NEPA Updates

NEBC: Business and the Environment

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Seven County: A Course Correction

Scope of the Effects Analysis

- Reasonably foreseeable effects
  - Effects that are separate in ***time*** or ***place*** from the proposed action need not be analyzed
  - Need not analyze effects that fall outside the agency's regulatory authority

"NEPA has transformed from a modest procedural requirement into a blunt and haphazard tool . . . . Some project opponents have invoked NEPA and sought to enlist the courts in blocking or delaying even those projects that otherwise comply with all relevant substantive environmental laws."

Seven County: A Course Correction

Substantial Deference to Agencies

- NEPA says that an EIS should be "detailed"
  - Which environmental effects to study
  - Which alternatives to consider
  - How much detail to include

"Some courts have strayed and not applied NEPA with the level of deference demanded . . . Those decisions have instead engaged in overly intrusive (and unpredictable) review in NEPA cases. Those rulings have slowed down or blocked many projects and, in turn, caused litigation-averse agencies to take ever more time and to prepare ever longer EISs for future projects."

Seven County: A Course Correction

Remedy for a Deficient NEPA Analysis Should Not Automatically be Vacatur

- Minor flaws or omissions do not require vacatur unless they would have affected the agency's final decision
- Not whether the EIS itself is inadequate, but whether the **agency's final decision was reasonable and reasonably explained**

"A 1970 legislative acorn has grown over the years into a judicial oak that has hindered infrastructure development 'under the guise' of just a little more process."

Anticipated Implications of *Seven County*

- How will it be treated by lower courts?
- How will it be treated by agencies? Will agencies:
  - Analyze a more limited scope of effects?
  - Limit analysis of climate related effects (e.g. GHG emissions)?
  - Prepare shorter EISs?
  - Complete reviews more quickly?

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Subsequent Case Law

- Adherence to *Seven County*
- Largely upholding agency decisions
- Largely not vacating agency approvals when the NEPA analysis is flawed

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