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# The New NEPA:
## *Implications for Projects, Permitting, and Litigation*

**Brandon Tuck**

**Jeremy Marwell**

**Andrew Beach**

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# SPEAKERS

## Brandon Tuck

**Partner – Environmental & Natural Resources**

Houston, TX

## Jeremy Marwell

**Partner – Appellate**

Washington, D.C.

## Andrew Beach

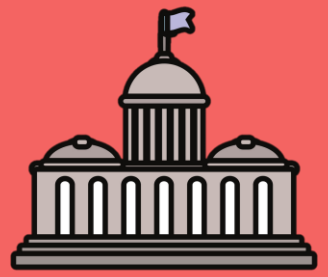
**Counsel – Energy Regulatory**

Washington, D.C.

# Program Overview

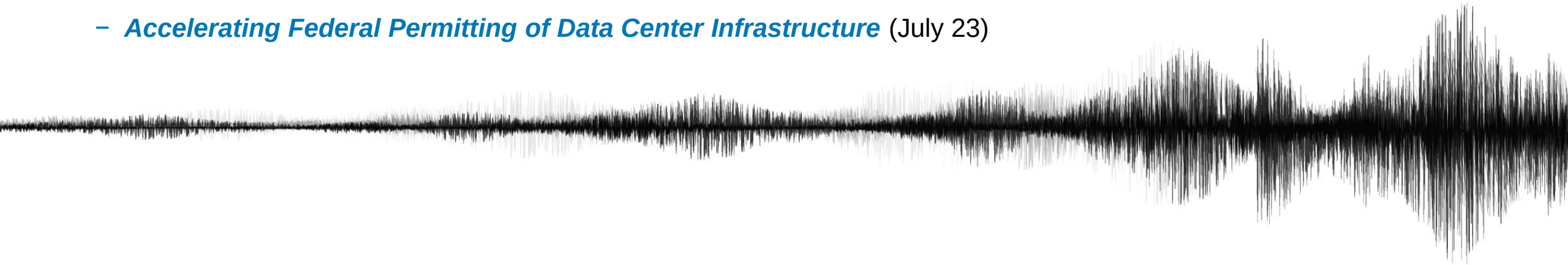
- **Overview of changes to NEPA** – What has happened in the past year?
- **Implications for permitting and project development** – What does it mean?
- **Understanding and mitigating litigation risk** – What can you do?

# Overview of Changes to NEPA



# EXECUTIVE BRANCH

- **January 2025:** President Trump directs government-wide overhaul of permitting practices
  - ***Unleashing American Energy***: revoked Carter-era EO; directed CEQ to propose rescinding its NEPA regulations
  - ***Declaring a National Energy Emergency***: Emergency permitting procedures to expedite energy projects
- **February 2025:** CEQ's interim final rule rescinding its NEPA regulations
- **June 2025**: Federal agencies overhaul their NEPA procedures (with many choosing non-binding guidance)
- **Infrastructure development remains a priority:**
  - ***Updating Permitting Technology for the 21st Century*** (April 15)
  - ***Accelerating Federal Permitting of Data Center Infrastructure*** (July 23)





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# LEGISLATIVE BRANCH

- **Accelerated NEPA reviews under the *One Big Beautiful Bill***
  - Fee-based provision for faster NEPA reviews was the lone survivor among many more ambitious revisions

- **Bipartisan efforts for more NEPA and permitting reform? Some pending bills:**
  - ***SPEED Act (Standardizing Permitting and Expediting Economic Development)***: would add more than a dozen measures to streamline NEPA reviews, increase project development certainty, and ensure timely judicial review
  - ***ePermit Act***: would centralize data across federal agencies with the goal of faster environmental reviews
  - ***Studying NEPA's Impact on Projects Act***: would require CEQ to publish annual reports on judicial review of NEPA actions and timelines and costs for EISs and EAs
  - ***Maintaining Cooperative Permitting Act of 2025***: would restrict EPA from withdrawing approvals of certain state permitting programs
  - ***Streamlining NEPA for Coal Act***: would direct the Department of the Interior to identify existing and potential categorial exclusions for coal projects

# JUDICIAL BRANCH

**Decisions at all levels of the judiciary reflect a revisiting of NEPA principles and narrower role for courts in reviewing agencies' NEPA obligations**

- ***Marin Audubon Society v. FAA*** (D.C. Cir. 2024): CEQ lacks authority to issue binding regulations
- ***Iowa v. CEQ*** (D. N.D. 2024): CEQ lacks authority to issue binding regulations
- ***Seven County Infrastructure Coalition v. Eagle County, CO*** (2025)
  - Agencies' NEPA decisions are owed "**substantial deference**"
  - NEPA does not *require* agencies to consider environmental effect of activities "**separate in time or place**" from the proposed project, or those that fall **outside the agency's authority** and that would be **initiated by third parties**

# Implications for Permitting and Project Development

# AGENCY-LEVEL NEPA PROCEDURES

- **Without a guiding set of uniform regulations, agency procedures vary**
  - For example, agencies differ on how (and if) they will consider ***cumulative impacts***:


Army; DOT:
No mention

FERC:
No change

Agriculture:
Can consider "impacts as appropriate to the specific action and in the context of the potentially affected environment"

DOE:
Significance of an effect is evaluated "in the context of the affected environment"

Interior:
Can consider "trends and planned actions" in the area

- **Nuances and subtleties may invite litigation or lead to disparate caselaw**
- **Lawmakers are already forecasting regulatory whiplash**
  - Sen. Whitehouse (D-RI): "fractured" agency guidance creates "an inefficient patchwork of divergent rules and inconsistent applications of [the] law"
  - Future permitting reform bills may focus on (re)creating an aligned set of agency procedures

# AGENCY DEFERENCE & DISCRETION

- **Agencies have more latitude to determine the content and scope of their NEPA review**
  - Courts owe "substantial deference" to the series of "fact-dependent, context-specific, and policy-laden choices about the depth and breadth of [the environmental] inquiry" that an agency inevitably makes in conducting a review
  - Many agencies' procedures direct the agency to document "where and how it drew a reasonable and manageable line" regarding aspects of review, including effects that may be remote in space or time
  - Agencies may, but are not required to under NEPA, consider effects from other actions separate in space or time, or that fall beyond the agency's authority, or that would be initiated by a third party

- **But, greater agency deference and discretion can lead to uncertainty and inconsistency**
  - An agency can still decide to consider upstream or downstream effects, so long as it explains its reasoning
  - *Seven County* requires courts to give these decisions "substantial deference," which can cut both ways
  - Even more uncertainty with agencies relying on a guidance-based approach to NEPA procedures (which can be changed more quickly and easily in response to changing policy priorities than binding regulations)

# SCOPE OF NEPA REVIEWS: PROCEDURES & PRACTICE

- **_Seven County_ limits what effects agencies are _required_ to consider in their NEPA reviews**
  - Most agency procedures incorporate *Seven County*'s holding that an agency need not consider impacts "remote in time, geographically remote, or the product of a lengthy causal chain," or those that "the agency has no ability to prevent due to limits of its regulatory authority, or that would occur regardless of the proposed action, or that would need to be initiated by a third party"
- **Courts have invoked _Seven County_ when rejecting challenges to infrastructure projects**
  - ***Sierra Club v. FERC* (D.C. Cir.)**: Rejected challenge to Saguaro border-crossing pipeline approval, noting that FERC has substantial discretion to draw the line with respect to the scope of its review, and it did not have to consider impacts from an upstream intrastate pipeline outside FERC's regulatory authority
  - ***Ctr. for Biological Diversity v. BLM* (9th Cir.)**: Rejected, in part, NEPA challenge to oil & gas lease sales in Alaska, noting BLM's "significant discretion" to frame its alternatives analysis
  - ***Friends of the Everglades v. DHS* (11th Cir.)**: Staying preliminary injunction against "Alligator Alcatraz," finding no "major federal action" and emphasizing NEPA's role as a procedural statute, even where agency conducted no environmental review

# AGENCY PRACTICE: SPOTLIGHT ON FERC

- **Minimal change to NEPA regulations; staff manual with procedural updates**

- **Opportunity for NEPA Streamlining under the One Big Beautiful Bill?**
  - 6-month EA and 12-month EIS compared to historical FERC timelines
  - CEQ's fee compared to FERC's third-party environmental consultant practice

- ***Seven County* appearances in recent FERC orders**
  - ***Venture Global CP2 LNG, LLC* (2025):** Asserting FERC is entitled to substantial deference on its geographic scope of review and its decision not to model LNG terminal marine source emissions
  - ***Transcontinental Gas Pipeline Co.* (2025):** Rejecting challenge to pipeline because FERC is not required to assess indirect downstream emissions from the shipping or use of natural gas
  - ***Rover Pipeline LLC* (2025):** Approving pipeline project and noting that indirect impacts of potential RNG contaminations are separate projects outside FERC's authority not required to be considered

# Understanding and Mitigating Litigation Risk

# UNDERSTANDING LITIGATION RISK

- **Streamlined procedures can lead to faster timelines now, but may invite litigation later**
  - Sophisticated project opponents are looking for test cases to litigate against the first wave of projects emerging from these new procedures
  - Similar scrutiny of agency practice in issuing guidance documents outside of notice-and-comment
  - A different administration could pause or revisit authorizations for streamline-permitted projects, potentially interrupting construction or operation
- **NEPA litigation to *shift*—and not *disappear*—as opponents may increasingly challenge projects on substantive grounds or craft novel challenges to different kinds of permits**
  - With varied NEPA procedures across agencies, opponents may test new (and old) theories, or reframe claims of inadequate environmental review under substantive statutes
  - Even with judicial deference to agency decision-making (which is itself subject to some limits, as seen in *Loper Bright*), challenging every permit gives project opponents more chances to win
  - Project opponents were already using these tactics against pipeline and wind projects before Administration policy shift
    - Recent midstream projects and offshore wind projects have seen challenges under the Clean Water Act, Clean Air Act, Endangered Species Act, Marine Mammal Protection Act, National Historic Preservation Act, and more

# UNDERSTANDING LITIGATION RISK

- **Judicial review standard in *Seven County* may help agencies and project developers prevail in litigation**
  - "Substantial deference" makes it harder for project opponents to win on "fly specking" challenges to NEPA documents, or issues of scope such as discussion of upstream and downstream impacts, like greenhouse gas emissions
  - But under a different administration, agency decisions to include those impacts would get deference
- **Courts may think twice before granting vacatur or stays**
  - Vacatur or stays of key permits needed for construction or operation can be devastating for large infrastructure projects
    - ***Save the Colorado v. Semonite* (D. Colo):** Clean Water Act Section 404 permit for a dam construction project vacated on Clean Water Act, NEPA, and Administrative Procedure Act grounds
  - But *Seven County*'s statement that deficient NEPA documents "may not necessarily require a court to vacate the agency's ultimate approval of a project" may change things
    - ***Alligator Alcatraz*:** 11th Circuit cited to *Seven County* in overturning a preliminary injunction sought on NEPA grounds

# "ENERGY EMERGENCIES" & INFRASTRUCTURE

- **Following the Administration's *Declaring an Energy Emergency* EO, agencies have identified and applied emergency procedures for certain energy projects**
  - Army Corps: expedited permitting procedures for energy projects on request, with tight timelines for consultations with other agencies
  - Interior: emergency procedures under NEPA, the Endangered Species Act, and National Historic Preservation Act, for energy projects (e.g., 14-day EA and 28-day EIS)

- **Projects using emergency procedures may face increased litigation risk**
  - Project opponents may argue that the Executive Order's emergency findings do not align with emergency provisions in existing statutes or regulations
  - Opponents may focus limited resources on challenging projects permitted under emergency procedures
  - Projects not yet operational before a future change in administration could face political risk if a future administration halts construction to assess whether streamlined environmental reviews were adequate

# MITIGATING LITIGATION RISK – WHAT CAN YOU DO?

- **Carefully consider whether to participate in emergency permitting procedures**
  - Weigh benefits of expedited permitting against potential increase in litigation risk
  - Consider “middle of the road” approach that expedites timelines while complying with ordinary-course procedural steps
- **Develop a strong administrative record**
  - Build record with an eye to the kinds of challenges that opponents might bring
  - Encourage agency to document its findings and rationale as to NEPA and underlying substantive law
  - Engage with agency staff early and often before truncated timelines begin
  - Consider including a strong analysis that follows past roadmaps to defensible permits
- **Prepare for creative or novel litigation strategies by opponents**
  - Expect litigation over previously “routine” state and federal permits, and commit resources accordingly

# MITIGATING LITIGATION RISK – WHAT CAN YOU DO?

- **Remain vigilant about adhering to the process**

  ***Center for Biological Diversity v. BLM* (9th Cir. 2025)**

  - Opponents challenged BLM's approval of oil and gas projects in Alaska, alleging a deficient alternatives analysis
  - Court noted that BLM's analysis is owed "substantial deference," and the judiciary's only role is to confirm that the agency addressed feasible alternative
  - BUT: 9th Circuit remanded BLM's approval; BLM could use the "full field development" standard to narrow the range of alternatives considered, but it couldn't choose an alternative that didn't follow this standard without explaining or justifying its reasoning
  - Agencies are still bound to follow procedure even when entitled to greater deference

- **Provide information to help agencies develop the record and document their decisions and rationale**
  - Consider building record to support multiple layers of defense to uphold the agency's review on contentious topics like climate change, upstream and downstream emissions, and environmental justice

# Thank you.

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