The 2023 Amendments to NEPA tweak current regulations in various ways in the name of permitting reform. Those changes make it easier to exempt smaller projects or cover them with programmatic impacts statements. The key issue, however, is going to be the effectiveness of new section 107, the main provision aimed at large-scale projects like transmission lines. That makes it crucial to understand how section 107 changes current requirements.

With that in mind, I sat down to see how section 107 compares with the pre-Trump CEQ regulations and the Trump regs. In today's post, I'll discuss the changes relating to the role of lead agencies. In later posts, I'll discuss other changes made by section 107.

There are multiple changes in the provisions governing lead agencies. Here are some of the main ones.

Modified conditions for use of lead agencies*.*

Section 107 calls for appointment of a lead agency when there are multiple agencies "participating in an environmental review or authorization of an action." (This is not explicit in section 107, which speaks of multiple participating agencies, but follows from the definition of "lead agency" in section 111(8)). In one respect, the conditions for using a lead agency have broadened, from only environmental impact statements (EISs) in the pre-Trump regs, to EIS's plus complex environmental assessments (EAs) in the Trump regs, to all EISs and EAs under section 107.

In another respect, the use of lead agencies actually seems to be curtailed. Under both earlier regulations, a lead agency was called for when more than one agency: "(1) Proposes or is involved in the same action; or (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity." The first condition seems to be roughly equivalent to the new language in section 107. But the second condition has disappeared entirely. Presumably, any use of lead agencies in the second situation would happen purely under a CEQ regulation, and therefore would not be subject to the other provisions of section 107, such as the statutory deadlines or possible delegation of environmental reviews to project applicants.

More limited participation by other agencies.

In section 107 as in the earlier regs, agencies other than the lead agency are called cooperating agencies. The earlier regs give cooperating agencies an active role in preparation of environmental reviews. They required the lead agency to "[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent practicable." That has been replaced by a much weaker requirement that the lead agency "give consideration to any analysis or proposal created by a cooperating agency."

On the other hand, coordinating agencies have greater flexibility in another respect, because the old regs required them to participate in the environmental analysis at their own expense or provide staff support at the request of the lead agency. Those requirements are gone.

Coordinating agencies retain the right to submit comments on a schedule determined by the lead agency. That could be particularly important when an environmental review is prepared by a project applicant, since coordinating agencies might not be involved in any earlier stage of the process.

Assessment.

Centralizing more of the review may lead to greater efficiency in preparing environmental reviews. To the extent that can be done without too much loss of quality or opportunities for public participation, that would be a desirable outcome.

On the other hand, it has some significant drawbacks. First, It reduces the expertise available to the lead agency and the buy-in of the cooperating agencies. Second, the stakes are higher in terms of which participating agency gets designated as lead. That could produce more disputes that will then get pushed up to CEQ to decide. Third, if they are not happy with the results, cooperating agencies may submit comments that will make it harder to defend the content of the environmental review in court. Or they may still have the ability to prepare their own environmental reviews — section 107(b) calls for a single environmental review document "to the extent practicable," leaving it open to coordinating agencies to claim authority to prepare their own reviews.

Finally, if they are unhappy with the review, cooperating agencies may also ignore the environmental review in making their own decisions about the project. For instance, if the Fish and Wildlife Service's views about impacts on endangered species are ignored, it may simply refuse to sign off on a "no jeopardy" finding for

the project.

In short, there are strong practical benefits to participation by coordinating agencies, at least under certain circumstances. It’s difficult to know whether the changes in the role of the lead agency are, on balance, desirable. Hopefully, CEQ regulations will be able to fine tune the new provisions to maximizing the benefits of the changes.