



Supreme Court Narrows Both Judicial Review and Scope of NEPA Reviews

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On May 29, in [Seven County Infrastructure Coalition, et al., v. Eagle County, Colorado, et al.](#), the U.S. Supreme Court issued a landmark National Environmental Policy Act (“NEPA”) decision concluding that NEPA does not allow courts, “under the guise of judicial review” of agency compliance with NEPA, to delay or block projects based on the environmental effects of projects that are not a part of the project subject to NEPA review. The decision seeks to rein in what the Court says has become a “blunt and haphazard tool” to try to block or delay infrastructure and construction projects, by (1) clarifying the “substantial judicial deference” owed to agencies in determining the scope of NEPA documents, and (2) limiting agencies’ obligation to evaluate the potential environmental impacts of projects upstream and downstream from the project under review, especially where an agency has no authority or jurisdiction over those projects. The decision is expected to have significant implications for the scope of future NEPA reviews and challenges to agency NEPA compliance, particularly for energy-related infrastructure projects, many of which—like the rail line at issue in *Seven County Infrastructure Coalition*—have faced court challenges based upon claims that the reviewing agency violated NEPA by failing to fully consider “upstream” or “downstream” impacts that are not part of the project being reviewed.

Background

This dispute in *Seven County Infrastructure Coalition* involved a challenge by a Colorado county and several environmental groups to the environmental review and approval by the Surface Transportation Board (“Board”) of a proposed new 88-mile rail line connecting Utah’s Uinta Basin to the national railroad network. The connection would link oil and gas fields in the Uinta Basin to out-of-state refineries. The Board issued a 3,600-page NEPA Environmental Impact Statement (“EIS”) analyzing impacts of the railway’s construction and operation and noting, but not fully analyzing, the potential environmental effects of increased upstream oil and gas development in the Uinta Basin as well as downstream refining.

On review, the U.S. Court of Appeals for the D.C. Circuit found numerous NEPA violations, including that the Board impermissibly limited its analysis of environmental effects from upstream drilling in the Uinta Basin and downstream refining along the Gulf Coast. In so holding, the D.C. Circuit rejected the Board’s arguments that those effects would arise from other projects that are separate from the rail line and regulated by other entities. Based on these perceived deficiencies in the Board’s NEPA analysis, the court vacated the EIS and the Board’s final approval order for the rail line.

Majority Opinion

The Court on an 8-0 vote, with Justice Gorsuch recused, unanimously reversed and remanded the D.C. Circuit's decision. In a majority opinion penned by Justice Kavanaugh and joined by four other Justices, the Court held that the D.C. Circuit (1) failed to afford the Board the substantial deference required under NEPA for the agency's factual findings and policy determinations, and (2) incorrectly interpreted the scope of the effects required to be analyzed under NEPA. In these respects, the Court cited its opinion last Term in *Loper Bright Enterprises v. Raimondo* and explained that such deference is consistent with *Loper Bright* where an agency "exercises discretion granted by a statute." Three Justices concurred in the result, writing on a more limited basis that the Board's statutory authority did not provide the agency authority or jurisdiction with respect to the development or use of commodities such as oil that might be transported on the proposed rail line and, therefore, the Board was not required by NEPA to consider the effects of drilling and refining.

Emphasizing the purely procedural nature of NEPA, the Court's majority opinion explained that, when reviewing whether an EIS complies with NEPA, courts should afford "substantial judicial deference" to the agency's judgment as to the appropriate scope of the document: "So long as the EIS addresses environmental effects from the project at issue, courts should defer to agencies' decisions about where to draw the line—including (i) how far to go in considering indirect environmental effects from the project at hand and (ii) whether to analyze environmental effects from other projects separate in time or place from the project at hand."

Expanding upon the appropriate posture of a court's judicial review of NEPA analyses—and distinguishing that review from the *de novo* review that applies to judicial review of an agency's interpretation of a statute—the Court articulated several core elements. First, where an agency is required to make "speculative assessments or predictive or scientific judgments" a reviewing court must be at its "most deferential." Second, the reviewing court's role, under the arbitrary-and-capricious standard of the Administrative Procedure Act ("APA"), is limited to deciding whether such determinations were "reasonable and reasonably explained." Finally, even if a court finds a NEPA review to be inadequate, that alone may not be grounds for vacating the underlying agency decision, absent reason to believe that the agency might disapprove the project if it conducted additional environmental review.

Further, weaving together prior precedent, the Court found that the D.C. Circuit incorrectly interpreted NEPA by requiring the Board to address impacts from upstream and downstream projects separate in time or place from the proposed rail line. The Court stressed that NEPA's focus is on the "proposed action" under agency review, "not other future or geographically separate projects that may be built (or expanded) as a result of or in the wake of the immediate project under consideration." Although "indirect effects" of a project—including effects separated by geographic distance or time—can sometimes fall within NEPA, the Court explained that NEPA does not require an agency to analyze the effects of

separate projects, even if the project being reviewed might lead to the construction or increased use of those separate projects. This is because a separate project “breaks the chain of proximate causation between the project at hand and the environmental effects of the separate project.” In so finding, the Court noted that “[t]he effects from a separate project may be factually foreseeable, but that does not mean that those effects are relevant to the agency’s decision-making process or that it is reasonable to hold the agency responsible for those effects.”

Importantly, the Court further noted that the Board had no regulatory authority over those separate projects; it does not regulate oil drilling, oil and gas leases, or oil refineries. Because “agencies are not required to analyze the effects of projects over which they do not exercise regulatory authority,” the Court found that there was no “reasonably close causal relationship” between the rail line and the environmental effects of the separate drilling and refining projects.

Implications

The Court’s decision will have important implications both for future judicial reviews of NEPA cases as well as the scope of underlying agency NEPA reviews. Further, given the frequency of challenges to agency NEPA analyses based upon the adequacy of evaluation of upstream and downstream impacts and the [Administration’s rescission of the government-wide Council on Environmental Quality NEPA implementing regulations](#), the Court’s decision provides important guidance to agencies on complying with their NEPA obligations.

How courts and agencies will respond to this limited judicial role in the review under NEPA and the APA remains to be seen. It is worth noting that the Court did not squarely address the scope of “connected actions” that typically have been included as part of the review of the underlying project. But it is likely that this decision will lead to fewer decisions finding NEPA reviews inadequate as well as fewer holdings vacating underlying agency decisions (even after finding the underlying NEPA review inadequate). Additionally, the Court’s decision clearly gives agencies more leeway in defining the scope of their environmental reviews—including linear energy and transportation projects as well as port facilities and power plants that often tie into development and resource uses that are separate from the proposed project or involve upstream or downstream activities.

For More Information

Van Ness Feldman closely monitors and counsels clients on NEPA and project permitting issues. If you would like more information on how these updates may impact your business, please contact [Molly Lawrence](#), [Jonathan Simon](#), [Michael Pincus](#), [Rachael Lipinski](#), [Joe Nelson](#), [Jenna Mandell-Rice](#), [Michael McBride](#), or any member of the firm’s Environmental practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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