

How Justices' Ruling On NEPA Reviews Is Playing Out

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In the two months since the [U.S. Supreme Court issued](#) its highly anticipated May 29 decision interpreting the scope of agencies' review under the National Environmental Policy Act, lower courts and the agencies themselves are beginning to heed the court's call.

In *Seven County Infrastructure Coalition v. Eagle County, Colorado*, Justice Brett Kavanaugh, writing for the court, held that courts must defer to federal agencies in deciding the appropriate scope of their review of the environmental impact of proposed projects under NEPA.

The court's ruling vacated a [U.S. Court of Appeals for the District of Columbia Circuit](#) decision, which in turn had vacated the [Surface Transportation Board's](#) order granting the Seven County Infrastructure Coalition's petition to construct and operate an 80-mile railway in Utah's Uinta Basin. The railway's primary purpose would be to transport waxy crude oil from the basin to the national rail network.

The STB conducted an environmental review process, including the preparation of an environmental impact statement, or EIS, as required by NEPA. The board's EIS considered various impacts of the railway's construction and operation within the project area, including effects on water resources, air quality, special status species, land use and local economies.

Project opponents argued that the EIS was deficient because the STB had declined to analyze certain downstream impacts, such as effects from increased train traffic on existing rail lines beyond the new railway, and potential oil spills along the Colorado River; upstream impacts, such as increased drilling in the Uinta Basin; and other potential environmental effects, such as increased crude oil refining impacts on Gulf Coast communities.



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Opponents also argued that the STB did not disclose the potential effects of the project on historic sites or structures along the Union Pacific line in Eagle County. The STB determined these potential impacts were beyond the scope of its regulatory authority.

In granting Eagle County's petition to vacate the STB orders, the D.C. Circuit concluded that NEPA required the STB to study environmental impacts beyond the geographic area where the project was to be located, even though those impacts were outside the STB's regulatory authority.

In reversing the D.C. Circuit's decision, the Supreme Court found that the STB acted reasonably in choosing not to consider upstream and downstream impacts, because they were not part of the project under review, and were beyond the STB's authority to consider.

The high court held that courts must defer to agencies' decisions about the scope and detail of their environmental analyses, because these decisions depend on scientific, technical and policy judgments that fall within the agency's expertise, not the court's. According to the court, "substantial judicial deference is required in NEPA cases."

NEPA has been the subject of decades of regulatory whiplash between presidential administrations, with much litigation over the appropriate scope of agencies' NEPA analyses. The Seven County decision places guardrails on that scope, by ruling that federal agencies are not required to consider the environmental effects of upstream and downstream projects that are separate in time or place from the proposed project.

The Seven County decision is expected to provide some relief for project developers, and may result in more projects reaching the finish line. However, questions remain over how different agencies will implement the court's ruling — particularly since the depth and breadth of an agency's NEPA analysis will depend on how the scope of the project is defined, and how an agency chooses to wield its broad discretion over factual, policy and technical considerations.

As has often been the case over the 59-year history of NEPA, this may depend in part on the regulatory agenda of the administration overseeing the agency at the time the decision is made.



Courts Begin Interpreting Seven County Ruling

In perhaps an early indication of the impact the Seven County decision will have on the substantial deference courts will afford to an agency's NEPA reviews, the D.C. Circuit, in *Appalachian Voices v. Federal Energy Regulatory Commission*, recently affirmed FERC's construction deadline extension for a portion of the Mountain Valley Pipeline.

In its June 6 ruling, the court found that FERC's decision not to conduct a supplemental NEPA analysis before granting an extension request was reasonable, and deference was ultimately due to FERC to determine whether a supplemental environmental analysis under NEPA was necessary.

Though the D.C. Circuit panel's majority opinion didn't specifically rely on the Seven County decision in reaching its conclusion, the panel nonetheless ruled that FERC's assessment of what is necessary and appropriate — whether in the context of extending deadlines or revising prior findings — was entitled to substantial deference, since it involved a judgment of regulatory policy.

U.S. Circuit Judge Karen Henderson offered a blistering concurrence, citing directly to Seven County and echoing Justice Kavanaugh's frustrations with the way in which NEPA has been utilized by project opponents to stymie project development, despite years of process required to obtain key environmental permits:

Petitioners — a collection of environmental groups — have developed a cottage industry that uses the nation's environmental laws to retard new development. Petitioners deluge permitting agencies with dubious claims. The agencies spend years writing thousands of pages of environmental review in an attempt to stave off litigation. Often, however, no sooner do agencies approve new development than they find themselves under a tidal wave of litigation from environmental groups. These groups do not need to win their lawsuits. Indeed, they rarely do. Yet they emerge victorious because delay is the coin of the realm. Developers — overwhelmed by the torrent of challenges — often abandon their projects rather than weather the storm. Many more are cowed from even entering the market.

A potentially more nuanced view of the Seven County decision's impact on agency



cumulative impacts analyses may have been previewed in the U.S. District Court for the District of Maryland's July 2 ruling in *Mayor and City Council of Ocean City, Maryland v. U.S. Department of the Interior*.

The district court rejected in part a defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court found that a plaintiff group failed to state a claim that the Bureau of Ocean Energy Management improperly approved an EIS that failed to consider the cumulative impacts of a wind project.

The court acknowledged that under *Seven County*, when the effects of an agency action arise from a separate project — for example, a possible future project, or one that is geographically distinct from the project at hand — NEPA does not require the agency to evaluate the effects of that separate project.

However, the court found that it was unclear, at least in the context of a Rule 12(b)(6) motion, whether the *Seven County* court's discussion of separate projects resolved the cumulative impact issue raised by the plaintiffs in this particular case, since "the agency is permitted to consider effects of the project at hand that might flow out into other geographic areas."

Where the agency in *Seven County* "possess[ed] no regulatory authority over those separate projects," in this case, all of the offshore development at issue was within the Bureau of Ocean Energy Management's purview. The court concluded that "[w]hile it may be likely that, ultimately, the required 'substantial deference' will control, Plaintiff's claim is not subject to dismissal under the low bar of a Rule 12(b)(6) standard."

Agency Reactions to *Seven County*

The Supreme Court's *Seven County* decision comes on the heels of significant recent shifts in the NEPA regulatory and policy landscape initiated by the Trump administration. On Feb. 25, in response to an executive order from President Donald Trump intended to foster U.S. energy development, the White House Council on Environmental Quality issued an interim final rule rescinding its long-standing NEPA regulations.

Then, one day before the *Seven County* decision was issued, the CEQ withdrew its interim



guidance on consideration of greenhouse gas emissions and climate change, which had directed federal agencies to consider the effects of greenhouse gas emissions and climate change in their NEPA reviews. The CEQ determined that the guidance was inconsistent with Trump's executive order.

According to a CEQ press release, these revisions are designed to implement deadlines and page limits on agency environmental reviews, provide clarification that NEPA does not apply to every federal agency action, and create certain categorical exclusions from NEPA reviews.[1] The revised NEPA procedures depart from prior CEQ regulations that required agencies to consider more remote, indirect and cumulative effects of a proposed action, among other things.

Although the CEQ's guidance regarding consideration of greenhouse gas emissions and climate change in NEPA reviews was ultimately nonbinding, the CEQ's decision to withdraw its guidance appears to align with the *Seven County* decision, which limits consideration of indirect environmental effects such as climate change. Still, the *Seven County* decision does not change the fact that project sponsors must carefully navigate potentially inconsistent NEPA implementation and regulations across agencies.[2]

In light of Trump's executive order, the CEQ's interim final rule rescinding its long-standing NEPA regulations, and the *Seven County* decision, several federal agencies have recently updated, rescinded or proposed changes to their NEPA implementing regulations and procedures. These include the U.S. Department of Agriculture, the U.S. Department of Commerce (including the National Oceanic and Atmospheric Administration), the U.S. Department of Energy, the U.S. Department of Transportation, the U.S. Department of Defense, the U.S. Army Corps of Engineers, the Federal Communications Commission, the Department of the Interior and FERC.

An End to Protracted NEPA Reviews and Litigation?

Under *Seven County*, courts must afford substantial deference to agency determinations about environmental impacts. According to the Supreme Court, a "course correction" under NEPA was necessary, in order to reign in courts from "micro-manag[ing] agency choices."

However, the *Seven County* decision is unlikely to put a complete stop to robust, time-



consuming NEPA analyses as a matter of law. In *Seven County*, the court acknowledged that there can be "gray area[s] in defining the project at hand" that can impact the scope of the agency's EIS, as well as instances in which upstream or downstream projects could be considered "interrelated and close in time and place to the project at issue," and thus included in a NEPA analysis.

The Supreme Court was clear that these gray areas and questions of interrelatedness to other projects are factual and policy determinations for which agencies are granted substantial deference to resolve.

A NEPA analysis, the court said, "will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry. Courts should afford substantial deference and should not micro-manage those agency choices so long as they fall within a broad zone of reasonableness."

The court explained that prior court decisions have failed to afford the appropriate level of deference to agencies' NEPA analyses, which has in turn slowed down or blocked many projects and caused litigation-averse agencies to take even more time to prepare their NEPA analyses.

The *Seven County* decision underscores the importance of project sponsors properly defining their project. Although a project defined in broader, generic terms may provide some perceived flexibility for the project sponsor, the definition of the project at issue will ultimately dictate the scope of a NEPA analysis, particularly with respect to geography and indirect environmental impacts and impacts from other projects separate in time or place — i.e., cumulative impacts.

Defining the project scope is critical for permitting programs requiring analysis of alternatives — such as nonattainment new source reviews under the Clean Air Act — which are frequently the subject of litigation and project opposition.

According to the Supreme Court, "NEPA has transformed from a modest procedural requirement into a blunt and haphazard tool employed by project opponents (who may not always be entirely motivated by concern for the environment) to try to stop or at least slow down new infrastructure and construction projects." An agency's NEPA analysis often



includes an analysis of separate projects and attenuated effects, and a robust exploration of alternatives, all of which have created fertile ground for litigation and project opposition.

But by reinforcing that NEPA is "a purely procedural statute" that does not require agencies to weigh environmental consequences in any particular way, the high court may have struck a blow to project opponents that frequently use NEPA to challenge projects by alleging inadequate analysis of greenhouse gas emissions or downstream effects. It remains to be seen whether that blow is a knockout punch, or merely glancing.

Practical Implications for Developers Navigating the Shifting NEPA Landscape

It remains to be seen how and whether project developers will benefit from the narrowed scope of effects that must be considered as part of a NEPA review. Although recent NEPA guidance from agencies indicates that many of them are moving away from consideration of cumulative impacts as part of a NEPA analysis, project applicants should be mindful that each agency has its own unique NEPA review procedures.

For instance, even though FERC has recently updated its NEPA regulations to remove references to the rescinded CEQ regulations, FERC did not remove the regulatory provision providing that FERC staff should assess the cumulative effects of a proposed project.

Certain federal agencies, such as the Department of Energy and the Department of Interior, have largely repealed their NEPA regulations, and will instead rely on their revised agency guidance documents to implement their NEPA reviews. This creates the specter of NEPA policy and regulatory whiplash between administrations, as future administrations with different NEPA policy priorities could revise these agency guidance documents without having to go through formal notice-and-comment rulemaking.

Even though the CEQ rescinded its guidance recommending that agencies quantify and monetize greenhouse gas emissions using social cost of carbon estimates as part of a NEPA analysis, project developers should not assume that the social cost of carbon will no longer be included in a NEPA analysis. There could still be instances where agencies decide, in their substantial discretion, that evaluating the social cost of carbon and upstream or downstream impacts is appropriate due to the scope and nature of the particular project.



Given the distinct philosophical differences on climate change between the Biden and Trump administrations, this may be of greater concern in future administrations than the current one. However, infrastructure projects have long lead times, and project permits, especially air permits, often require permit renewals.

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[1] <https://www.whitehouse.gov/fact-sheets/2025/06/fact-sheet-president-trump-is-delivering-historic-permitting-wins-across-the-federal-government/>.

[2] See "The Three Things You Should Know About the Council on Environmental Quality's Removal of its National Environmental Policy Act Implementing Regulations," <https://www.saul.com/insights/alert/three-things-you-should-know-about-council-environmental-qualitys-removal-its>.

Read more at: <https://www.law360.com/articles/2369969/how-justices-ruling-on-nepa-reviews-is-playing-out?copied=1>