The Litigation Hydra of Interim Final Rules:

How CEQ's attempt to streamline NEPA through emergency rulemaking risks deeper legal chaos

By Elizabeth McCarthy

The Trump administration claims there's an emergency: federal environmental regulations are too burdensome, and agencies need relief immediately. On his first day in office, President Trump signed Executive Order 14154, Unleashing American Energy, revoking the Carter-era directive that gave the Council for Environmental Quality (CEQ, the Council) authority to issue binding regulations under the National Environmental Policy Act (NEPA). In its place, Trump directed the Council to eliminate those regulations and replace them with non-binding guidance.

Audaciously and despite legal risk, the Council issued an interim final rule (IFR) that removed its 1978 NEPA regulations. The Council also distributed a memo to agencies—which we only know about because it leaked—instructing agencies to withdraw their NEPA-implementing regulations and revise internal NEPA procedures as quickly as possible, using interim final rules. The move aims to rapidly implement the President's energy order by invoking emergency authority, usually reserved for genuine crises, to bypass the usual public comment process. Skipping public comment lets the Council push agencies to act fast and cut through the bureaucracy that slows normal rulemaking.

However, this strategy is likely to backfire. The problem isn't just that the Council's unified framework fractured into agency-by-agency procedures. The council invoked "good cause" to eliminate its regulations, bypassing a standard public comment procedure. The Department of Energy followed, issuing its own interim final rule. So did the departments of the Interior and Agriculture, among others, each claiming that administrative urgency justifies skipping standard rulemaking. The result is a litigation hydra: multiple agency frameworks, each adopted using dubious emergency shortcuts already being litigated in court. What was meant to expedite decision-making has instead invited greater procedural uncertainty and prolonged litigation. This whitepaper examines the historical context of CEQ and the recent Seven County decision, and argues that the rationale behind the 2025 IFR is fragile, opening up agencies and builders to more, rather than less, litigation.

The IFR chaos is already visible. In Nevada, the Bureau of Land Management (BLM) is approving the South Railroad mine—8,500 acres, four open pits—without publishing a draft environmental impact statement (EIS) for public comment. For 47 years, agencies published draft EISs to allow the public, tribes, and other federal agencies to identify problems and voice their concerns before final approval. BLM now claims its interim procedures make drafts optional for major projects. Those procedures rest on the Interior's IFR, which rests on the Council's IFR; both involve emergency authority to bypass public comment. Even agencies with independent NEPA authority, like the Department of Energy, have tethered their actions to the Council's interim rule—further entangling the government in a chain of questionable legal authority. Legal experts expect challenges to the entire chain. If courts find that the Council misused the "good cause" exemption—typically reserved by courts for emergencies such as natural disasters and immediate threats to public safety—the Interior's procedures will likely collapse, BLM's mine approval will probably become arbitrary and capricious, and every other project approval under this framework seems likely to fall into legal limbo.

This approach exposes the fragility of governing environmental review through executive action alone. Without congressional action to establish durable procedures and clear authority, NEPA implementation will continue to swing with each administration—and agencies, project sponsors, and courts will keep fighting over the same basic questions.

1. Congress Never Gave the CEQ Clear Regulatory Authority

Courts have long disagreed on the Council's role in NEPA. Congress created the Council within NEPA to oversee the federal government's NEPA implementation and ensure that agencies met NEPA's procedural requirements. But the statute left open how the Council was supposed to interact with the rest of the government. Some courts read the Council's guidance as merely advisory, carrying no binding effect on agencies. Others gave it persuasive weight, deferring to the Council's interpretations when resolving disputes. Because the Supreme Court never squarely resolved this question on the reach of the Council's authority, the Court's silence left each administration free to lean on executive orders.

President Carter sought to settle the issue in 1977 by granting the Council regulatory authority through an executive order, directing it to issue regulations that would make the EIS process more consistent and useful across federal agencies. But executive action can only go so far. Without a statutory anchor, the next administration can withdraw that authority, leaving the courts to decide what is or is not law. Interpretations swing with politics, as each administration governs by repeal and replace, and splinter in litigation as judges issue divergent rulings on nearly identical disputes.

The 1978 regulations issued after Carter's executive order aimed to bring consistency and clarity across federal agencies. However, their blanket approach imposed detailed mandates, rigid in form but weak in enforcement. Flaws became apparent quickly. The rules briefly required "worst-case" analysis (§1502.22), pushing agencies toward speculative scenarios that congested reviews and fueled litigation. The Council dropped the requirement in 1986, but broad obligations to analyze "direct, indirect, and cumulative" effects continued to expand review scope and fuel disputes over NEPA's limits.

The rules also never clearly defined “reasonable alternatives,” allowing agencies to frame the project’s purpose and need so narrowly that only their preferred option qualified. Courts repeatedly struck down these analyses for failing to consider a “genuine range of alternatives,” forcing costly rewrites.

Procedural complexity soon overwhelmed the framework. The council set a uniform baseline that agencies layered their own NEPA rules onto, introducing variation and increasing the surface for litigation. Efficiency measures like page and time limits were meant to impose discipline but had no enforcement mechanism, leaving them widely ignored. These weaknesses invited courts to expand NEPA’s reach and fueled the pendulum of reform—from the Trump administration’s 2020 rewrite to Biden's Phase 1 and 2 revisions and now the 2025 executive order and interim final rules.

NEPA’s framework has swung with each administration, and recent efforts at coordination have done little to steady it. Congress created the Federal Permitting Improvement Steering Council (Permitting Council) under the 2015 FAST-41 Act to streamline reviews for large infrastructure projects. Housed within the Executive Office of the President but separate from CEQ, the Permitting Council brings together senior officials from major permitting agencies to monitor project reviews and resolve bottlenecks. Yet the Permitting Council’s authority under FAST-41 has proven limited. It has improved transparency only at the margins and lacks the power to align NEPA procedures or enforce timelines across agencies. Its limited impact underscores how partial, executive-level fixes cannot substitute for a durable, statutory framework.

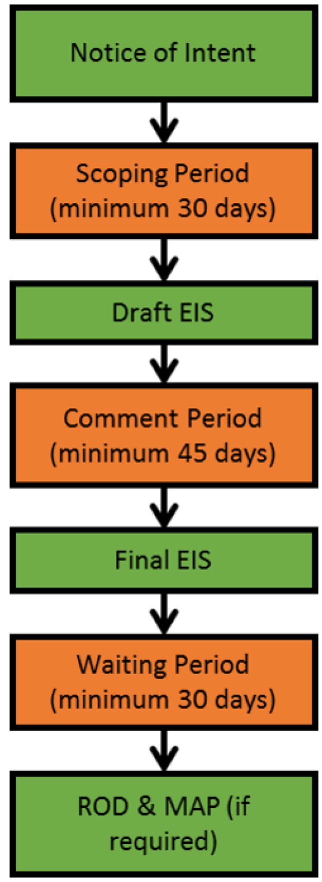
2. Courts Will Set the Limits Without Deferring to Agencies

The Supreme Court's recent *Seven County* decision provides agencies with substantial latitude for what they consider in a NEPA analysis. Even so, how lower courts will apply this guidance remains unclear, leading to potentially differing outcomes across circuits.

Rescinding the 1978 CEQ and agency implementing regulations and replacing them with nonbinding Council guidance, a set of disjointed interim rules, and agency-by-agency procedures is a bet on more litigation. Without a common regulatory framework, agencies must now interpret NEPA's requirements on their own, deciding independently what to review and how deeply to analyze impacts, whether to prepare a draft EIS, or if a CatEx is appropriate. Each of these decisions becomes a question of statutory interpretation around NEPA's most amorphous and subjective terms like "minimal Federal funding," "substantial control," "significant effects," and "major federal action."

And while agencies retain broad deference on judgments about what to cover within an EIS and how deeply under *Seven County*, they no longer receive deference on questions of how they interpret ambiguous statutory terms. That's because the Supreme Court also issued *Loper Bright* in 2024. Prior to *Loper Bright*, agencies would receive court deference for their interpretations of ambiguous statutory terms. But now courts have reclaimed authority to reject agency interpretations, accepting them only if the agency's interpretation is independently persuasive and consistent with the statute's text and purpose. Courts interpret NEPA's ambiguous statutory terms for themselves. This loss of deference guarantees that courts will keep writing NEPA policy one case at a time.

3. The Rationale Behind The 2025 IFRs Is Fragile



Amid growing legal uncertainty, the Council is relying on a rarely invoked shortcut: the interim final rule. In the typical case, agencies regulate by using the notice-and-comment process under the Administrative Procedure Act (APA). Under notice-and-comment rulemaking, public input is crucial in informing the agency of potential disputes. But the APA does offer agencies the chance to pass rules on a fast track through the IFR process. This is the so-called "good cause" exception to notice-and-comment. The "good cause" exception 5 U.S.C. §§ 553 (b)(B) and 553 (d)(3), allows an agency to bypass these steps if it finds that the notice-and-comment process is "impractical, unnecessary, or contrary to the public interest."

IFRs take effect immediately and bypass the standard public comment processes. But agencies usually use IFRs in rare and extreme circumstances, e.g. emergencies such as 9/11 or COVID, and courts generally share that narrow view of the appropriate use for IFRs. The agency must demonstrate an immediate need, such as public safety risk, a looming statutory deadline, or circumstances where delay would impose concrete harm. Policy preferences, administrative convenience, or self-created urgency are likely insufficient to establish good cause. Deploying an IFR to overhaul NEPA regulations is extraordinary and legally precarious.

While the 2025 IFRs aim to streamline the environmental review process, they may introduce new complexities and uncertainties. These rules could significantly impact the NEPA analysis, potentially altering the scope and depth of environmental reviews.

The Council treats President Trump's revocation of EO 11991 as the legal basis for eliminating the regulations and as the justification for skipping routine APA procedures, such as posting notice of and receiving public comments. By using the EO as both the reason for its unconventional implementation and the authority to justify this action, the Council creates a circular argument.

In Section III of the Council's IFR, *Basis for Implementing an Interim Final Rule*, the Council identifies "confusion" as an urgent harm that justifies a good cause exemption to proceed without public comment. However, much of the uncertainty rests on the Council's declarations about the validity of its rulemaking authority and its decision to invoke an IFR. The APA's good-cause exception applies when delay would make rulemaking impractical or contrary to the public interest.

The Council's argument to remove all NEPA-implementing regulations leans heavily on a single court decision that vacated the Phase 2 Regulations (*Iowa v. the Council*, 1:24-cv-00089 (D.N.D. 2025)), treating the court's questions about whether the regulations rest on a solid statutory foundation as proof that such regulations are unjustified. But this is speculative. Questions aren't findings. The decisions mentioned did not remove all the regulations that implement NEPA, only the very short-lived Phase 2 regulations. Therefore, the original regulations that agencies have relied on for decades should still apply.

For the Council, "confusion" amounts to administrative convenience: claiming agencies need the rule gone to avoid a messy interim. It asserts policy urgency by citing the need to immediately implement EO 14154 rather than wait for the normal rulemaking process. It invokes a self-created timing problem by treating the uncertainty that followed the repeal of EO 11991 as an emergency of its own making.

The Council reclassifies NEPA regulations as "procedural" in their IFR to justify bypassing full notice and comment. However, the Council and agencies treated the rules as binding on agencies for decades. Under the APA, rules that bind agency conduct are generally considered substantive rather than procedural. Such an abrupt reversal could be seen as arbitrary or capricious, undermining the action's legitimacy and exposing it to further legal challenge.

By rescinding all regulations, the Council left agencies without a clear framework for complying with NEPA, prompting several agencies to issue interim rules. However, it's important to distinguish between the Council's IFR and the follow-on IFRs issued by individual agencies. The Council's action applies government-wide, eliminating the 1978 NEPA regulations, citing Trump's EO as the directive triggering its repeal. The agency-level IFRs—from DOE, Interior, USDA, etc.—are separate rulemakings responding to the Council's directive.

Agencies frame their IFRs as updates to align with the Council's repeal of regulations and to incorporate the Supreme Court's Seven County decision, which they interpret as narrowing NEPA's scope to procedural requirements. They, too, invoke the APA's good cause exemption to bypass notice and comment, claiming that rescinding their old procedures without immediate replacements would "create a vacuum that would inflict immense uncertainty on agencies and regulated parties and potentially grind all projects to a halt." This, however, stretches the good cause standard. The agencies' urgency stems from the Council's policy decision, not a binding legal mandate or unavoidable circumstance, making their justification difficult to sustain.

Interim rules based on unsettled authority and weak justification keep agencies and builders in court and leave outcomes to judicial discretion.

4. Stop Governing by Lawsuit

Rules made without proper process or Congressional approval lack clear standards and invite legal challenge. Agencies have done just that by turning to interim final rules. Instead of setting policy through rulemaking, the government will continue implementing national infrastructure policy by addressing procedural disputes on a case-by-case basis.

A more durable balance won't come from another round of top-down reform but from courts narrowing remedies and giving agencies space to act. That shift will make environmental review more predictable without requiring Congress to rewrite the statute or imposing an overly generalized single framework.

As the House and Senate negotiate a permitting package this fall, lawmakers have a real opportunity to make these structural fixes tangible. Both parties agree on the need for faster, more predictable reviews, but that seems near impossible under today's fragmented framework. The practical path is straightforward. Congress should merge the Council and the Federal Permitting Improvement Steering Council (Permitting Council) into a single, independent entity with the authority to coordinate environmental reviews, drive timelines, and operate a unified NEPA data and software platform. The Council and the Permitting Council currently share overlapping mandates but lack the authority to ensure consistent agency procedures, fueling confusion for both courts and developers. Rather than issuing another set of rules, combining these bodies would streamline implementation across agencies and help courts and the public see what's working—and what's not. Its authority should rest in statute, not executive order, so it endures beyond any one administration. This would allow agencies and sponsors to easily coordinate, working on the same timeline and with the same data. That is how to deliver faster approvals, clearer obligations, and reviews that courts will uphold.

Leave it to executive orders and IFRs, and litigation will continue to write policy.