Navigating the Future of Environmental Policy

JULY 9, 2025

Presented by
Ted Boling

Perkins Coie, Washington DC

Perkins Coie

NEPA: Recent developments

CEQ regulations amended: 2020 (Trump Administration codification of E.O 13807),

2022 (Biden Admin. Phase I Rule)

2023: Fiscal Responsibility Act Amendments and implementing regulations (2024 Phase II Rule)

2024: Supreme Court grants cert. in case about scope of agency review statute requires (*Seven County*)

2024: D.C. Circuit sua sponte invalidation of CEQ authority (*Marin Audubon*)

2025: NEPA Executive Order, CEQ Notice of Proposed Rulemaking, and CEQ Guidance Document

© Perkins Coie LLP

NEPA Amendments: Fiscal Responsibility Act of 2023 (June 3, 2023)

Perkins Coie

DID

- Codify many concepts developed in NEPA caselaw (including some cases based on the 2020 CEQ regulations), as well as some concepts from CEQ regulations.
- Adopt page limits and presumptive time limits for NEPA analyses.
- "To the extent practicable," adopted One Federal Decision policy of E.O. 13807

DID NOT

- Address "cumulative effects" or any scoping of effects (*Seven County*)
- Provide more explicit basis for CEQ's rulemaking authority. (*Marin Audubon*)
- Restrict or otherwise speak to agencies' ability to consider alternatives or impacts outside their control (*Seven County*).

 © Perkins Coie LLP

Marin Audubon Society v. Federal Aviation Administration, 121 F.4th 902 (D.C. Cir. Nov. 12, 2024)

- Court invalidated a plan for tour flights over four national parks on the ground that the analysis of the plan violated NEPA's statutory requirements, but rejected any arguments based on the NEPA regulations, which it determined are ultra vires.
- 2-1 majority found that, although neither party raised legitimacy of CEQ's rulemaking authority, that authority based on Carter Executive Order 11991 lacks any Congressional basis: "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."
    - *FDA v. Brown & Williamson:* an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.
    - *Youngstown Sheet & Tube Co. v. Sawyer:* the Constitution does not permit the Executive to arrogate to itself the lawmaking power of Congress.
- All parties sought rehearing *en banc* – petition denied, 2025 WL 374897 (Jan. 31, 2025) (The panel majority's rejection of the CEQ's authority to issue binding NEPA regulations was unnecessary to the panel's disposition.)

 © Perkins Coie LLP

Executive Order 14154, "Unleashing American Energy" (Jan. 20, 2025)

1) Revoked President Carter's Executive Order 11991
2) Directed CEQ to propose rescinding its NEPA regulations, and
3) Required CEQ to issue guidance on implementing NEPA by February 19, 2025 and to convene a working group to coordinate the revision of agency-level implementing regulations "for consistency."
4) CEQ guidance and agency-specific implementing regulations "must expedite permitting approvals and meet deadlines established in the Fiscal Responsibility Act of 2023," and "**prioritize efficiency and certainty over any other objectives** . . . . that could . . . add delays and ambiguity to the permitting process."

© Perkins Coie LLP

Seven County Infrastructure Coalition v. Eagle County, Colorado

Seven County Coalition: group of Utah counties that supports a proposed 88-mile railway project into Utah's relatively isolated Uinta Basin.

The railway would connect the Uinta Basin to the national rail network and carry a variety of natural resource commodities, primarily waxy crude oil destined for refinery markets along the Gulf Coast.

Surface Transportation Board approved Seven County's proposal in 2021 following an expedited EIS.

Eagle County, Colorado and the Center for Biological Diversity challenged the Board's decision in the U.S. Court of Appeals for the D.C. Circuit

 © Perkins Coie LLP

Seven County Infrastructure Coalition v. Eagle County, Colorado

Perkins Coie

- Challengers argued Board should have considered potential "upstream" effects on increased oil drilling in Utah and Colorado & "downstream" oil refining activities > 1,000 miles away along the Gulf Coast.

- D.C. Circuit panel: because the Board could prevent alleged environmental effects related to the proposed railway by denying Seven County's application, it should have analyzed increased drilling and increased air emissions at Gulf Coast refineries. *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1180 (D.C. Cir. 2023).

- Cited D.C. Circuit precedent, *Sierra Club v. FERC* (Sabal Trail case), 867 F.3d 1357,1373 (D.C. Cir. 2017).

- Sabal Trail has come under fire as inconsistent with *Public Citizen v. NHTSA* 541 U.S. 752, 770 (2004): "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," its NEPA analysis need not include that effect.

- Cert. question: "Does [NEPA] require an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority?"
  - Government opposed cert.
  - Argument held December 10.

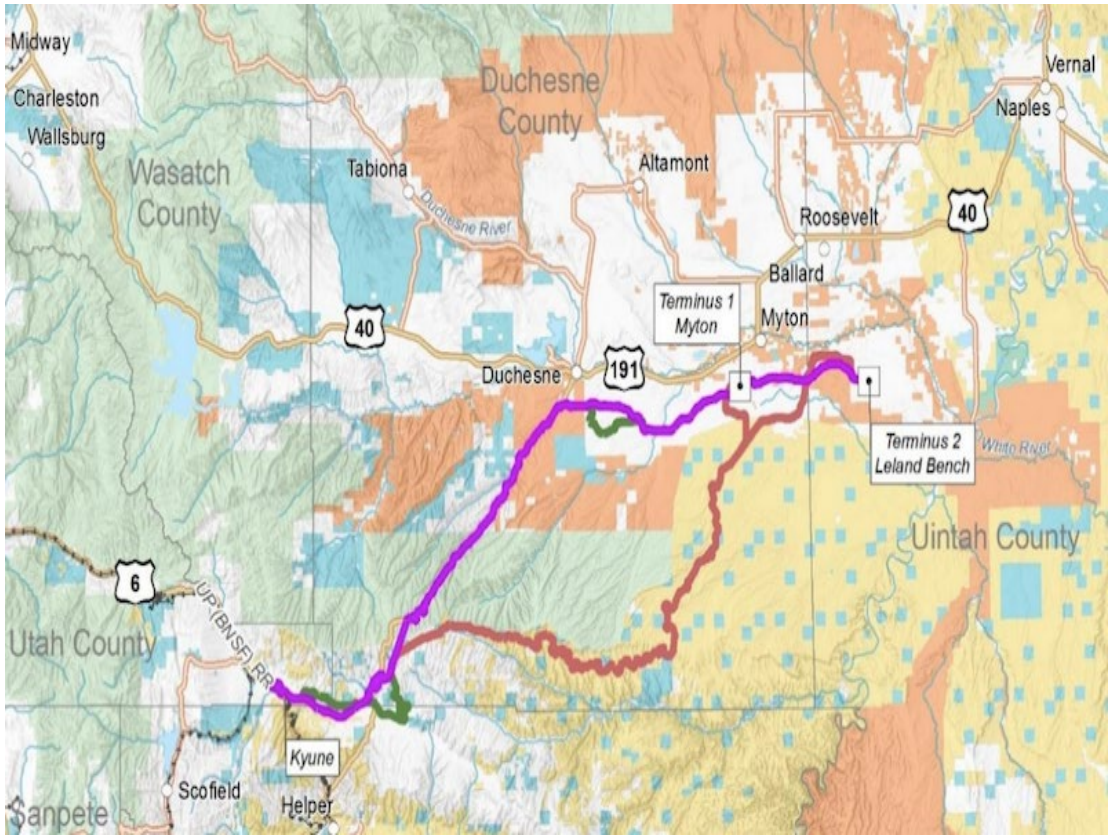
 © Perkins Coie LLP

Seven County Infrastructure Coalition v. Eagle County, Colorado

- Petitioners: D.C. Circuit should have upheld STB's decision b/c NEPA only requires agencies to consider the reasonably foreseeable environmental effects of a proposed agency action that are also within its jurisdiction.
  - Section 102(c): agency must consider "(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented"
- Federal respondents: Board reasonably limited its consideration of the upstream and downstream effects of the proposed rail line
  - Proper scope of NEPA analysis must be determined on case-by-case basis.
  - Disagreed with Petitioner's position that effects outside the agency's jurisdiction, or that are remote in time and space, are never reasonably foreseeable.
- Respondents: increased emissions foreseen, ergo foreseeable.

 © Perkins Coie LLP

May 29, 2025: *Seven County Infrastructure v. Eagle, County Colorado*



- Federal agencies need not evaluate environmental effects they have no legal authority to prevent or mitigate.

- D.C. Circuit failed afford the Board the substantial judicial deference required in NEPA cases.
- Court should just confirm that the agency addressed environmental consequences and feasible alternatives.
- Ensure the final decision was "reasonably explained."

- D.C. Circuit incorrectly required the Board to consider environmental effects of upstream and downstream projects that are separate in time and place from the Unita Basin Railway.
  - Separate projects break the "chain of proximate causation"
  - Applied *Public Citizen* holding

© Perkins Coie LLP

Implications of the *Seven County* Decision

"NEPA has transformed from a modest procedural requirement into a blunt and haphazard tool employed by project opponents (who may not be motivated by concern for the environment) to try to stop or at least slow down new infrastructure construction projects"

"While NEPA requires an EIS to be 'detailed,' and the meaning of 'detailed' is a legal question, what details need to be included in any given EIS is a factual determination for the agency." (citing Loper Bright Enterprises v. Raimando, 603 U.S. 369, 391-92).

"In sum, when assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content , and level of detail of the resulting EIS. Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness."

© Perkins Coie LLP

Implications of the *Seven County* Decision for Injunctions

> "Even if an EIS falls short in some respects, that deficiency may not necessarily require a court to vacate the agency's ultimate approval a project, at least absent reason to believe that the agency might disapprove the project if it added more to the EIS."

> "[E]ven if the EIS drew the line on the effects of separate upstream or downstream projects too narrowly, that mistake would not necessarily require a court to vacate the agency's approval of the railroad project."

Center for Biological Diversity v. BLM ("Willow Project") (9th Cir. June 13, 2025) cited *Seven County* for:

> "[R]eview of an agency's alternative analysis must be [deferential]"
> "[R]ole is to confirm that the agency has addressed feasible alternatives to the proposed projects'"

Held that BLM's decision was arbitration and capricious because it did not explain why it deviated from a full field development standard.

Remanded without vacatur, finding it unwarranted to fix the purely procedural error.

© Perkins Coie LLP

Agency NEPA Rulemaking Post-*Seven County*

- DEPARTMENT OF AGRICULTURE, Interim Final Rule, 90 FR 29632 (July 3, 2025) individual agency NEPA regulations will be rescinded in full:
  - Agricultural Research Service: 7 CFR 520;
  - Animal and Plant Health Inspection Service: 7 CFR 372;
  - Farm Service Agency: 7 CFR 799;
  - National Institute of Food and Agriculture: 7 CFR 3407;
  - Natural Resources Conservation Service: 7 CFR 650;
  - Rural Development: 7 CFR 1970; and
  - U.S. Forest Service: 36 CFR 220.
- "Where USDA agency NEPA regulations used agency-developed terms, such as those associated with agency-developed forms and other document types, these have been generalized to allow for the application of consistent Department implementing procedures for NEPA."
- *Seven County* sought to address the effect on "litigation-averse agencies" which, in light of judicial "micromanage[ment]," had been "tak[ing] ever more time and [ ] prepar[ing] ever longer EISs [environmental impact statements] for future projects." *Id*.at 1513. USDA incorporated this case's holdings into these procedures, availing itself of the latest information and guidance from the Court for its future NEPA application.

© Perkins Coie LLP

Agency NEPA Rulemaking Post-*Seven County*

DEPARTMENT OF COMMERCE, Directive Number DAO 216-6 (This Order supersedes all previous versions but does not affect the Department-wide NEPA categorical exclusions)

.01 Each Operating Unit is responsible for compliance with NEPA and this Order and for maintaining and implementing their respective Operating Unit-specific NEPA procedures:

- a. NOAA Companion Manual - Proposed Changes to Categorical Exclusions (in redline)
  b. NTIA NEPA Procedures
  c. NIST NEPA Procedures
  d. EDA National Environmental Policy Act Implementing Directive 17.02-2
  e. FirstNet NEPA Procedures

.02 The Operating Units with NEPA procedures have direct relationships with other agencies that seek review of NEPA documents, cooperating agency status, or other coordination and will be responsible for making their own arrangements for such matters.

.03 The Assistant General Counsel for Transactions and Program Management is the Department's Chief NEPA Officer and is responsible for overseeing the Department's implementation of NEPA and providing NEPA-related legal advice to Operating Units as needed.

© Perkins Coie LLP

Agency NEPA Rulemaking Post-*Seven County*

DEPARTMENT OF DEFENSE: The Army, Navy, and Air Force rescinded their NEPA implementing regulations in interim final rules and the Department issued the *Department of Defense National Environmental Policy Act Implementing Procedures* (DoD NEPA Procedures) on June 30, 2025.

These procedures apply to DoD Components including functions for the Army Civil Works programs. (https://www.denix.osd.mil/nepa/) 90 FR 27857 (June 30, 2025) ("The DoD NEPA Procedures seek to faithfully implement the recent significant changes to NEPA prescribed by Congress, instruction provided by the President, and guidance provided by the Supreme Court.")

- Department of the Air Force Notice of Repeal NEPA Regulations
- Department of the Army Notice of Repeal NEPA Regulations
- Department of the Navy Notice of Repeal NEPA Regulations
- United States Army Corps of Engineers Notice of Repeal NEPA Regulations
- United States Army Corps of Engineers Civil Works Notice of Repeal NEPA Regulations

© Perkins Coie LLP

Agency NEPA Rulemaking Post-*Seven County*

DEPARTMENT OF ENERGY, Interim Final Rule, 90 FR 29676

- "Mindful that the Supreme Court recently clarified NEPA is a 'purely procedural statute,' DOE will henceforth maintain the remainder of its procedures in a procedural guidance document separate from the Code of Federal Regulations (DOE NEPA implementing procedures)."
- DOE is revising 10 CFR part 1021 to contain only administrative and routine actions excepted from NEPA review in appendix A, its existing categorical exclusions in appendix B, related requirements, and a provision for emergency circumstances.
- DOE is revising appendix A in 10 CFR part 1021 to align with DOE's new NEPA implementing procedures that it is publishing separate from the Code of Federal Regulations. Appendix A in 10 CFR part 1021 (formerly categorical exclusions) are now administrative and routine actions that do not require NEPA review.
- DOE is also revising 10 CFR part 205, subpart W, to remove the NEPA procedures from its Presidential permit regulations.

FERC, Final Rule, 90 FR 29423 (revised NEPA regulations to remove reference to CEQ's rescinded regulations).

© Perkins Coie LLP

Agency NEPA Rulemaking Post-*Seven County*

- DEPARTMENT OF THE INTERIOR, Interim Final Rule, 90 FR 29498 (partially rescinding and making necessary targeted updates to its remaining regulations)
  - "Mindful that the Supreme Court recently clarified NEPA is a 'purely procedural statute,' DOI will henceforth maintain the remainder of its NEPA procedures— which apply only to DOI's internal processes—in a Handbook"
  - DOI retains and makes limited updates to provisions relating to:
    - emergency responses to ensure that DOI can respond timely to any such event and to avoid any confusion regarding the continued validity of this already-established provision for action in emergency situations (43 CFR 46.150);
    - categorical exclusions and their use to avoid any instability in these vital procedures or uncertainty about the continued validity of its already-established categorical exclusions (43 CFR 46.205, 46.210, 46.215); and
    - applicant and contractor preparation of environmental documents to provide a durable framework for the use of such documents (43 CFR 46.105, 46.107).
    - All other provisions will be removed from 43 CFR part 46.

© Perkins Coie LLP

Agency NEPA Rulemaking Post-*Seven County*

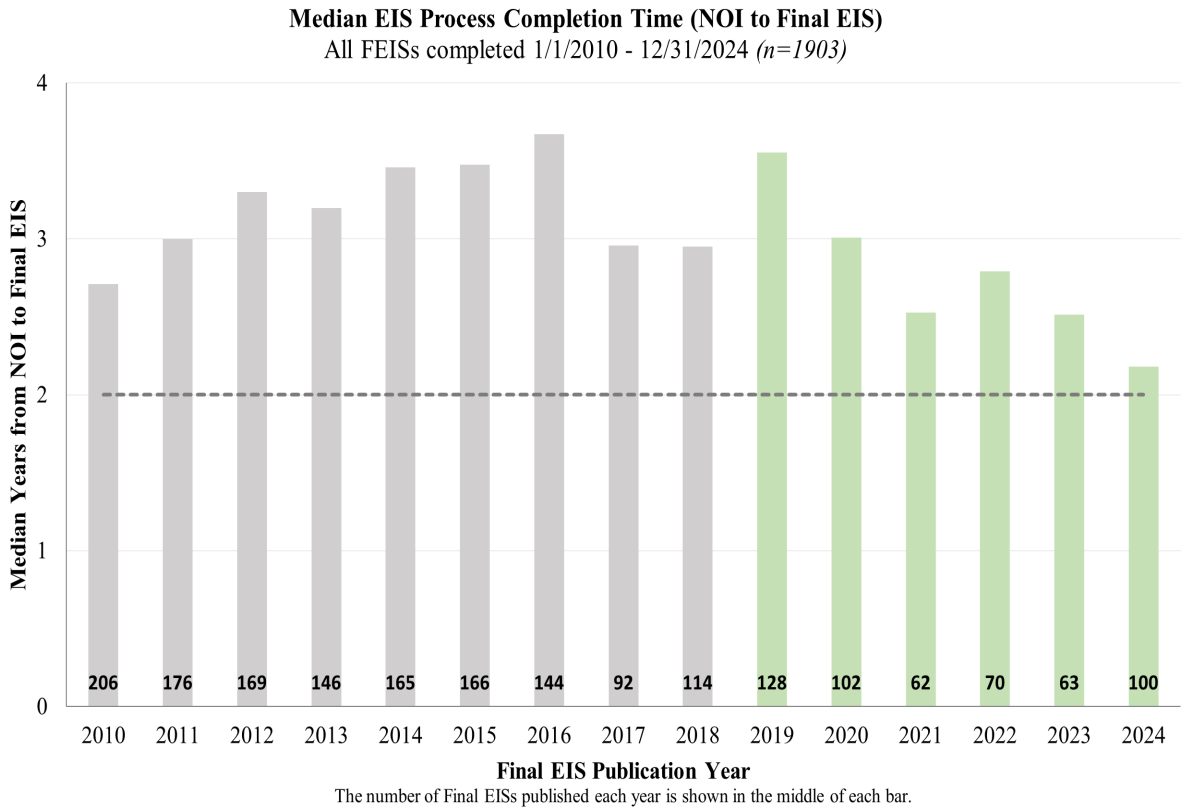
DEPARTMENT OF TRANSPORTATION, Notice of availability, 90 FR 29621 (updating DOT Order 5610.1C "Procedures for Considering Environmental Impacts")

- update incorporates provisions from the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); Moving Ahead for Progress in the 21st Century Act (MAP-21); the Fixing America's Surface Transportation (FAST) Act, the Infrastructure Investment and Jobs Act (IIJA); and the Fiscal Responsibility Act of 2023 (FRA 2023) related to the environmental review process.
- Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), and Federal Transit Administration (FTA) NEPA implementing procedures will remain in 23 CFR part 771 because those agencies have specific statutory provisions related to 23 U.S.C. 139 projects that do not apply departmentwide. In addition, Federal Aviation Administration (FAA) NEPA implementing procedures will remain in separate procedures in FAA Order 1050.1. Both 23 CFR part 771 and Order 1050.1 have been revised to be consistent with this Order to the extent possible.
- There have been no modifications to any OA CEs.
- However, the Department does plan to supplement this Order in the near future to establish new CEs, and to revise existing CEs, including the technical corrections needed.

© Perkins Coie LLP

Number of EISs Issued: 2010-2025

2010-2024

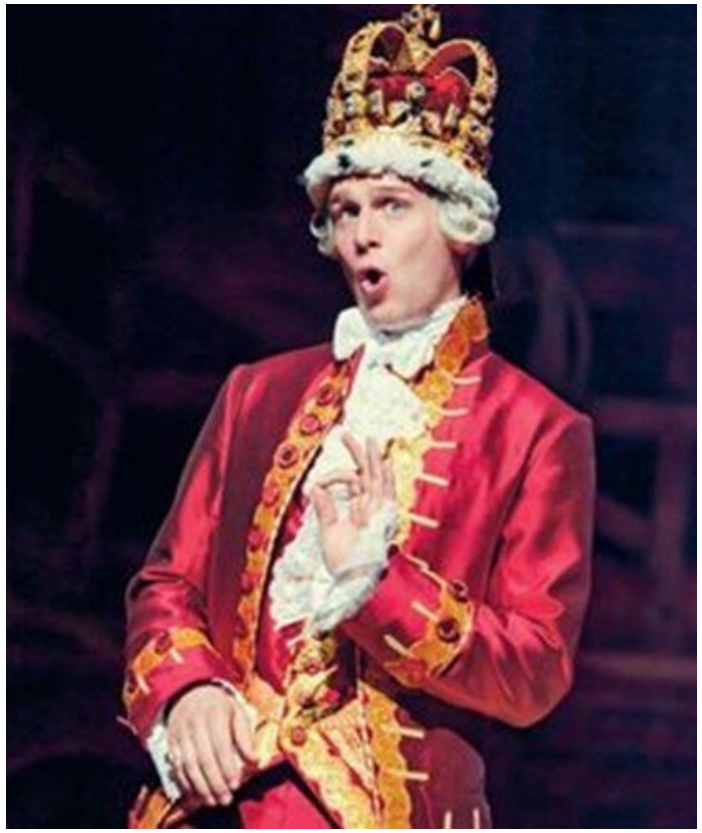


2025 (Jan-Mar)

	Jan.	Feb.	Mar.	Apr.
Total	18	8	8	4
Draft	9	2	5	0
Draft Supplement	1	2	0	4
Final	8	4	3	1
Final Supplement	0	0	0	0

© Perkins Coie LLP

What's next?



Agency NEPA procedures will become more important, but not entitled to the "substantial deference" given to CEQ regulations

Seven County decision will influence how agency NEPA procedures define scope of analysis

Will NEPA analysis become a discretionary check-the-box exercise or will greater deference encourage greater collaboration?

 © Perkins Coie LLP