

Federal Regulations &
Key Legal Updates
WPPA Environmental
Seminar

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Loper Bright Update 603 U.S. 369 (2024)

- “*Chevron* is overruled.” Biggest impact so far is on NEPA (to be discussed). Also, to a lesser extent, CWA (also to be discussed).
- State law:
 - *Rosehill v. Hawai’i Land Use Comm’n*, 556 P.3d 387, 404 (Haw. 2024).
 - *Centurylink Commc’ns, LLC, v. Wash. Utils. and Transp. Comm’n*, 2025 WL 2306209 *9 n. 20 (Wash. Ct. App. Aug. 11, 2025).
- In Practice



San Francisco v. EPA, 604 U.S. 334 (2025)

- Question Presented: Whether the CWA allows EPA (or State) to impose generic prohibitions in NPDES permits that subject permit holders to enforcement for exceedances of WQS without identifying specific limits to which their discharges must conform.
- Ruling: Narrative “end-result” requirements exceed EPA’s authority under the CWA.
- Broader trend of SCOTUS ruling against EPA.

San Francisco v. EPA, 604 U.S. 334 (2025)

- 33 U.S.C. §1311 “Effluent Limitations”
 - Federal Water Pollution Control Act (WPCA) → Clean Water Act
 - Need to dictate what is required in the permit.
 - Carrot: Federal Permit Shield; Stick: Enforcement
 - Multiple dischargers
- *Loper Bright*
- Dissent
- What happens when EPA doesn’t have the information to develop effluent limitations?
- What happens now?

Amici on behalf of SF:
Public Wastewater and
Stormwater Agencies and
Munis, Local Gov’t Legal
Center, Am. Farm Bureau,
Am. Gas Assoc., Am.
Petroleum Institute, and
more. . .

Amici on behalf of EPA:
State of California, State of
Washington (and 11 other
states), Columbia
Riverkeeper, NRDC,
Conservation Law
Foundation, Sierra Club,
and more . . .

Clean Water Act ("CWA")—Post- Sackett in Washington

- A U.S. Supreme Court case—*Sackett*—reduced waters of the U.S. ("WOTUS") subject to regulation under the CWA
- Washington state regulates "waters of the state"
- Less WOTUS = more waters in Washington only regulated by the state
- Ecology proposing new permitting program for projects that could alter or impact waters of the state—"State Waters Alteration Permit" program

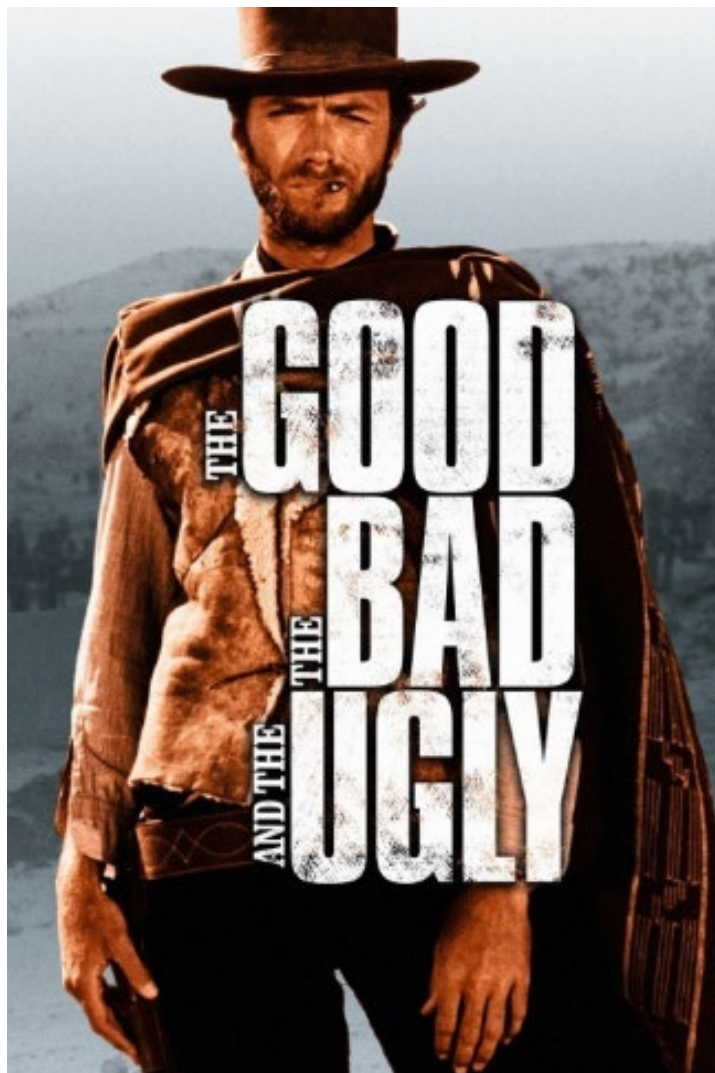


National Environmental Policy Act (“NEPA”)—Background

- Requires review of environmental impacts for all “**major Federal actions significantly affecting the quality of the human environment**”
- Procedural statute
- Different types of review: categorical exclusion, environmental assessment, environmental impact statement
- Foundational environmental law
- Permitting reform

NEPA Timeline

- 1970: NEPA signed into law
- 1970/1977: Executive Order 11514, amended by Executive Order 11991
- 1978: Council on Environmental Quality (“CEQ”) NEPA regulations 40 CFR 1500-1508
- 1984, 1986, 2005: CEQ NEPA regulation amendments
- 2020: Trump CEQ final rule
- 2022: Biden Administration (“Phase 1”) final rule
- 2023: NEPA amended by Fiscal Responsibility Act
- 2024: Biden Administration (“Phase 2”) final rule
- 2025: CEQ regulations rescinded; statute amended



NEPA— *What's
next for CEQ?*

What's next for NEPA and CEQ?

The Good	The Bad	The Ugly
<ul style="list-style-type: none">• Benefits to a clean slate• Opportunity to influence what comes next	<ul style="list-style-type: none">• Risk of agency confusion and delay• Ongoing uncertainty	<ul style="list-style-type: none">• Interagency inconsistency• Heightened risk of legal challenges?

NEPA—Seven County

- U.S. Supreme Court’s decision reins in NEPA by:
 - (1) clarifying the “substantial judicial deference” owed to agencies in determining the scope of NEPA documents, and
 - (2) limiting agencies’ obligation to evaluate potential environmental impacts of projects upstream and downstream from the project under review (especially where an agency has no authority or jurisdiction over those projects)
- Decision is expected to have **significant implications** for the scope of future NEPA reviews and challenges to agency NEPA compliance—particularly for energy-related infrastructure projects which have faced court challenges based upon claims that the reviewing agency violated NEPA by failing to fully consider “upstream” or “downstream” impacts that are not part of the project being reviewed

NEPA—Agency Implementing Regulations and Guidance

- Late June/early July, many departments and agencies issued rulemakings and guidance re: NEPA implementation
- Response to EO 14154 and CEQ's rescission of the government-wide NEPA regulations

<u>DOE</u>	<u>FERC</u>	<u>DOI</u>	<u>Army Corps</u>	<u>USDA</u>
• <u>Interim final rule & implementing procedures</u>	• <u>Final rule & staff guidance</u>	• <u>Interim final rule & handbook</u>	• <u>Interim final rules</u>	• <u>Interim final rule</u>

NEPA—Agency Changes Cont.

BLUF (Bottom Line Up Front): Potential efficiency benefits at the cost of greater uncertainty and the potential for inconsistent implementation across agencies.

Moving from regulations → non-binding guidance

- Creates more flexibility
- Also creates uncertainty (i.e., mid-review shifts in agency direction or procedures + changes in future administrations)
- Increased focus on Categorical Exclusions
- Emphasis on streamlining measures (deadlines and page limits)
- Narrower NEPA applicability (“major” and “federal”)
- Narrower scope of analysis (*Seven County*)
- Reduced public and tribal engagement

Advantages

- *Faster NEPA review!!*
- Still issues with “start” trigger for EISs—but expedited process may help
- Applicants control timeline “start” trigger for EAs

Limitations

- Does not address other permitting issues (ESA, NHPA, NTPs, etc.)
- May be issues with calculating cost
- Potential issues with CEQ capacity
- Limited teeth to enforce deadlines

Neutral

- Many project developers already cover the cost of NEPA review

NEPA—Expediated for a Fee

- The One Big Beautiful Bill Act contains a statutory amendment to NEPA
- This amendment provides an optional expedited NEPA review for a fee
- Applicants can choose to pay 125% of the estimated cost of preparing a NEPA EA or EIS up front for an expedited review—180 days for EAs and 1-year for EISs

Endangered Species Act ("ESA")— Background

- The Endangered Species Act ("ESA") prohibits the "take" of endangered species—this prohibition can be applied to threatened species
- The ESA statute defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"
- A person can receive authorization to incidentally take an ESA-listed species through the Section 7 consultation process or a permit issued pursuant to Section 10
- By regulation FWS and NMFS (the "Services") defined "harm" as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering"
 - Regulation upheld by a 1995 Supreme Court decision which found the Services inclusion of significant habitat modification to be reasonable

ESA–Services Proposed “Harm” Rule

- The Services [published a notice of proposed rulemaking](#) that would rescind the ESA regulatory definition of “harm” which incorporates habitat modification or degradation into the ESA statutory definition of “take”
- This would *narrow* the definition of take given the removal of habitat modification and the apparent focus on acts directed immediately and intentionally against a particular animal
- This would reduce liability exposure for potentially prohibited take and would likely result in narrower limitations on measures that could be required to “minimize” the impact of incidental take authorized by Section 7 or “minimize and mitigate” the impact of take authorized by Section 10
- This would apply prospectively and would not affect already granted permits

ESA–Harm Rescission Implications

- Without a regulatory definition or further guidance, there would be some uncertainty on the scope and interpretation of “take”—this could result in increased litigation
- A subsequent administration could change the regulation again
- If finalized, any new Incidental Take Statements accompanying a biological opinion are likely to not include take coverage for habitat impacts
 - This could cause some confusion/exposure if the next administration restores habitat impacts to the definition of harm
- Timing? Legislation?

Questions

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