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Extreme Makeover – NEPA Edition: Permitting Agencies Strip Their Environmental Review Regulations Down To The Studs

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In the past two weeks, six federal permitting agencies — the U.S. Departments of Interior (USDOI), Agriculture (USDA), Energy (DOE), Commerce (DoC), Defense (DoD), and Transportation (USDOT) — withdrew most of their National Environmental Policy Act (NEPA) implementing regulations in favor of a more streamlined approach, in most instances substituting a guidance-based regime for their former regulations. The Federal Energy Regulatory Commission also issued a more tailored final rule revising its NEPA regulations, which we discuss in depth here with a focus on its implications for hydropower projects.

These moves have been anticipated since the Trump administration's February rescission of NEPA regulations initially promulgated in 1978 by the Council on Environmental Quality (CEQ), following two court cases holding that CEQ lacked any regulatory authority. The rescission of CEQ regulations was accompanied by a memorandum directing all federal agencies to revise or establish new NEPA implementation procedures consistent with the president's day one Executive Order 14154, Unleashing American Energy, which ordered agencies to "undertake all available efforts to eliminate" energy infrastructure permitting delays.

The changes vary by agency, both in process and substance. For instance, USDOI, DOE, and USDA issued interim final rules (IFR) that took effect immediately upon publication and whittled down existing regulations and moved most procedures into a guidance document; DoD eliminated its departmental NEPA regulations wholesale and replaced them with new procedures, but undertook separate IFRs to roll back U.S. Army Corps of Engineers, Army, Navy, and Air Force NEPA regulations; DoC issued largely new guidance and sought comment on a host of new categorical exclusions (CEs); and USDOT used a light touch for certain NEPA regulations required by separate statute for several of its key sub-agencies.

The USDOI approach is particularly instructive, as its IFR took the following three steps:

- Rescission of most of the existing departmental NEPA regulations, which were each originally promulgated to build off the now-defunct CEQ regulations. In the absence of CEQ regulations, each agency opted for a (mostly) clean slate at the departmental level.

- Maintenance of regulations in subject areas most relevant to streamlining the NEPA process, including: departmental categorical exclusions, *i.e.*, federal actions that are exempt from NEPA review; expedited reviews for emergency procedures; and applicant and contractor preparation of NEPA documents.

- Replacement of the rescinded regulations with “non-binding” guidance documents that nonetheless contain “mandatory” words, and that purport to be consistent with the U.S. Supreme Court’s recent decision in *Seven County Infrastructure Coalition et al. v. Eagle County, Co*.

The IFR was accompanied by a 30-day comment period in lieu of the typical notice-and-comment rulemaking process. The public has until August 4 to submit comments on the IFR — but we would not anticipate any significant modifications to the IFRs.

USDOI asserted two bases for avoiding notice-and-comment rulemaking. First, it cites *Seven County* in asserting that because NEPA is a “purely procedural statute,” any regulations arising from the law are “interpretive rules” or “rules of agency procedure” exempt from notice and comment under the APA.[1] Second, and in the alternative, USDOI claims to have good cause for proceeding with an IFR because it is not tenable to continue to have agency NEPA regulations drafted as if the CEQ regulations still existed.

Perhaps anticipating a legal challenge, USDOI preemptively addresses expected concerns that third parties may have “reliance interests” in the agencies’ existing NEPA procedures. The agencies stated that the rule rescissions will not affect ongoing NEPA reviews in accordance with CEQ guidance — although we note that the referenced February 19, 2025, guidance states that ongoing NEPA analysis will be conducted according to prior NEPA implementing regulations only “until revisions are completed via the appropriate rulemaking process.” USDOI also asserted that because NEPA is a procedural statute, reliance interests grounded in substantive environmental concerns are entitled to “no weight.” Finally, USDOI noted that hypothetical reliance interests are outweighed by the need to streamline permitting processes in accordance with the Supreme Court’s holding in *Seven County*. (USDA and DOE adopted almost identical reasoning for their respective IFRs.)

The key question is what these changes mean for ongoing and future NEPA reviews.

- Procedurally, there is some uncertainty regarding whether the now-rescinded NEPA regulations (CEQ and agency-specific) still apply to pending reviews. Prospectively, the lack of unifying CEQ regulations could increase the chance that agencies or sub-agencies will adopt divergent interpretations of the statutory requirements for their NEPA reviews. Nonetheless, we believe agencies are likely to treat their new guidance documents as binding, and several agencies (particularly USDOI, DOE, and USDA) are adopting a coordinated strategy that could end up reducing differences among agency approaches.

- Substantively, it is highly likely that NEPA reviews will take less time under the new guidance-based regime and will result in fewer and less intensive mitigation measures — at least for this administration’s most favored energy sources. While faster reviews can often lead to corner-cutting and litigation risk, *Seven County* is almost certain to increase judicial deference to individual NEPA analyses — even ones that might have warranted remand or vacatur in the recent past.

- To date, lawsuits challenging the withdrawal of the CEQ regulations have likely been deterred by the aforementioned court decisions holding that CEQ lacks regulatory authority. While that does not necessarily foreclose future challenges to that withdrawal or any agency-specific rescissions of NEPA regulations, we anticipate that environmental groups, already stretched thin by this administration’s flood-the-zone approach,

are going to be increasingly selective in which rules and individual projects to challenge. This is particularly the case given the uphill battle such challenges are expected to face post-*Seven County*.

- Nonetheless, no amount of regulatory streamlining can fully compensate for the recent depletion in agency staffing — which could continue to be a factor informing the quality and timing of agency NEPA reviews. We expect greater reliance on contractor or applicant-prepared NEPA documents as a means of compensating for staffing reductions while continuing to advance NEPA reviews.

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[1] 5 U.S.C. § 553(b)(A).

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