Infrastructure and Energy Projects on a Rulemaking Rollercoaster Ride

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The Bureau of Land Management "simply engineered a process to ensure a preordained conclusion," declared District Judge Yvonne Gonzales Rogers in an opinion striking down the Trump administration's rescission of the Obama-era Waste Prevention Rule, aiming to reduce emissions from oil and gas production on BLM lands.

In resolving a legal battle between California, New Mexico, and environmental groups on the one hand, and Wyoming, oil and gas organizations, and the federal government on the other, the judge found that BLM failed to adequately consider public health impacts, especially for tribes, and underestimated climate consequences by improperly relying on a purely domestic metric for measuring the social cost of carbon.

Professionals along for the ride should expect ups and downs ahead

But before the ink dried on Gonzales Rogers's opinion, a Wyoming federal judge revived a challenge to that very same Obama-era rule — making this another case of judicial whiplash affecting the Trump administration's infrastructure and energy agenda. Over the past months, proponents of infrastructure and energy projects have been on a regulatory rollercoaster ride that is unlikely to slow down in the months ahead as the courts grapple with ongoing and likely challenges to key Clean Water Act and National Environmental Policy Act rules.

Earlier this spring, in *Northern Plains Resource Council v. Army Corps,* a case challenging the issuance of CWA permits for the Keystone XL pipeline, District Judge Brian Morris gave a remedy that could impact all utility infrastructure developers. Morris vacated Nationwide Permit 12, which authorizes certain discharges of dredged or fill material associated with utility lines and associated facilities, including oil and gas pipelines, based on the corps' failure to initiate consultation under Section 7 of the Endangered Species Act. The court found "resounding evidence" that discharges authorized by NWP 12 may affect endangered and threatened species and that the corps could not rely on a "general condition" requiring a preconstruction notification to the corps if a permittee believes an activity "might" affect listed species or habitat.

The district court subsequently modified its remedy to apply only to new oil and gas pipeline construction, but the order was still nationwide in scope. When the Ninth Circuit denied emergency motions for a stay pending appeal, the Supreme Court stepped in. In an extraordinary move, the Court lifted the nationwide injunction, limiting the ruling to the pipeline.

Meanwhile, practitioners are awaiting a proposal from the corps, which has been sitting with OMB since January, on the "Reissuance and Modification of Nationwide Permits." Whether and how the proposed rule will address compliance with the ESA is unclear. And observers are closely watching what, if anything, the corps will do on remand in an effort to shore up NWP 12, including whether it will initiate a new consultation round.

In June, EPA released the final rule overhauling its regulations guiding states' and authorized tribes' issuance of water quality certifications under Section 401 of the CWA. The administration touts this rulemaking as a key component of its efforts to expedite infrastructure permitting. The use of the Section 401 review authority by states and tribes to halt construction of infrastructure projects has been hotly contested, for example, with respect to interstate natural gas pipelines and hydropower projects.

The rulemaking claims to provide certainty and require timely decisions. In the short run, however, it may lead to increased litigation and in some cases additional delays in project implementation. As expected, attorneys general from California, New York, and other states recently asked a federal judge to strike down the rule, alleging that it violates precedents interpreting the statute.

As if this were not enough, in July the White House Council on Environmental Quality finalized its overhaul of NEPA's implementing regulations. CEQ makes changes to nearly every section of the regulations, which were last comprehensively updated in 1978. CEQ managed to complete this historic rulemaking in only six months despite receiving over a million comments.

Among other things, critics claimed that deletion of the requirement to study "cumulative impacts" of agency actions would drastically scale back consideration of climate change in NEPA reviews. CEQ included language designed to address the impact of climate change on proposed actions — but did little to allay concerns that the new rule would curtail consideration of the impacts of proposed actions on climate. Largely ducking the issue, CEQ noted that it was not yet ready to finalize its proposed NEPA guidance on greenhouse gas emissions, leaving these important issues for another day.

Environmental practitioners are holding on to their hats as the wild ride continues.