

## C O M M E N T S

# SEPARATING HOLDING FROM DICTA: MARIN AUDUBON V. FAA

by Justin L. McCarthy

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For more than 40 years, the White House Council on Environmental Quality's (CEQ's) regulations implementing the National Environmental Policy Act (NEPA) were universally regarded as "the bible for the federal establishment and for the reviewing courts."<sup>1</sup> Indeed, in *Andrus v. Sierra Club*, the U.S. Supreme Court stated that "CEQ's interpretation of NEPA is entitled to substantial deference."<sup>2</sup> In late 2024, however, in *Marin Audubon Society v. Federal Aviation Administration*, a divided panel for the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit cast significant doubt on the continued durability of CEQ's NEPA regulations, stating that the agency lacked the authority to issue binding regulations governing federal agencies' compliance with NEPA.<sup>3</sup>

Although the D.C. Circuit's decision gained national attention among environmental law practitioners,<sup>4</sup> this

Comment argues that on closer examination of the court's legal reasoning, these sweeping statements concerning CEQ's regulatory authority actually amount to nonbinding dicta. It further argues that even if these statements were not dicta, the *Marin Audubon* decision suffers from multiple errors in reasoning. Specifically, the *Marin Audubon* court erred in three ways: (1) it disregarded the Supreme Court's well-considered dicta on the issue; (2) it failed to consider whether NEPA contains an implied delegation of rulemaking authority; and (3) it erroneously found that CEQ's regulations were not a valid delegation of presidential authority under the Take Care Clause of the U.S. Constitution.

## I. NEPA and CEQ's Regulatory History

NEPA was passed by the U.S. Congress in 1969 and signed into law by President Richard Nixon in 1970 amid growing public concern about environmental degradation.<sup>5</sup> Such highly visible environmental disasters as the 1969 Santa Barbara oil spill and the repeated fires on the Cuyahoga River, which had become heavily polluted by industrial waste, galvanized public support for comprehensive environmental regulation.<sup>6</sup>

Often referred to as the "Magna Carta" of environmental laws, NEPA's §101 establishes a national policy "to use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in pro-

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1. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1518 (2012) (quoting Oliver A. Houck, Book Review, *Is That All? A Review of The National Environmental Policy Act, An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENV'T L. & POL'Y F. 173, 183 n.38 (2000)).
2. 442 U.S. 347, 358 (1979).
3. 121 F.4th 902, 908 (D.C. Cir. 2024). In February 2025, a North Dakota district court in *Iowa v. Council on Environmental Quality*, No. 24-cv-00089, 2025 WL 598928 (D.N.D. Feb. 3, 2025), held that NEPA did not give CEQ authority to issue binding regulations. That case is currently on appeal to the U.S. Court of Appeals for the Eighth Circuit and is beyond the scope of this Comment.
4. See, e.g., Peter Whitfield et al., *D.C. Circuit Answers Unasked Question to Invalidate 50 Years of Environmental Regulatory Framework as Ultra Vires*, SIDLEY AUSTIN LLP (Nov. 13, 2024), <https://www.sidley.com/en/insights/newsupdates/2024/11/dc-court-of-appeals-answers-unasked-question-to-invalidate-50-years-of-environmental-regulatory>; Laura C. Williams et al., *DC Circuit Issues Landmark Ruling Holding CEQ Lacks Authority to Issue NEPA Regulations*, MORGAN LEWIS (Nov. 13, 2024), <https://www.morganlewis.com/pubs/2024/11/dc-circuit-issues-landmark-ruling-holding-ceq-lacks-authority-to-issue-nepa-regulations>; Michael R. Pincus et al., *D.C. Circuit Throws Out Over 40 Years of NEPA Regulation*, VAN NESS FELDMAN LLP (Nov. 14, 2024), <https://www.vnf.com/dc-circuit-throws-out-over-40-years-of-nepa-regulation>; Sarah Bordelon et al., *Marin Audubon Should Not Upend the NEPA Process*, HOLLAND & HART LLP (Nov. 14, 2024), <https://www.hollandhart.com/marin-audubon-should-not-upend-the-nepa-process>; Donald F. McGahn et al., *D.C. Circuit Finds Council on Environmental Quality's NEPA Regulations Are Unenforceable*, JONES DAY (Nov. 15, 2024), <https://www.jonesday.com/en/insights/2024/11/dc-circuit-finds-council-on-environmental-quality-nepa-regulations-are-unenforceable>; Kristin Watt et al., *D.C. Circuit Issues Ruling That Could Affect NEPA Compliance*, VORYS SATER SEYMOUR & PEASE LLP (Nov. 20, 2024), <https://www.voryst.com/publication-d-c-circuit-issues-ruling-that-could-affect-nepa-compliance>; Ana D. Schwab et al., *Split D.C. Circuit Panel Holds That CEQ Lacks Authority to Issue NEPA Regulations*, BEST BEST & KRIEGER LLP (Nov. 21, 2024), <https://bbkllaw.com/resources/la-112124-split-dc-circuit-panel-holds-that-ceq-lacks-authority-to-issue-nepa-reg>; Jay C. Johnson, *Whither the Council on Environmental Quality NEPA Regulations? A Clear-Eyed Perspective*, VENABLE LLP (Nov. 25, 2024), <https://www.venable.com/insights/publications/2024/11/whither-the-council-on-environmental-quality>.

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5. 42 U.S.C. §§4321-4370m-12.

6. Jon Hamilton, *How California's Worst Oil Spill Turned Beaches Black and the Nation Green*, NPR (Jan. 28, 2019), <https://www.npr.org/2019/01/28/688219307/how-californias-worst-oil-spill-turned-beaches-black-and-the-nation-green>; Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/> ("Despite being much smaller than previous fires, the river blaze in Cleveland [in 1969] . . . became a symbol for the nascent environmental movement[.]").

ductive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>7</sup> NEPA also affirms that the federal government has a continuing responsibility to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>8</sup> Thus, by framing environmental protection as a trust obligation owed to future generations, NEPA incorporates an important principle of intergenerational equity.

In order to achieve these goals, §102 of NEPA in turn establishes certain procedural requirements that federal agencies must follow. Specifically, NEPA requires federal agencies to issue a “detailed statement” addressing the environmental impact of all “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>9</sup> This “detailed statement” must include: (1) any reasonably foreseeable environmental impacts of the proposed action; (2) any reasonably foreseeable adverse effects that cannot be avoided; (3) a reasonable range of alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action.<sup>10</sup>

While the “substantive” policy goals articulated in §101 of NEPA “leave[ ] room for a reasonable exercise of discretion,” courts have repeatedly found that agencies are required to comply with the “procedural” requirements in §102 “to the fullest extent possible.”<sup>11</sup> As the Supreme Court explained in *Robertson v. Methow Valley Citizens Council*, NEPA is fundamentally a procedural statute.<sup>12</sup> It does not dictate particular outcomes, and “merely prohibits uninformed—rather than unwise—agency action.”<sup>13</sup>

NEPA also established CEQ within the Executive Office of the President to “review and appraise” agencies’ compliance with the statute, “make recommendations to the President,” and “develop and recommend to the President national policies to foster and promote the improvement of environmental quality.”<sup>14</sup> As discussed in more detail in Part III, since 1971, Congress has substantively amended NEPA on two occasions, the most recent of which occurred in 2023 with passage of the Fiscal Responsibility Act.<sup>15</sup>

Although NEPA does not expressly delegate authority to CEQ to issue binding regulations, the agency first issued interim guidelines on the administration of NEPA in 1970,<sup>16</sup> pursuant to Executive Order No. 11514 issued by President Nixon in March 1970.<sup>17</sup> These guidelines sought to identify which federal actions triggered NEPA review, and directed federal agencies to establish procedures for “identifying those agency actions requiring [preparation of] environmental statements.”<sup>18</sup> This guidance, however, offered little substantive direction about how agencies should evaluate environmental impacts in their decision-making, and was quickly superseded by another memorandum issued by CEQ in 1971.<sup>19</sup>

Then in 1973, CEQ published more robust guidelines relating to the preparation of environmental impact statements (EISs).<sup>20</sup> According to CEQ, the agency decided to publish the guidelines in the *Code of Federal Regulations* “because they affect State and local governmental agencies, environmental groups, industry, private individuals, in addition to Federal agencies, to which they are specifically directed.”<sup>21</sup>

In 1977, the regulatory landscape changed significantly after President Jimmy Carter issued Executive Order No. 11991, directing CEQ to promulgate binding NEPA regulations applicable to all federal agencies.<sup>22</sup> In response, CEQ undertook a “comprehensive” rulemaking process that included notice-and-comment procedures as well as broad consultation with stakeholders across the public and private sectors.<sup>23</sup> This culminated in the issuance of CEQ’s 1978 implementing regulations, which served as the principal framework for NEPA implementation across the federal government. These regulations formalized the tiered approach to environmental review synonymous with NEPA today—categorical exclusions (CEs), environmental assessments (EAs), and EISs—and introduced important procedural concepts such as scoping.<sup>24</sup>

With one exception,<sup>25</sup> CEQ’s 1978 NEPA implementing regulations remained unchanged until President Donald Trump undertook wholesale revisions in 2020 designed to

7. 42 U.S.C. §4331(a); see also S. REP. NO. 296, at 4 (1969) (“The purpose [of NEPA] is to establish, by congressional action, a national policy to guide Federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment.”). Sen. Henry “Scoop” Jackson, the law’s primary sponsor in the U.S. Senate, characterized NEPA as “the most important and far-reaching environmental and conservation measure ever enacted.” 115 CONG. REC. 40416 (1969).

8. 42 U.S.C. §4331(b)(1).

9. *Id.* §4332(B)-(C).

10. *Id.* §4332(2)(C)(i)-(v).

11. *Calvert Cliffs’ Coordinated Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971).

12. 490 U.S. 332 (1989).

13. *Id.*

14. 42 U.S.C. §4342 (identifying the “dut[ies] and function[s]” of CEQ).

15. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10; see also Pub. L. No. 94-83, 89 Stat. 424 (1975) (specifying parameters under which states may prepare an environmental impact statement (EIS)).

16. CEQ, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390 (May 12, 1970).

17. Exec. Order No. 11514, 35 Fed. Reg. 4247, 4247-48 (Mar. 5, 1970) (directing CEQ to “[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of [NEPA].”).

18. 35 Fed. Reg. at 7391.

19. CEQ, Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (Apr. 23, 1971).

20. CEQ, Part 1500—Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550 (Aug. 1, 1973).

21. *Id.* at 20550.

22. Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 24, 1977) (amending Exec. Order No. 11514, 35 Fed. Reg. 4247 (Mar. 5, 1970)) (directing CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA].”).

23. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (describing CEQ’s regulations as a “single set of uniform, mandatory regulations applicable to all federal agencies”).

24. See 40 C.F.R. §§1500-1508.1 (withdrawn in 2025).

25. National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 52 Fed. Reg. 15619 (Apr. 12, 1986) (revising 40 C.F.R. §1502.22).

“streamline” the environmental review process for “major infrastructure and other projects.”<sup>26</sup> The regulatory landscape shifted again under President Joseph Biden, who issued “Phase 1” and “Phase 2” rulemakings in 2022 and 2024, respectively, revising CEQ’s regulations.<sup>27</sup> Finally, following the D.C. Circuit’s decision in *Marin Audubon*, President Trump issued Executive Order No. 14154, revoking President Carter’s previous Executive Order and directing CEQ to propose withdrawing the agency’s NEPA regulations.<sup>28</sup> In place of CEQ’s NEPA regulations, the agency is directed to coordinate with federal agencies on the revision of agency-specific NEPA regulations.<sup>29</sup>

## II. *Marin Audubon*: An Overview

As noted above, CEQ’s regulatory authority under NEPA remained essentially unchallenged for more than 40 years, until the D.C. Circuit handed down its decision in *Marin Audubon* in November 2024.<sup>30</sup> A comprehensive overview of the case is essential to disentangling the court’s reasoning and distinguishing holding from dicta.

*Marin Audubon* stemmed from a challenge to the approval of tourist flights over four national parks near San Francisco. Under the National Parks Air Tour Management Act (NPATMA), the Federal Aviation Administration (FAA) and National Park Service (NPS) are required to jointly develop “air tour management plans” regulating tourist flights over national parks throughout the United States.<sup>31</sup> The purpose of these flight plans is to prevent and mitigate any significant adverse impacts that commercial air tour operations may have on “natural and cultural resources, visitor experiences, and tribal lands.”<sup>32</sup>

In formulating these management plans, FAA and NPS are required to comply with NEPA.<sup>33</sup> To prevent unreasonable disruption and delay, the law also permits existing commercial air tour operators to apply for “interim operat-

ing authority” while FAA and NPS are in the process of finalizing new management plans.<sup>34</sup> This interim operating authority terminates 180 days after a new management plan is enacted.<sup>35</sup>

When Congress passed NPATMA in 2000, it directed the two agencies to “make every effort” to finalize management plans within 24 months of a commercial air tour operator’s application.<sup>36</sup> After nearly two decades of “bicker[ing]” and “infighting” between FAA and NPS, however, the two agencies failed to finalize a single management plan.<sup>37</sup> For example, although the two agencies announced in 2011 their intent to prepare an EA for the four Bay Area parks subject to this litigation, no such EA was ever completed.<sup>38</sup>

Agency reliance on interim operating authority therefore became the rule rather than the exception. After this extended inaction, the D.C. Circuit granted a petition for a writ of mandamus requiring the two agencies to bring 23 parks with pending applications, including the four Bay Area parks at issue in this case, into compliance with NPATMA.<sup>39</sup>

Under court order to restart the process, the two agencies decided to prepare a single management plan for all four Bay Area parks subject to this litigation, because of the “close proximity of the parks” and the fact that some routes overfly multiple parks.<sup>40</sup> In carrying out their NEPA analysis, however, the two agencies used existing commercial air tours as a baseline to determine whether the management plan would have significant environmental effects.<sup>41</sup> This was a significant decision because, under interim operating authority, commercial air tour operators were already conducting an average of 2,548 tours per year over the four Bay Area parks.<sup>42</sup>

In approving the final management plan, FAA relied on a CE together with a series of mitigation measures instead of preparing an EA or EIS.<sup>43</sup> These mitigation measures included restrictions on the types of aircraft that operators could use, daily flight caps, and modification of exist-

26. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020).

27. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453 (Apr. 20, 2022); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (May 1, 2024).

28. Exec. Order No. 14154, 90 Fed. Reg. 8353, 8355 (Jan. 29, 2025).

29. *Id.*

30. *Marin Audubon Soc’y v. Federal Aviation Admin.*, 121 F.4th 902 (D.C. Cir. 2024).

31. *Id.* at 905; *see also* 49 U.S.C. §40128(a)-(b). NPATMA applies to all “commercial air operations” that take place below 5,000 feet within one-half mile of any national park except Grand Canyon National Park, which is governed by separate legislation. The purpose of the flight must be sightseeing. *Id.* §40128(g)(4).

32. *Marin Audubon*, 121 F.4th at 905; 49 U.S.C. §40128(b)(1)(B). Congress passed NPATMA in 2000 to address concerns that noise pollution from commercial air tours over national parks could impair visitors’ experiences and park resources. *Mitigating Air Tour Impacts at National Parks*, U.S. DEP’T TRANSP. VOLPE CTR. (May 15, 2018), <https://www.volpe.dot.gov/news/mitigating-air-tour-impacts-national-parks>.

33. 49 U.S.C. §40128(b)(2). The FAA Modernization and Reform Act of 2012 amended NPATMA to permit FAA and NPS to enter into voluntary agreements with air tour operators in lieu of developing management plans. These voluntary agreements are exempt from NEPA. *Id.* §40128(b)(7). The 2012 amendments also exempt national parks with fewer than 50 annual tours from the management plan and voluntary agreement requirements. *Id.* §40128(a)(5).

34. *Id.* §40128(c)(1); *see also* Notice of Final Opinion on the Transferability of Interim Operating Authority Under the National Parks Air Tour Management Act, 72 Fed. Reg. 6802, 6803 (Feb. 13, 2007) (explaining that Congress established the interim operation authority process to ensure that commercial air operators “would not be put out of business” while the agencies analyzed the environment impacts of the management plans).

35. 49 U.S.C. §40128(c)(2)(E).

36. *Id.*

37. *In re Public Emps. for Env’t Resp. (In re PEER)*, 957 F.3d 267, 270 (D.C. Cir. 2020).

38. Notice of Intent to Prepare an Environmental Assessment, 76 Fed. Reg. 45312 (July 28, 2011).

39. *In re PEER*, 957 F.3d at 270.

40. *Marin Audubon Soc’y v. Federal Aviation Admin.*, 121 F.4th 902, 907 (D.C. Cir. 2024); U.S. DEPARTMENT OF TRANSPORTATION ET AL., RECORD OF DECISION: AIR TOUR MANAGEMENT PLAN FOR GOLDEN GATE NATIONAL RECREATIONAL AREA, MUIR WOODS NATIONAL MONUMENT, SAN FRANCISCO MARITIME NATIONAL HISTORICAL PARK, AND POINT REYES NATIONAL SEASHORE 4 (2023) [hereinafter BAY AREA PARKS RECORD OF DECISION (2023)].

41. BAY AREA PARKS RECORD OF DECISION (2023), *supra* note 40, at 1 (“In this case, the baseline is the current condition of Park resources and values, as impacted by 2,548 commercial air tours per year[.]”).

42. *Marin Audubon*, 121 F.4th at 908.

43. *Id.*; BAY AREA PARKS RECORD OF DECISION (2023), *supra* note 40, at 8.

ing flight routes to avoid disturbing wildlife and minimize negative effects on visitors' aesthetic experiences.<sup>44</sup> Because of these mitigation measures, the agencies concluded that “the impacts [of the plan] will be beneficial compared to current conditions.”<sup>45</sup>

Environmental groups subsequently challenged the management plan, arguing that reliance on an NPS CE was arbitrary and capricious because the agencies used thousands of existing air tours as an inappropriate baseline to determine that the new flight plan would have beneficial environmental impacts.<sup>46</sup> On review, the D.C. Circuit unanimously held that the agencies improperly “enshrined the status quo” as the baseline without evaluating the environmental impacts of the existing flights, therefore violating NEPA.<sup>47</sup>

As an initial matter, the court noted that the agency's selection of an appropriate baseline “matters a great deal,” because “[i]f the baseline is artificially high, the agency might erroneously conclude that even highly disruptive actions will have minimal incremental environmental effects.”<sup>48</sup> Although the agencies argued that congressional authorization of the interim operating authority procedures made selection of the status quo a reasonable baseline, the court squarely rejected this reasoning.<sup>49</sup> Such an approach, the court observed, would undermine both NEPA's procedural mandate as well as the substantive goal of NPATMA, which Congress enacted to “preserve, protect, and enhance the environment by minimizing, mitigating, or preventing the adverse effects of aircraft overflights” on national parks.<sup>50</sup> The court therefore concluded that the agencies had violated NEPA by “tilting the scales” in a way designed to obscure the true environmental impacts of the management plan.<sup>51</sup>

Writing for a divided panel, however, Judge A. Raymond Randolph went further, declaring that CEQ's NEPA regulations were ultra vires, or beyond the law.<sup>52</sup> His opinion began by noting that the D.C. Circuit has expressed “serious concerns” and “longstanding misgivings” over the years on the question of whether CEQ's regulations had any “binding effect” under NEPA.<sup>53</sup> The court stated that “[n]o statutory language states or suggests that Congress empowered CEQ to issue rules binding on other agen-

cies—that is, to act as a regulatory agency rather than as an advisory agency.”<sup>54</sup>

Instead, the court identified Executive Order Nos. 11514 and 11991, issued by President Nixon in 1970<sup>55</sup> and President Carter in 1977,<sup>56</sup> as the sole basis for the agency's authority to issue binding regulations. The court concluded, however, that these Executive Orders did not provide CEQ with the authority to promulgate binding rules because only congressional statutes can do that.<sup>57</sup> Relying on *Youngstown Sheet & Tube v. Sawyer*, the court reasoned that allowing CEQ to exercise such rulemaking authority absent congressional authorization and based solely on executive orders was not consistent with separation-of-powers principles.<sup>58</sup>

Key to the court's reasoning was an examination of the history of CEQ's regulations, beginning with President Nixon's Executive Order in 1970 directing the agency to “[i]ssue guidelines” to federal agencies concerning compliance with NEPA.<sup>59</sup> Although CEQ considered the resulting guidelines to be “non-discretionary” and the legal equivalent of binding rules, the court found it significant that, in a “quasi-confession of error,” the solicitor general advised the Supreme Court in the 1976 case *Kleppe v. Sierra Club* that CEQ's guidelines were not in fact mandatory.<sup>60</sup> The court also brushed aside the Supreme Court's previous statement in *Andrus* that CEQ's regulations are entitled to substantial deference, stating “we are not bound by every stray remark on an issue the parties neither raised nor discussed in any meaningful way.”<sup>61</sup>

### III. Analysis

The D.C. Circuit's decision in *Marin Audubon* represents a significant departure from precedent concerning CEQ's regulatory authority.<sup>62</sup> This part argues, however, that a

44. *Marin Audubon*, 121 F.4th at 908; BAY AREA PARKS RECORD OF DECISION (2023), *supra* note 40, at 17.

45. *Marin Audubon*, 121 F.4th at 908; BAY AREA PARKS RECORD OF DECISION (2023), *supra* note 40, at 2.

46. *Marin Audubon*, 121 F.4th at 905, 915.

47. *Id.* at 916.

48. *Id.*

49. *Id.* at 916-17.

50. *Id.* at 916 (quoting Pub. L. No. 106-181, §802(2), 114 Stat. 181, 186).

51. *Id.*

52. *Id.* at 909.

53. *Id.* With the exception of *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 341 n.\* (D.C. Cir. 2002), Judge Randolph participated in every case cited by the *Marin Audubon* court questioning CEQ's rulemaking authority. See *Nevada v. Department of Energy*, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (citation omitted); *City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999); *Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th 1112, 1118 (D.C. Cir. 2021) (Randolph, J., concurring).

54. *Marin Audubon*, 121 F.4th at 910.

55. Exec. Order No. 11514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970) (authorizing CEQ to “[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment”).

56. Exec. Order No. 11991, 42 Fed. Reg. 26967, 26968 (May 25, 1977) (authorizing CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA]”).

57. *Marin Audubon*, 121 F.4th at 908-09 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952)) (“[T]he Constitution does not permit the President to seize for himself the ‘law-making power of Congress’ by issuing an order that, ‘like a statute, authorizes a government official to promulgate . . . rules and regulations.’”).

58. *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 588) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by government departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.”).

59. *Id.* at 910; Exec. Order No. 11514, §3(h), 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970).

60. *Marin Audubon*, 121 F.4th at 910; *Kleppe v. Sierra Club*, 427 U.S. 390, 396 (1976). Judge Randolph's attribution of significance to the “quasi-confession of error” committed by the solicitor general in *Kleppe* is tempered significantly by an important omission: Judge Randolph personally briefed and argued the case on behalf of the government in his prior position as deputy solicitor general with the U.S. Department of Justice.

61. *Marin Audubon*, 121 F.4th at 910.

62. As noted by litigants in *Iowa v. Council on Env't Quality*, State Intervenor-Defendant's Additional Supplemental Briefing at 22, *Iowa v. Council on*

closer examination of the court's legal reasoning reveals that its sweeping statements concerning CEQ constitute nonbinding dicta and do not operate as a legitimate constraint on the agency's regulatory authority.

Further, even if these statements were not dicta, the *Marin Audubon* court's decision suffers from multiple errors in legal reasoning sufficient to warrant reconsideration. Specifically, the *Marin Audubon* court erred in three ways: (1) it disregarded the Supreme Court's repeated and well-considered dicta on the issue; (2) it failed to consider whether NEPA contains an implied delegation of rulemaking authority; and (3) it erroneously found that CEQ's regulations were not a valid delegation of presidential authority under the Take Care Clause of the Constitution.

#### A. *Marin Audubon: Disentangling Holding From Dicta*

As an initial matter, the D.C. Circuit's decision in *Marin Audubon* was unusual—and unexpected—for two reasons. First, the opinion was unusual because it violated the longstanding principle of party presentation, which discourages courts from considering legal arguments and issues not raised by the parties on appeal.<sup>63</sup> Instead, the D.C. Circuit decided *sua sponte* to take up the issue, stating that it “retain[s] the independent power to identify and apply the proper construction of governing law.”<sup>64</sup> The decision to depart from the principle of party presentation was espe-

cially problematic in this case because, as discussed below, it likely contributed to multiple inaccurate statements about the law.

Second, and more important, the D.C. Circuit's opinion was also unusual because it did not involve a direct challenge to the validity of CEQ's regulations. Instead, in determining that preparation of an EA or EIS was unnecessary, NPS relied on a CE for “[c]hanges or amendments to an approved action when such changes would cause no or only minimal environmental impacts.”<sup>65</sup> Petitioners therefore alleged that NPS violated its own NEPA regulations, not CEQ's regulations. This makes the D.C. Circuit's decision overturning CEQ's authority to issue binding NEPA regulations dicta, because it was not essential to the holding that NPS inappropriately relied on its own CE to approve the final management plans.

Accordingly, *Marin Audubon* does not operate as a legitimate constraint on CEQ's authority to issue binding rules under NEPA. This interpretation was also endorsed by Chief Judge Sri Srinivasan, in a concurrence to the D.C. Circuit's denial of a petition for en banc review.<sup>66</sup> Judge Srinivasan, joined by six other judges, underscored that en banc review was unnecessary because the D.C. Circuit's statement in *Marin Audubon* concerning the validity of CEQ's NEPA regulations was dicta. Judge Srinivasan stated: “The panel unanimously ruled in favor of the challenge in this case on an entirely separate ground . . . meaning that the panel majority's rejection of the CEQ's authority to issue binding NEPA regulations was unnecessary to the panel's disposition.”<sup>67</sup>

#### B. *Marin Audubon and the Supreme Court's Well-Considered Deference to CEQ's Regulatory Authority*

The D.C. Circuit's statements in *Marin Audubon* also cut against multiple pronouncements by the Supreme Court that, while also technically dicta, nonetheless carry substantial weight. As the U.S. Court of Appeals for the Eleventh Circuit has observed, “there is dicta . . . and then there is Supreme Court dicta.” Most prominently, in *Andrus*, the (pre-*Chevron*) Supreme Court famously stated that “CEQ's interpretation of NEPA is entitled to substantial deference.”<sup>68</sup> Years later, in 2004, the Supreme Court in *Public Citizen* further clarified that CEQ was “established by NEPA with authority to issue regulations interpreting it.”<sup>69</sup>

Env't Quality, No. 1:24-cv-00089 (D.N.D. Dec. 13, 2024), ECF 134, prior to the D.C. Circuit's decision in *Marin Audubon*, nearly every federal court of appeals had explicitly or implicitly endorsed CEQ's regulatory authority under NEPA. See *Foundation on Econ. Trends v. Lyng*, 817 F.2d 882, 884 n.6 (D.C. Cir. 1987); *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983), *abrogated on other grounds by* *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989); *Brodsky v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 113, 120 n.3 (2d Cir. 2013); *New Jersey Dept. of Env't Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 409 n.9 (3d Cir. 1994); *Sugarloaf Citizens Ass'n v. Federal Energy Regul. Comm'n*, 959 F.2d 508, 512 n.3 (4th Cir. 1992); *Sierra Club v. Sigler*, 695 F.2d 957, 964 (5th Cir. 1983); *Kentucky Riverkeeper Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013); *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); *Trustees for Ala. v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988), *overruled on other grounds by* *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1369 (Fed. Cir. 2003).

63. See, e.g., *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (“[T]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”). As Chief Judge Sri Srinivasan notes in his partial dissent, the D.C. Circuit has also applied the principle of party presentation to NEPA claims on multiple occasions. See, e.g., *Nevada v. Department of Energy*, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (“The [Department of Energy] accepts [the CEQ regulations] as binding, as do we for purposes of this appeal.”); *Grand Canyon Tr. v. Federal Aviation Admin.*, 290 F.3d 339, 341 n.\* (D.C. Cir. 2002) (“Neither party challenges the regulatory authority of the CEQ, and hence we have no occasion to question the binding effect of the regulations on the FAA.”); *City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999) (“Because the Administration does not challenge the Council's regulatory authority, we treat the Council's regulations as binding on the agency.”); see also *United States v. Sineneng-Smith*, 590 U.S. 371 (2020) (holding that the U.S. Court of Appeals for the Ninth Circuit panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion).

64. *Marin Audubon*, 121 F.4th at 909 (citations omitted).

65. *Id.* at 908, 911.

66. *Marin Audubon Soc'y v. Federal Aviation Admin.*, No. 23-1067, 2025 WL 374897, at \*1 (D.C. Cir. Jan. 31, 2025) (Srinivasan, J., concurring).

67. *Id.*; see also *Marin Audubon*, 121 F.4th at 922 (Srinivasan, J., dissenting) (explaining that there was no need in *Marin Audubon* to reach the issue of CEQ's regulatory authority).

68. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); see also *id.* (describing CEQ's regulation as a set of “mandatory regulations applicable to all federal agencies”).

69. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004).

Consistent with this sentiment, the D.C. Circuit has repeatedly emphasized that it is required to follow “carefully considered language of the Supreme Court, even if technically dictum.”<sup>70</sup> Thus, although the *Marin Audubon* court was correct when it stated that it was not bound by every “stray remark” made by the Supreme Court, its rejection of the Supreme Court’s consistent treatment of CEQ’s authority under NEPA reflects a misapplication of that principle.

In addition to these express statements, the Supreme Court has, on multiple occasions, implicitly affirmed CEQ’s authority to issue binding regulations under NEPA.<sup>71</sup> In *Andrus*, the Supreme Court relied on CEQ’s regulations to determine that NEPA did not require federal agencies to prepare EISs for appropriation requests.<sup>72</sup> Similarly, in *Robertson*, the Supreme Court substantially relied on CEQ’s regulations to conclude that NEPA did not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan.<sup>73</sup> Significantly, there the Supreme Court also held that CEQ’s amendment of its regulations to delete the requirement for a “worst case analysis” was valid and “entitled to substantial deference.”<sup>74</sup> Finally, in *Marsh v. Oregon Natural Resources Council*, the Supreme Court deferred to CEQ’s judgment concerning the existence of circumstances where new information requires federal agencies to supplement a completed EIS.<sup>75</sup>

Thus, while the Supreme Court did not expressly hold in *Andrus*, *Robertson*, or *Marsh* that CEQ has the authority to issue binding regulations under NEPA, such a background assumption was essential to its reasoning. In other words, the Supreme Court could not have relied on CEQ’s interpretation of its own regulations without first accepting—at least implicitly—that those same regulations carried legal force. It is therefore inconceivable to suggest that the Supreme Court failed to consider the question of CEQ’s authority to issue binding regulations in reaching each of these conclusions.

### C. CEQ, NEPA, and Implied Delegations of Rulemaking Authority

In concluding that CEQ’s regulations were ultra vires, the *Marin Audubon* court also failed to consider whether the Council acted pursuant to an implied delegation of rulemaking authority under NEPA. As the Supreme Court explained in *Loper Bright Enterprises v. Raimondo*, although some statutes “expressly delegate” rulemaking authority to an agency, “[o]thers empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility,’ such as ‘appropriate’ or ‘reasonable.’”<sup>76</sup> Thus, although *Loper Bright* expressly rejected the *Chevron* doctrine’s default presumption that statutory gaps and ambiguities provide agencies with implied delegations of authority, it did not wholesale foreclose the possibility of implied delegations in particularly compelling cases.<sup>77</sup>

In other words, “[t]he whole thrust of the Court’s approach in *Loper Bright* is that the best reading is the best reading, and that applies whether the relevant delegation is express or implied.”<sup>78</sup> Further, as at least one administrative law scholar has noted,<sup>79</sup> a blanket prohibition on implied delegations of authority would threaten to swallow up the major questions doctrine, which requires that agencies point to “clear congressional authorization” before issuing regulations of vast “economic and political significance.”<sup>80</sup>

In the case of NEPA, the statute specifically directs CEQ to consult with “all agencies of the Federal Government . . . [to] identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.”<sup>81</sup> As a matter of congressional policy, NEPA also directs the federal government to “use all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources” in pursuit of various environmental goals.<sup>82</sup>

Taken together, this statutory language contains an implied delegation of authority providing CEQ with sufficient flexibility and discretion to issue governmentwide regulations instead of engaging in agency-by-agency consultation. Indeed, “the absence of NEPA regulations . . . would undermine NEPA’s goal to create a uniform approach to federal environmental review.”<sup>83</sup> In failing to

70. *Winslow v. Federal Energy Regul. Comm’n*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (quoting *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006)).

71. The majority of Supreme Court cases involving NEPA have focused on questions involving the interpretation of an individual agency’s own NEPA regulations. *See, e.g.*, *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87 (1983). However, as discussed below, there are multiple cases where the Supreme Court directly addressed and applied CEQ’s regulations.

72. *Andrus*, 442 U.S. at 348-49.

73. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

74. *Id.* at 356.

75. 490 U.S. 360, 372 (1989) (“This reading of the statute is supported by Council on Environmental Quality (CEQ) and [U.S. Army Corps of Engineering] regulations, both of which make plain that, at times, supplementation is required.”).

76. 603 U.S. 369, 393 (2024) (internal citations omitted).

77. Adrian Vermeule, *Implied Delegations After Loper*, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2024), <https://www.yalejreg.com/nc/IMPLIED-DELEGATIONS-AFTER-LOPER-BY-ADRIAN-VERMEULE/>.

78. *Id.*

79. *Id.*

80. *West Virginia v. Environmental Prot. Agency*, 597 U.S. 697, 721 (2022); *see also id.* (explaining that the vast majority of “ordinary case[s]” do not trigger scrutiny under the major questions doctrine).

81. 42 U.S.C. §4332(2)(B).

82. *Id.* §4331.

83. State Intervenor-Defendant’s Additional Supplemental Briefing at 22, *Iowa v. Council on Env’t Quality*, No. 1:24-cv-00089 (D.N.D. Dec. 13, 2024), ECF 134.

consider this broader context, the *Marin Audubon* court thus failed to exhaust all the traditional tools of statutory construction.<sup>84</sup>

Finally, a finding of an implied delegation of rulemaking authority under NEPA is especially persuasive in this case because of Congress' repeated recognition of CEQ's regulatory authority under the statute over the past four decades. Legislative acquiescence occurs where Congress implicitly approves a well-understood and long-standing legal interpretation or otherwise "acquiesces" to the conduct by failing to take action to contradict it.<sup>85</sup> Although the Supreme Court has cautioned that legislative acquiescence can be problematic where "administrative action . . . raise[s] serious constitutional problems," Congress' repeated and explicit references to CEQ's regulations in numerous statutory enactments go well beyond legislative acquiescence, and are best characterized as legislative affirmation.<sup>86</sup>

Most notably, Congress codified substantial portions of CEQ's regulations in the Fiscal Responsibility Act of 2023.<sup>87</sup> Beyond that, as a group of environmental law scholars previously noted in a letter to CEQ, Congress has expressly referenced or incorporated CEQ's regulations on at least 20 occasions.<sup>88</sup> By overlooking this extensive legislative history, the *Marin Audubon* court disregarded compelling evidence affirming that Congress intended for CEQ to possess regulatory authority.

#### D. CEQ's Regulatory Authority and the Take Care Clause of the Constitution

Finally, even if NEPA does not contain an implied delegation of rulemaking authority, the *Marin Audubon* court erroneously found that CEQ's regulations could not be a valid exercise of presidential authority under the Take Care Clause of the Constitution, which directs the president to "take Care that the Laws be faithfully executed, and [he]

shall Commission all the Officers of the United States."<sup>89</sup> This legal misstep rests on a fundamental misreading of Executive Order No. 11991, as well as a failure to grasp the fact that CEQ's regulations were only binding on executive branch agencies.

In rejecting this possibility, the *Marin Audubon* court cited the Supreme Court's statement in *Chrysler Corp. v. Brown* for the proposition that "[f]or CEQ's regulations to be legally binding on agencies, courts, and the public, 'it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress.'"<sup>90</sup> The problem with this statement, however, is that *Chrysler Corp.* involved a challenge to agency regulations under the Administrative Procedure Act (APA) directed at private parties.<sup>91</sup> By contrast, CEQ's regulations only applied to federal agencies and did not bind third parties such as the public. Consequently, the court's reliance on *Chrysler Corp.* was unwarranted and does not control in the case of CEQ's regulations.

Instead, as various environmental law scholars have also argued,<sup>92</sup> the better view is that, even if NEPA does not contain an implied delegation of rulemaking authority, CEQ's regulations were nonetheless a valid delegation of authority under the Take Care Clause of the Constitution and 3 U.S.C. §301,<sup>93</sup> the latter of which expressly authorizes the president to delegate functions to any U.S. Senate-confirmed principal officer.<sup>94</sup> Here again, the presidential power to establish governmentwide NEPA procedures is also consistent with congressional policy directing that the federal government "use all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources" in pursuit of various environmental goals.<sup>95</sup>

The *Marin Audubon* court also rejected the possibility that CEQ's regulatory authority constituted a valid delegation under the Take Care Clause of the Constitution because executive orders "focused solely on the internal

84. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 372 (2024).

85. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015) ("The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency."); *Dames & Moore v. Regan*, 453 U.S. 654, 680-81, 686 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. . . . Congress did not question the fact of the settlement or the power of the President to have concluded it."); *Ex Parte Grossman*, 267 U.S. 87, 118-19 (1925) ("[L]ong practice . . . and acquiescence in it strongly sustains the construction it is based on.");

86. *Greene v. McElroy*, 360 U.S. 474, 507, 579 (1959).

87. Pub. L. No. 118-5, 137 Stat. 10 (2023). The Fiscal Responsibility Act incorporated numerous concepts from CEQ's regulations, including EAs, CEs, and findings of no significant impact (FONSI)s. See 42 U.S.C. §§4336(b)(2), 4336e(1), 4336e(7).

88. Robert Abrams et al., Public Comment to CEQ, Docket #CEQ-2025-0002, Interim Final Rule, National Environmental Policy Act Implementing Regulations, RIN 0331-AA10 (Mar. 27, 2025), <https://cpr-assets.s3.amazonaws.com/wp/uploads/2025/03/ceq-nepa-ifr-comments-law-professors-032725.pdf> (compiling the undermentioned legislation). See John C. Ruple et al., *The Trump Administration's Self-Inflicted Problem: Why Repealing CEQ Regulations Will Delay Infrastructure and Energy Development*, 55 ELR 10378 (July/Aug. 2025).

89. U.S. CONST. art. II, §3.

90. *Marin Audubon Soc'y v. Federal Aviation Admin.*, 121 F.4th 902, 912 (D.C. Cir. 2024) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979)).

91. *Id.* at 913.

92. Abrams et al., *supra* note 88, at 9.

93. 3 U.S.C. §301:

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President[.]

94. The fact that CEQ's regulations were a valid delegation of authority under the Take Care Clause may only partially rehabilitate the regulations. It is, at best, unclear whether the president can compel independent regulatory agencies to act via executive order where their authority is based solely on the Take Care Clause of the Constitution. The term "independent regulatory agency" is defined by statute at 44 U.S.C. §3502(5) and includes such agencies as the Federal Communications Commission, Federal Energy Regulatory Commission, and Nuclear Regulatory Commission. This broader constitutional question is, regrettably, beyond the scope of this Comment.

95. Abrams et al., *supra* note 88, at 9 (quoting 42 U.S.C. §4331).

management of the Executive Branch create no private rights and are not judicially reviewable.”<sup>96</sup> Such executive orders, according to the court, are therefore not “law” within the meaning of the Constitution or APA.<sup>97</sup> This statement is problematic, however, because it fundamentally mischaracterizes the text and purpose of Executive Order No. 11991. In support of its view that this order was unreviewable, the court analogized to *California v. Environmental Protection Agency*, which involved a challenge to the U.S. Environmental Protection Agency’s compliance with Executive Order Nos. 12898 and 13132 in promulgating the agency’s “Aircraft Rule.”<sup>98</sup>

This comparison is unwarranted by the facts. Executive Order No. 12898, which addressed environmental justice, expressly stated that “[t]his order shall not be construed to create any right to judicial review.”<sup>99</sup> Executive Order No. 13132, which required agencies to consider the division of governmental responsibilities between the federal government and the states, similarly stated that “[t]his order . . . is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.”<sup>100</sup>

By contrast, Executive Order No. 11991 addressing NEPA contained no such limiting provision. This is a meaningful distinction because, as the court in *California v. Environmental Protection Agency* went on to clarify, the types of executive orders it was speaking about “simply serve as presidential directives to agency officials to consider certain policies when making regulatory decisions.” Thus, while Executive Order No. 11991 was focused solely on internal executive management insofar as it empowered

CEQ to issue implementing regulations, it was still legally binding on executive branch agencies and challengeable under the law. It therefore constituted a constitutionally sound basis for CEQ’s authority.

#### IV. Conclusion

A close reading of *Marin Audubon* reveals that the court’s sweeping statements concerning CEQ’s regulatory authority were not essential to its holding and therefore constitute nonbinding dicta. Further, this Comment demonstrates that these statements rest on flawed legal reasoning and merit reconsideration. More saliently, these flaws also underscore the danger that appellate courts face when they choose to depart from the long-standing principle of party presentation.

Although *Marin Audubon*, President Trump’s revocation of Executive Order No. 11991, and CEQ’s subsequent withdrawal of its implementing regulations have introduced significant uncertainty into the federal permitting process, reports of NEPA’s demise are greatly exaggerated. Federal agencies, including independent regulatory agencies, are still required to comply “to the fullest extent possible” with NEPA’s statutory provisions.<sup>101</sup> These include the requirements to analyze the reasonably foreseeable environmental impacts of major federal actions and consider a reasonable range of alternatives.<sup>102</sup> Moreover, federal agencies must also comply with their own NEPA regulations.<sup>103</sup> Finally, even in the absence of CEQ’s regulations, NEPA practitioners can still point to a significant body of pre-1978 case law in both their comments and legal briefs to the court.<sup>104</sup>

96. *Marin Audubon*, 121 F.4th at 913 (quoting *California v. Environmental Prot. Agency*, 72 F.4th 308, 318 (D.C. Cir. 2023)).

97. *California v. Environmental Prot. Agency*, 72 F.4th at 318.

98. *Id.* at 311.

99. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

100. Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 10, 1999).

101. *Calvert Cliffs’ Coordinated Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971).

102. *See* 42 U.S.C. §4332(C)(i)-(v).

103. *See, e.g.*, 43 C.F.R. §46 (Bureau of Land Management NEPA regulations); 36 C.F.R. §220 (Forest Service NEPA regulations); 33 C.F.R. §230 (U.S. Army Corps of Engineers NEPA regulations); 10 C.F.R. §1021 (Department of Energy NEPA regulations); 23 C.F.R. §771 (Federal Highway Administration NEPA regulations); 24 C.F.R. §50 (Department of Housing and Urban Development NEPA regulations).

104. *See, e.g.*, *Natural Res. Def. Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (evaluating reasonable alternatives); *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (defining “significance”); *Minnesota Pub. Interest Rsch. Grp. v. Butz*, 498 F.2d 1314 (8th Cir. 1974) (defining “major federal action”); *Texas Comm. on Nat. Res. v. Bergland*, 573 F.2d 201 (5th Cir. 1978) (explaining the requirements for functional equivalence).