OSB Environment & Natural Resources Section

E–O U T L O O K

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2026 Environmental & Natural Resources Law Section
Issue 1 OREGON STATE BAR

Editors' Note: Any opinions expressed herein are those of the author alone.

EPA to Limit States' Role Under CWA in Federal Permitting

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A rule proposed by the EPA last month would reduce the ability of states to influence federal licensing and permitting decisions on purported water-quality grounds.

Under Section 401 of the Clean Water Act (CWA), whenever a planned project could result in a discharge into navigable waters, states and authorized tribes with CWA jurisdiction over the prospective discharge must issue, or waive, a water quality certification before a federal agency may grant a permit or license for such project. States have previously used this authority to impose conditions on, or outright block, federal permitting and licensing of various projects, frequently in the context of energy infrastructure. EPA's proposed rule would, among other things, tighten Section 401 certification timelines and limit the scope of certifications to discharges from point sources into waters of the United States, reversing a Biden-era rule that allowed states and tribes to much more broadly evaluate (and object to) the impacts of potential projects.

The proposed rule is part of the Trump Administration's effort to accelerate development of energy infrastructure. Comments on the proposed rule must be submitted by February 17, 2026.

Legal Background

Section 401 of the CWA is one example of the principle of cooperative federalism on which the Act as a whole is based. Any applicant for a federal license or permit to conduct an activity that "may result in any discharge into the navigable waters" must "provide the licensing or permitting agency a certification from" a certifying agency.[1] Under Section 401, the certification is required to "set forth" effluent limits or other conditions on the discharge to waters of the United States necessary to assure compliance with Sections 301, 302, 303, 306, and 307 of the CWA.[2] The certifying agency is most often "the State in which the discharge originates or will originate," though an authorized tribe may be the certifying authority on certain tribal lands, and the EPA may be the certifying authority on federal lands and certain other tribal lands.[3] A certifying agency may grant a Section 401 certification, deny it, waive certification (essentially waiving any objection to the proposed project), or grant the certification with conditions. Failure to act on an application "within a reasonable period of time," no more than one year, is deemed a waiver of certification.[4]

In practice, Section 401 certification comes up most often in U.S. Army Corps of Engineers (USACE) permits for discharge of dredged or fill material, Federal Energy Regulatory Commission (FERC) licensing for hydropower projects, and EPA-administered National Pollutant Discharge Elimination System (NPDES) permits in states that do not administer their own permitting programs and certain territories and Indian lands.[5]

States' Uses of Section 401 Authority

Section 401 certification can be a critical step of federal permitting and licensing, as denial of certification is essentially a death knell for a proposed project.[6] Thus, Section 401 gives states or authorized tribes significant authority over water quality impacts of a proposed project. States have used this authority to slow, block, or impose conditions on proposed projects, sometimes on grounds with arguably only an attenuated connection to water quality concerns.[7]

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[1] 33 U.S.C. § 1341(a)(1).

[2] 33 U.S.C. § 1341(a)(1), (d).

[3] 33 U.S.C. § 1341(a)(1); 33 U.S.C. § 1377 (laying out process for authorization for tribe's treatment as a state for purposes of, *inter alia*, CWA § 401).

[4] 33 U.S.C. § 1341(a)(1).

[5] The EPA issues all NPDES permits in Massachusetts, New Hampshire, New Mexico, the District of Columbia, and U.S. territories other than the U.S. Virgin Islands.

[6] 33 U.S.C. § 1341(a)(1).

[7] *See, e.g.*, *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 454 (2d Cir. 2018) (New York Department of Environmental Conservation denied Section 401 certification for natural gas pipeline because project proponent "failed to evaluate the downstream greenhouse gas emissions," though FERC determined that New York waived certification by taking too long to reach decision).

For example, in 2016, the New York State Department of Environmental Conservation denied a Section 401 certification to Constitution Pipeline Company, LLC with respect to a proposed 121-mile interstate natural gas pipeline, most of which would be in New York.[8] The Department explained that Constitution had failed to provide adequate information showing why trenchless stream-crossing technology was not feasible at each of the 251 streams across the state that the pipeline would need to cross.[9] The U.S. Court of Appeals for the Second Circuit rejected Constitution's challenge to New York's decision, effectively dooming the pipeline's license and permit applications before FERC and USACE.[10] In May 2025, Constitution attempted to revive the project with a new application to New York for Section 401 certification, though in November 2025 it withdrew its application after the state's continued insistence on additional required data and studies.[11] The next month, Constitution petitioned FERC to find that New York has waived certification of the pipeline.[12]

In 2017, the Washington State Department of Ecology denied a Section 401 certification to Lighthouse Resources, Inc., a coal supply chain company that was aiming to build and operate a new coal export facility called the Millennium Bulk Terminal on the Columbia River in Longview, Washington.[13] The facility would have facilitated the export of some 44 million metric tons of coal per year to Asian countries.[14] The state denied the certificate on the grounds that the project would cause "significant unavoidable adverse impacts" and that the state did not have "reasonable assurance" that the project would meet water quality standards.[15] After years of litigation, including an attempt by Montana and Wyoming to challenge Washington's denial of a Section 401 certification through an original complaint before the Supreme Court,[16] the Millennium Bulk Terminal ultimately was never built.

Even where states do not outright block projects, they often impose conditions on Section 401 certification that can significantly influence project development. In 2021, California, for instance, amended a certification originally issued with respect to a hydropower license in 2001 to add conditions requiring that the operator make various accommodations for whitewater recreation, including incorporating new whitewater

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[8] *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 91 (2d Cir. 2017).
[9] *Id.* at 96-97.
[10] *Id.* at 102-03.
[11] New York State Department of Environmental Conservation, *Constitution Pipeline Project*, https://dec.ny.gov/environmental-protection/facilities-in-your-neighborhood/constitution-pipeline-project (last visited Jan. 20, 2026).
[12] In the Matter of Constitution Pipeline Company, LLC, Docket Nos. CP13-499, CP18-5 (Dec. 19, 2025).
[13] *Lighthouse Res., Inc. v. Inslee*, 429 F. Supp. 3d 736, 738 (W.D. Wash. 2019).
[14] *Id.*
[15] *Id.* at 739 (internal quotation marks omitted).
[16] *Montana v. Washington*, No. 22O152 (U.S. 2020).

boating flows, providing new parking spaces for boaters and anglers, posting information on alternative camping opportunities, and consulting with a whitewater recreation nonprofit annually before scheduling whitewater flow releases.[17] In addition, states often grant Section 401 certifications on the condition that permittees or licensees implement wildlife mitigation measures—Oregon, for example, required that an applicant proposing to remove a dam provide and maintain fish passage throughout the removal process, mitigate impacts on certain fish species, and study and implement mitigation actions for the benefit of a species of turtle as the state "deems warranted," among many other conditions.[18] And Washington State routinely "outlines where sediment spoils can go" when ports seek permission to dredge a channel or waterway.[19]

Previous Rulemaking

To counteract states delaying, blocking, or otherwise influencing projects in these ways, the first Trump Administration issued a rule in 2020 that was the forerunner of the rule recently proposed by EPA. The 2020 rule narrowed the authority of states in what environmental impacts they could consider as part of their inquiries into Section 401 certification and impose more concrete time limits on state action.[20] States and environmental groups swiftly challenged the rule.[21]

Shortly after President Biden took office in 2021, the EPA signaled that it would reconsider the 2020 rule.[22] In 2023, EPA issued a new rule that returned in significant part to the 1971 regulation in place until the Trump Administration's 2020 rule—most notably, the 2023 rule allows states to consider the overall proposed activity's impact on water quality in considering Section 401 certification, not just the anticipated point source discharges alone.[23]

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[17] Cardno, *Pit 1 Hydroelectric Project 401 Water Quality Certification Amendment Draft Environmental Impact Report* (2021), www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/pit1_ferc2687/pit1_rdeir.pdf

[18] Oregon Dep't Env't Quality, *Clean Water Act Section 401 Certification for the Klamath River Renewal Corporation License Surrender and Removal of the Lower Klamath Project* (2018), https://www.oregon.gov/deq/FilterDocs/ferc14803final.pdf.

[19] Wash. Dep't of Ecology, *Focus on: Section 401 Water Quality Certifications* (2020), https://apps.ecology.wa.gov/publications/documents/2006014.pdf.

[20] *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42210 (July 13, 2020).

[21] *Illinois v. Wheeler (In re Clean Water Act Rulemaking)*, 60 F.4th 583, 590 (9th Cir. 2023).

[22] *Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29541 (June 2, 2021).

[23] *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66558 (Sep. 27, 2023).

Proposed Rule

That brings us to the rule proposed by EPA on January 15, 2026, which EPA acknowledges is largely a reinstatement of the 2020 rule issued under the first Trump Administration.[24] As justification, EPA primarily cites the Supreme Court's decision in 2024 to overturn *Chevron* deference,[25] necessitating a new agency interpretation of Section 401 of the CWA in light of the new framework for statutory interpretation.[26] But the rule may be best understood as one piece of the administration's broader agenda of accelerating infrastructure development, even where states object.[27]

The rule proposes the following changes to implementation of Section 401:

- **Scope of Certification**: Most significantly, the proposed rule would limit certifying authorities to considering the water quality impacts of point source discharges to waters of the United States, prohibiting consideration of and conditions regarding other water quality impacts as was allowed under the 2023 rule.[28] Thus, under the proposed rule, states generally would not be able to consider "tangential" project impacts like "increased water withdrawals, releasing pollutants into groundwater, increased erosion and sedimentation, reduced stormwater infiltration, disconnecting ecosystems," "harming endangered species," "hydrological changes," or "increases in impervious surfaces that result in high-velocity runoff events that can deposit sediment or other pollutants into waterways"[29]—EPA's view is that these cannot be considered because they are generally not direct impacts of point source discharges into navigable waters.
- **Federal Control of Application Components and Timing**: As part of a push to standardize the requirements for Section 401 certification packages, the proposed rule would remove elements of the current rule that allow states and tribes to define additional contents that must be submitted as part of a request for Section 401 certification.[30] The rule would also tighten the time a certifying authority has to make a certification decision. The default time is six months, unless the state and federal government agree to an extended timeline of up to one year.[31] States and authorized tribes also would not be able to ask for withdrawal and resubmission of

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[24] *See, e.g.*, 91 Fed. Reg. 2026 ("The 2020 Rule included regulatory text similar to what EPA now proposes . . . .").
[25] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).
[26] 91 Fed. Reg. 2023.
[27] *See, e.g.*, EO 14156, "Declaring a National Energy Emergency" (Jan. 20, 2025); EO 14241, "Reinvigorating America's Beautiful Clean Coal Industry" (Apr. 8, 2025); EO 14243, "Protecting American Energy From State Overreach" (Apr. 9, 2025); EO 14326, "Unleashing Alaska's Extraordinary Resource Potential" (July 31, 2025).
[28] 91 Fed. Reg. 2023.
[29] 85 Fed. Reg. 42252.
[30] 91 Fed. Reg. 2017.
[31] 91 Fed. Reg. 2021.

Section 401 certification applications,[32] as New York did twice with respect to the Constitution Pipeline to obtain significantly more time to review the certification application.[33]

- **Documentation of Conditions and Denials of Certification**: The proposed rule would standardize the required documentation and explanations from certifying authorities on rationales for imposing conditions on grants of certification and denials of certification.[34]
- **Limiting Modification of Certifications**: The proposed rule would make it more difficult to modify a Section 401 certification that has already been issued by requiring the federal government, state or other certifying authority, and applicant to agree on specific language for a modification before it may be made.[35]
- **Streamlining "Neighboring State" Input**: Section 401(a)(2) of the CWA provides a process by which neighboring states may also provide their input on a proposed project's potential water quality impacts upon a determination from the EPA that the project "may affect" waters in the neighboring states.[36] The proposed rule would make clear that the EPA can make "may affect" determinations categorically based on proposed projects' location, project types, and discharge types—potentially speeding up the process.[37] The rule would also require neighboring states to specifically explain their rationales for objecting to a project and set a clear timeline for hearings.[38]
- **Amending Process for Tribal Input**: Currently, tribes may seek "treatment as a state" status solely for purposes of issuing Section 401 certifications or neighboring state certifications; the proposed rule would remove the option for tribes to seek treatment as a state for purposes of Section 401 only, requiring tribes to instead seek the more general treatment as a state status under 40 C.F.R. § 131.8, which is a broader designation allowing a tribe to be treated as a state for purposes of setting water quality standards in addition to issuing Section 401 certifications.[39]

Comments on the proposed rule are due by February 17, 2026, although many states and other commenters have requested an extension of time to further consider the rule.

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[32] 91 Fed. Reg. 2021.

[33] *Constitution Pipeline*, 868 F.3d at 94; *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (finding states waived certification authority with respect to proposed hydropower project after over a decade of withdrawals and resubmissions of the project proponent's application).

[34] 91 Fed. Reg. 2030.

[35] 91 Fed. Reg. 2030-31.

[36] 33 U.S.C. § 1341(a)(2).

[37] 91 Fed. Reg. 2031-32.

[38] *Id.*

[39] 91 Fed. Reg. 2035-36.

Looking Forward

Considering the prolific litigation springing from the 2020 rule and the 2023 rule, EPA's proposed rule, if finalized, will almost certainly be challenged by some states and environmental groups, some of which have already expressed their opposition.[40]

One issue likely to arise in litigation is whether the proposed rule is consistent with *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*,[41] in which the Supreme Court held that the State of Washington could lawfully condition its grant of Section 401 certification for a hydroelectricity project on requiring the project to maintain a minimum stream flow imposed to ensure compliance with the state water quality standards adopted pursuant to CWA § 303. This holding rested on the Court's conclusion that "§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[42] But imposing a minimum stream flow condition for the benefit of the designated use of a river as fish habitat does not appear to be permissible under the proposed rule, setting up an arguable conflict with *PUD No. 1*.[43] Indeed, a district court vacated the 2020 rule on the basis that "[t]he revised scope of certification that EPA promulgated takes an *antithetical* position to *PUD No. 1* without reasonably explaining the change," though the decision was later reversed because the district court had vacated the rule without first formally holding it unlawful.[44]

This time around, the EPA is likely to rely on the fact that the Supreme Court's decision in *PUD No. 1* relied on now-defunct *Chevron* deference.[45] Indeed, the proposed rule criticizes the analysis by the majority in *PUD No. 1* and sets forth an in-depth alternative statutory interpretation of Section 401 in light of its text, structure, and history, in preparation for future legal challenges.[46]

This article originally published on February 5, 2026.

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[40] Alexandra Trimble, *Trump EPA Undercuts State and Tribal Authority Under Clean Water Act*, Earthjustice (Jan. 20, 2026), https://earthjustice.org/press/2026/trump-epa-undercuts-state-and-tribal-authority-under-clean-water-act; Andrew Scibetta, *EPA Proposal Would Curb States' and Tribes' Clean Water Act Oversight*, NRDC (Jan. 13, 2026), https://www.nrdc.org/press-releases/epa-proposal-would-curb-states-and-tribes-clean-water-act-oversight.

[41] 511 U.S. 700 (1994).

[42] *Id.* at 712.

[43] *See* 85 Fed. Reg. 42256 (in 2020 final rule, EPA stated it "agree[d] that, in some cases," "requiring minimum in-stream flows is beyond the scope of water quality requirements" and "fish and wildlife impacts are not within the proper scope of section 401, because those impacts are more appropriately addressed under other federal statutes and regulations").

[44] *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1025 (N.D. Cal. 2021) (emphasis in original), *rev'd*, 60 F.4th 583 (9th Cir. 2023) (district court lacked authority to both grant voluntary remand of 2020 rule and vacate it without first holding it unlawful).

[45] *PUD No. 1*, 511 U.S. at 712; *id.* at 915 (Thomas, J., dissenting) (criticizing majority for invoking *Chevron*).

[46] 91 Fed. Reg. 2025-26.

Department of the Interior Finalizes Major Overhaul of NEPA Implementing Regulations

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Key Takeaways

- The Department of the Interior (DOI) has finalized a sweeping revision of its regulations implementing the National Environmental Policy Act (NEPA), marking one of the most significant changes to DOI's environmental review procedures since the Department first codified its NEPA regulations in 2008.
- While some provisions were retained, key changes include the transition of NEPA procedures to the DOI Handbook rather than the Code of Federal Regulations, new standards for environmental effect analysis, and opportunities for public comment at the discretion of a "responsible official."
- Project proponents and stakeholders must consider both the opportunities for increased efficiency and the reliability of these new procedures governing environmental review of proposed agency actions.

Background

DOI's final rule follows an interim final rule (IFR) issued on July 3, 2025,[1] and responds to several converging legal and policy developments. First, the Council on Environmental Quality (CEQ) rescinded its government-wide NEPA implementing regulations effective April 11, 2025,[2] following Executive Order 14154, "Unleashing American Energy," which revoked the executive order that had delegated NEPA rulemaking authority to CEQ.[3] Because DOI's prior NEPA regulations were expressly designed to supplement CEQ's regulations, the rescission necessitated that DOI adopt new standalone procedures. Second, the final rule aligns DOI's procedures with the 2023 amendments to NEPA enacted through the Fiscal Responsibility Act (FRA), which imposed mandatory deadlines and page limits for environmental documents. Third, the rule responds to the Supreme Court of the United States' 2025 decision in *Seven County Infrastructure Coalition v. Eagle County, Colorado*, which reiterated that NEPA is a "purely procedural statute" and refined

[1] National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (Jul. 3, 2025).
[2] 90 Fed. Reg. 10610 (Feb. 25, 2025).
[3] Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

the standard of judicial deference to agency judgments on scope of effects analysis required under the statute.[4]

The final rule is effective upon publication in the *Federal Register*. DOI has indicated that revised procedures will have no effect on ongoing NEPA reviews, where DOI, following CEQ guidance, will continue to apply preexisting procedures to applications that are sufficiently advanced.

Key Changes

Transition From Regulation to Handbook

The most fundamental change is DOI's decision to relocate the majority of its NEPA procedures from the *Code of Federal Regulations* to the *Department of the Interior Handbook: National Environmental Policy Act Implementing Procedures* (DOI NEPA Handbook). This change replaces agency interpretations of regulations, which are entitled to deference, with general guidelines that delegate significant discretion to officials for how to interpret and implement NEPA on a case-by-case basis. DOI explains that this shift, which returns the department to its pre-2008 approach, provides greater flexibility to adapt procedures in response to the rapidly evolving legal landscape.

Statutory Deadlines and Page Limits

The DOI NEPA Handbook incorporates the mandatory deadlines and page limits enacted in the 2023 NEPA amendments.[5] Environmental assessments (EAs) must generally be completed within one year of the triggering event, while environmental impact statements (EISs) must be completed within two years. EISs are limited to 150 pages, or 300 pages for actions of extraordinary complexity, with citations and appendices excluded from the page count. Congress provided project sponsors with a cause of action to seek judicial review if an agency fails to meet the deadlines for completion of environmental review.

Effects Analysis

The DOI NEPA Handbook reorients the analysis of environmental effects around the Supreme Court's guidance in *Seven County Infrastructure Coalition*, focusing on effects that are "reasonably foreseeable" and have a "reasonably close causal relationship" to the proposed action.[6] The handbook provides that bureaus "may, but [are] not required to by NEPA, analyze environmental effects from other projects separate in time, or separate in place, or that fall outside of the bureau's regulatory authority, or that would have to be initiated by a third party." DOI has moved away from the terminology of "direct,"

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[4] *Seven County Infrastructure Coalition v. Eagle County, Colorado*, 605 U.S. 168 (2025).

[5] 42 U.S.C. § 4336a.

[6] *Seven County*, 605 U.S. at 188.

"indirect," and "cumulative" effects, which DOI characterizes as artificial distinctions not found in the statute.

Under Section 1.2 of the DOI NEPA Handbook, decision-makers may also now formally weigh the degree to which an action will have "economic effects" against environmental impacts. This analysis can include aspects such as job creation and wages, property values, and other economic factors.

Public Participation

DOI's revised procedures reflect only those public participation requirements mandated by statute. NEPA, as amended by the FRA, requires agencies to solicit public comment in only one specific circumstance: when an agency issues a notice of intent to prepare an EIS.[7] DOI's procedures incorporate this requirement but do not mandate public comment on draft environmental documents or EAs. DOI explains that the CEQ regulations required more public involvement than the NEPA statute mandates. However, bureaus still have the authority to request additional public comments if they believe it is appropriate or useful, and DOI notes they have continued to do so voluntarily since the IFR was issued.

Provisions Retained in Regulation

DOI has retained a limited number of provisions in regulation at 43 C.F.R. Part 46, including emergency responses (Section 46.150); categorical exclusions and extraordinary circumstances (Sections 46.205, 46.210, and 46.215); applicant- and contractor-prepared environmental documents (Sections 46.105 and 46.107); and procedures for designating lead agencies and selecting cooperating agencies (Sections 46.220 and 46.225). The agency explains that it retained these provisions in regulation to ensure stability and provide a durable framework for tools that bureaus rely on to expedite reviews. See below for detailed information on how these retained sections changed.

1. **Categorical Exclusions**

The final rule provides that bureaus may rely on categorical exclusion determinations made by other agencies for substantially the same action without conducting their own extraordinary circumstances review, provided they document such reliance. Bureaus may also apply multiple categorical exclusions in combination to cover a proposed action composed of multiple action elements, provided they verify that each element is supported by a categorical exclusion and complete extraordinary circumstances review for the composite action as a whole.

[7] 42 U.S.C. § 4336a(c).

Section 46.210 lists departmental categorical exclusions, and the final rule reinstates categorical exclusions for hazardous fuels reduction activities using prescribed fire (up to 4,500 acres) and post-fire rehabilitation activities (up to 4,200 acres), which had been removed in the IFR.

2. Revised Extraordinary Circumstances

DOI has revised the list of extraordinary circumstances that preclude reliance on a categorical exclusion. The final rule removes the provision addressing actions that may have "highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources," which DOI found caused confusion and was misunderstood to mean that any controversy surrounding an action—rather than controversy about the nature or magnitude of environmental effects—constitutes an extraordinary circumstance. The rule also removes the extraordinary circumstances for actions that may violate a federal, state, local, or tribal law imposed for the protection of the environment, reasoning that legal compliance is distinct from the evaluation of environmental effects under NEPA. The extraordinary circumstance related to environmental justice was previously removed following the rescission of Executive Order 12898.[8]

3. Applicant-Prepared Environmental Documents

Section 46.107 establishes procedures for responsible officials to allow applicants or applicant-directed contractors to prepare EAs and EISs under bureau supervision, based on the FRA's requirement that agencies develop procedures to allow a project sponsor to prepare these environmental documents. Responsible officials retain discretion over whether to allow applicant preparation and remain responsible for the accuracy, scope, and content of the environmental document. Applicants must submit a professional integrity statement certifying that the analysis is prepared with professional and scientific integrity, as well as a disclosure statement specifying any financial or other interest in the outcome of the action. Bureaus must independently evaluate and verify that the environmental analysis meets applicable standards.

4. Lead and Cooperating Agencies

In response to public comments, DOI recodified provisions for designating lead agencies and selecting cooperating agencies. Lead bureaus must invite eligible federal, state, tribal, or local agencies to participate as cooperating agencies when developing an EIS and may do so when developing an EA. Requests for cooperating agency status cannot be arbitrarily denied, and any denial must be explained in the environmental document.

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[8] Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

5. **Emergency Responses**

Section 46.150 authorizes bureaus to take actions necessary to address imminent threats to life, property, or important natural, cultural, or historic resources without first preparing an environmental document or documenting use of a categorical exclusion. The final rule clarifies that NEPA's analysis and documentation requirements should not impede timely execution of emergency actions, though the responsible official should consider probable environmental consequences and take steps to mitigate reasonably foreseeable adverse effects to the extent practicable. For additional actions beyond those immediately necessary, alternative arrangements for NEPA compliance may be authorized.

Practical Implications

Project proponents and stakeholders should be aware of several practical implications. The transition to a handbook-based approach may provide DOI greater discretion to modify procedures without formal rulemaking, which could lead to evolving practices over time. Applicants may seek to take advantage of the procedures for applicant-prepared environmental documents, which can help ensure that project-specific information is incorporated efficiently and that document preparation stays on track. The statutory deadlines create both opportunities and obligations—project sponsors now have a judicial remedy if agencies fail to meet deadlines, but all parties should plan accordingly to meet the compressed timeframes. The reduced public comment requirements may accelerate reviews but could also leave environmental analysis vulnerable to challenges, including litigation over final decisions. Finally, stakeholders should monitor the DOI NEPA Handbook and bureau-specific guidance for updates, as changes to these nonregulatory documents may occur more frequently than changes to codified regulations.

This article originally published on February 25, 2026.

Oregon Plastic Packaging Recycling Law on Partial Hold Following Federal Court Ruling

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In a first-of-its-kind ruling on Oregon's Plastic Pollution and Recycling Modernization Act (RMA or the Act), U.S. District Court Judge Michael Simon on February 6 ordered the Oregon Department of Environmental Quality (DEQ) not to enforce the RMA against a trade association, the National Association of Wholesaler-Distributors (NAW), and its members. NAW filed suit last fall to block implementation of Oregon's revamped recycling program that assesses producers of packaged goods for the costs of recycling in Oregon. The injunction, however, only applies to NAW members and lasts only until the court issues a ruling following an expedited trial this July. Non-NAW members still must comply with the registration, data submission, and fee payment requirements of the RMA.

Background

Although Oregon's RMA is one of many state-level efforts to develop recycling alternatives after China and other foreign countries stopped accepting U.S. material, it is the farthest along in implementation. Oregon's law delegates to one or more state-approved producer responsibility organizations (PROs), which collect data from covered producers, issue assessments to each producer based on the reported weight and character of the packaging material shipped into Oregon, and use the funds collected from assessments to assist Oregon communities with recycling programs.

The statutory requirements for a PRO to obtain approval are significant enough that so far only one PRO—the Circular Action Alliance (CAA)—has been approved in Oregon. The CAA is a nonprofit formed by some of the largest producers of packaged goods in the world. CAA has not provided the basis for the fees it assesses, claiming it is proprietary and confidential, although DEQ has reviewed and approved the fees. Producers were required to enter into a contract with CAA, register with the program, and submit data. The contract provided for only private non-appealable arbitration should a dispute arise between CAA and a producer. Failure to register as a producer, submit data to CAA, or pay fees when due can result in DEQ levying penalties of $25,000 per day.

When covered producers began receiving CAA's fee invoices last July, some of the assessments exceeded the producers' profit margins. NAW, on behalf of its members who are subject to the RMA, filed a lawsuit in federal court in Portland alleging that the RMA violates the Commerce Clause of the U.S. Constitution because it discriminates against

out-of-state producers, unduly burdens national markets for products and packaging, and controls commerce occurring wholly outside Oregon; imposes unconstitutional conditions by requiring producers to contract with the sole PRO in order to do business in Oregon; and violates due process by subjecting producers to binding fee assessments with the sole avenue for relief being private, non-appealable arbitration.

NAW sought a preliminary injunction to bar DEQ from enforcing the RMA and to defer obligations of NAW members to pay fees under the Act. DEQ simultaneously moved to dismiss NAW's complaint. DEQ argued that the RMA does not discriminate against interstate commerce, impose unconstitutional conditions, or otherwise substantially burden interstate commerce. DEQ also argued that the RMA provides adequate procedural protections because DEQ oversees how CAA calculates fees and all regulations are subject to public notice and comment.

Hearing

At the February 6 hearing, Judge Simon opened by stating that he found this a "fascinating dispute." During the three-hour hearing, the judge questioned counsel for both sides about the scope of the program, Oregon's implementation of it, and the impact on producers. At the conclusion of the hearing, Judge Simon ruled from the bench, granting NAW's motion for a preliminary injunction. The judge said there were serious questions regarding Oregon's RMA, there was a substantial likelihood of irreparable harm because of substantial penalties for non-compliance, and the balance of equities sharply tipped in NAW's favor, particularly because he was setting a July 13, 2026, trial on the merits.

Impact

The judge's ruling only bars DEQ from enforcing the RMA against non-compliant NAW members. Any covered producer who is not an NAW member still must register with CAA, submit data of its 2024 covered packaging, and pay fees assessed by CAA. Judge Simon had asked DEQ whether it would suspend accrual of penalties or enforcement orders pending trial, but DEQ declined because it would effectively suspend the entire program. DEQ's lawyer did say that the agency would not assess penalties against non-compliant NAW members retroactive to the February 6 hearing should DEQ prevail at trial. That, however, does not apply to non-NAW members.

This article originally published on February 10, 2026.