA regulations are invalid since neither NEPA itself, nor any other statute, empowered CEQ to issue rules under CEQA. This is because the rulemaking authority CEQ relied on in creating regulations is derived from a presidential Executive Order granting CEQ the power to issue regulations to federal agencies to implement procedural provisions of CEQA. As a result, CEQ issued a substantial framework of regulations, which were purportedly "applicable to and binding on all Federal agencies."

In this case, the DC Circuit found that "NEPA provide[s] no support for CEQ's authority to issue binding regulations. 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. NEPA contains nothing close to the sort of clear language Congress typically uses to confer rulemaking authority." Moreover, an earlier Supreme Court case finding that CEQ's regulations are "entitled to substantial deference" was given no weight, "in light of the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024)." However, the Court did not expressly vacate any CEQ actions.

The fallout from this case could be monumental, making any agency action taken under the CEQ framework vulnerable to being vacated. There are hundreds of proposed federal agency actions pending across the country that may now require re-assessment in light of

the holding in *Marin Audubon*. At the very least, the case creates substantial uncertainty about the scope of NEPA obligations, particularly going into a change in administration. Given this substantial uncertainty, for now the only clear guidelines are those in the NEPA statute itself. Both petitioners and respondents filed petitions for rehearing en banc. If granted, the decision would be reviewed by the full D.C. Circuit, but not until the Trump Administration takes power. As such, there remains a possibility that the new administration will not expend efforts to defend CEQ's rulemaking authority.

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Oregon to Implement First Broad-Reaching EPR Recycling Law in the US

William L. Rasmussen & **Blakely T. Vogel**
Miller Nash LLP

Oregon is on the verge of implementing the first extended producer responsibility ("EPR") law in the United States broadly targeting recyclable materials with the goal of increasing recycling rates and reducing waste. Several other states, such as California and Colorado, are set to implement similar laws, but Oregon will be the first when its EPR laws go into effect in July 2025. If successful, these states could set a precedent for how other states handle their recycling programs and meet recycling goals.

Initially implemented in Germany in the early 1990s, EPR laws are common in other countries around the world. The heart of EPR laws is that product producers are required to finance the costs of collecting, recycling, and/or safely disposing of products that would otherwise be borne by local governments and (ultimately) taxpayers. EPRs also encourage producers to improve their products to increase recycling and reduce waste. Several U.S. states have experimented with EPR-like laws for years, including programs requiring producers bear costs associated with a variety of products: electronics, batteries, products containing mercury, etc. However, it was not until the 2020s that states targeted single-use plastic packaging and the growing plastic-pollution issues. Oregon was one of the first such states, passing the Plastic Pollution and Recycling Modernization Act ("RMA") in August 2021.

Broadly speaking, the RMA both increases the efficiency of Oregon's recycling system and requires packaging producers of all sorts to finance effective management of their products after consumer use (known as "covered products"). Among other things, the RMA addresses inefficiencies in Oregon's current recycling system by creating a unified statewide list of recyclables, expanding recycling services, providing recycling education materials to Oregon residents and businesses, upgrading recyclables sorting facilities, and ensuring that the recycling, recovery, or disposal of covered products benefit the environment and minimize public health risks. Producers will fund these sorts of improvements indirectly through a Producer Responsibility Organization ("PRO").

PROs are non-profit organizations created by producers to distribute producer funds and improve covered product management—from collection to recycling or disposal. PROs must distribute funds collected from producers to local governments to cover certain costs

associated with managing post-use covered products and provide improvements. For example, under the RMA, PROs must provide funds to cover the cost of transporting covered products, expanding on-route collection services, operating recycling depots, and even building new recycling reload facilities (if necessary). Further, PROs must actively ensure effective management of covered products by producing recycling educational materials, and by providing collection and recycling services for covered products that are difficult to recycle under the current system.

Circular Action Alliance will operate as the first and only PRO in Oregon when the RMA goes live in July 2025, and it will also operate as a PRO in California and Colorado when those laws go into effect. Miller Nash has provided substantial guidance regarding the interpretation of and compliance with the RMA.

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Oregon Pursues Listing PFOA and PFOS as Hazardous Substances under State Cleanup Law

Casey Clausen, **Nessa Horewitch Coppinger** & **Augustus Winkes**
Beveridge & Diamond PC

Last month, the Oregon Department of Environmental Quality ("DEQ") announced a rulemaking process to list perflouorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS") as hazardous substances under the Oregon Cleanup Law. The rulemaking would adopt EPA's designation earlier this year of PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Oregon Hazardous Substance Remedial Action rules define "hazardous substance" to include any substance listed as a hazardous substance under CERCLA.[1] The state rule, however, was last updated in 2006. The rulemaking would align Oregon's regulations with changes to the list of hazardous substances under CERCLA since 2006, including the addition of PFOA and PFOS.

DEQ states that the rulemaking would give DEQ authority to address PFOA and PFOS releases at cleanup sites, which may include site investigation, risk assessment, and remediation.[2] The Oregon Cleanup Law is modeled on CERCLA, and like CERCLA, provides for investigation and remediation of releases of hazardous substances and creates a strict liability scheme for parties responsible for these releases.

DEQ has convened an advisory committee to provide input into the rulemaking process. The first meeting was held on November 19. Parties with potential environmental cleanup responsibilities in Oregon should track DEQ's regulatory and enforcement approach to PFOA and PFOS as the rulemaking process develops.

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