

the DOD NEPA Guidance could be ignored by some agency staff because guidance documents are not legally binding. Among other problems, the DOD NEPA Guidance:

- **Jettisons Long-Standing Public Comment Requirements:** Under all prior NEPA regulations, agencies were required to publish a draft EIS and seek public comment on that draft. The DOD NEPA Guidance jettisons these requirements that are essential to meaningful public comment—a cornerstone of a NEPA review. Instead, the Guidance allows public comment “at any time that is reasonable in the process of preparing the EIS” and makes it clear that the Corps does not even have to publish a draft EIS.⁴ This effectively eliminates all public comment on a draft EIS, as it is not possible for the public, Tribes, or other federal and state agencies to provide meaningful comments on a document they have not seen.⁵ In short, the DOD NEPA Guidance could be used to turn public comment into little more than a check the box exercise.
- **Improperly Narrows the Scope of Review:** The DOD NEPA Guidance improperly narrows the scope of NEPA review. For example, the Guidance states that “effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain” and repeatedly encourages the Corps to limit the “consideration of any environmental effects” that will occur outside the defined project.⁶ However, this approach was explicitly rejected by the Supreme Court’s recent decision in *Seven County Infrastructure Coalition v. Eagle County*, which recognizes that “the environmental effects of the project at issue may fall within NEPA even if those effects might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas.”⁷ Robust analysis of such effects is critical for understanding the impacts of a civil works project.
- **Fails to Provide Important Guidance:** The DOD NEPA Guidance fails to provide direction on many important NEPA requirements (direction that was previously included

⁴ DOD NEPA Guidance at 12 (Draft feasibility reports with an integrated or attached EA and FONSI (as appropriate) or EIS can be circulated to agencies, organizations, and members of the public known to have an interest in the study for comment.”); DOD NEPA Guidance at 17 (“During the process of preparing the EIS, DoD may publish such draft, pre-decisional materials as in its judgment may assist in fulfilling its responsibilities under NEPA.”); DOD NEPA Guidance at 19 (“During the process of preparing any environmental document provided for by these procedures, DoD may publish such draft, predecisional materials as in its judgment may assist in fulfilling its responsibilities under NEPA and this guidance.”)

⁵ The DOD Guidance, like the prior Corps NEPA rules, does require the Corps to request public comment when it issues a Notice of Intent to prepare an EIS. DOD NEPA Guidance at 11. This could, however, be interpreted by the Corps to constitute the public comment required “at any time that is reasonable in the process of preparing the EIS.”

⁶ DOD NEPA Guidance at 25, 15, 8.

⁷ *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. ____ (2025) (decided May 29, 2025, Supreme Court Document 23-975).