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The National Environmental Policy Act's Scope Is Limited. U.S. Supreme Court Rules in the Seven County Infrastructure Coalition Appeal That Agency Review of Some "Separate Projects" Is Not Required.

In its unanimous decision issued on May 29, 2025, the U.S. Supreme Court addressed challenges to the U.S. Surface Transportation Board's environmental impact statement (EIS) prepared for a new railroad to be built and operated in Utah. Challenges were filed by Colorado's Eagle County and several environmental organizations. The Court reversed and remanded the D.C. Circuit Court's decision that found "numerous [National Environmental Policy Act] NEPA violations arising from the EIS."[1]

The 88-Mile Railroad Line

The Board, which reviews applications for new railroad lines, approved a proposal by a group of seven Utah counties (the Seven County Infrastructure Coalition) for the construction and operation of an approximately 88-mile railroad line in northeastern Utah. The line would connect Utah's oil-rich Uinta Basin to the national rail network and would facilitate the transportation of crude oil from Utah to refineries in Louisiana, Texas, and elsewhere.

The Board's Extraordinarily Lengthy EIS

The Board prepared what the Court referred to as "an extraordinarily lengthy EIS, spanning more than 3,600 pages of environmental analysis" addressing the environmental effects of the railroad line pursuant to NEPA. The U.S. Court of Appeals for the D.C. Circuit faulted the EIS for not sufficiently considering the **"environmental**

effects of projects separate from the railroad line itself." The D.C. Circuit Court ruled that the environmental effects that should have been addressed in the EIS included these separate projects:

1. Increased oil drilling upstream in the Uinta Basin; and
2. Increased oil refining downstream along the Gulf Coast of Louisiana and Texas.

Holding that the agency's NEPA analysis was flawed, the D.C. Circuit vacated the Board's EIS and the Board's approval of the 88-mile railroad line. That decision further delayed the railroad's construction even though the Board approved the project nearly four years earlier in December 2021.

Substantial Judicial Deference Required in NEPA Cases

Associate Justice Brett Kavanaugh delivered the unanimous 8-0 opinion of the Court [2] ruling that:

> First, **the D.C. Circuit did not afford the Board the substantial judicial deference required in NEPA cases.**
>
> Second, the D.C. Circuit ordered the Board to address the environmental effects of projects separate in time or place from the construction and operation of the railroad line.
>
> **But NEPA requires agencies to focus on the environmental effects of the project at issue.**
>
> Under NEPA, the Board's EIS did not need to address the environmental effects of upstream oil drilling or downstream oil refining. Rather, it needed to address only the effects of the 88-mile railroad line. And the Board's EIS did so. (Emphasis added.)

Upstream Oil Drilling and Other Speculative Projects Need Not Be Analyzed

The Court ruled that the Board's decision was correct that analysis of the environmental effects of upstream oil drilling was not needed emphasizing that the project at issue was an "88-mile railroad line, **not an oil well or a drilling permit in the Uinta Basin."** (Emphasis added.)

In addition, the Board possesses "no authority or control over potential future oil and gas development" in the Basin. Future projects would be "subject to the approval processes of other federal, state, local, and tribal agencies."

The environmental effects of future oil and gas development in the Basin are "speculative" and attenuated from the project at hand.[3]

NEPA is Purely Procedural – an Agency's Role – a Court's Role

Justice Kavanaugh emphasized the need to distinguish the agency's role from the court's role. Courts should "defer to agencies' decisions" about where to draw the line for:

1. How far to go in considering indirect environmental effects from the project at hand; and
2. Whether to analyze environmental effects from other projects separate in time or place from the project at hand.

Thus, agencies possess discretion and must have broad latitude to draw a "manageable line."[4]

In an attempt to "tie all this together," Justice Kavanaugh states:

> When assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry – and also about the length, content, and level of detail of the resulting EIS.
>
> **Courts** should afford substantial deference and **should not micromanage those agency choices** so long as they fall within a broad zone of reasonableness.
>
> As the Court has emphasized on several occasions, and we doubly underscore again today, "inherent in NEPA . . . is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision making process."[5] (Emphasis added.)

Delay Upon Delay – the Process Seems to "Border on the Kafkaesque."

The Court's critique of the history of NEPA implementation will perhaps reign in the extremes that project proponents have witnessed since President Nixon signed NEPA into law on January 1, 1970 – over 56 years ago. In his review, Justice Kavanaugh criticizes the tendency for agencies to engage in analysis of separate projects that address:

> more consideration of **attenuated effects**, more exploration of alternatives to proposed agency action, **more speculation and consultation and estimation and litigation**. (Emphasis added.)

He cites the 1978 U.S. Supreme Court decision in *Vermont Yankee*: "Delay upon delay, so much so that the process sometimes seems to "borde[r] on the Kafkaesque."[6]

And further:

> A 1970 legislative acorn has grown over the years into **a judicial oak** that has **hindered infrastructure development** "under the guise" of just a little more process. . . .
>
> **A course correction of sorts** is appropriate to bring judicial review under NEPA back in line with the statutory text and common sense. . . .
>
> Congress did not design NEPA for judges to hamstring new infrastructure and construction projects.
>
> On the contrary, as this Court has stressed, courts should and "must defer to 'the informed discretion of the responsible federal agencies.'"[7]

The D.C. Circuit Was Wrong on the Merits of NEPA

Beyond requiring that courts defer to the informed discretion of the agency, the majority then addresses the failings of the D.C. Circuit Court's rulings on the merits under NEPA stating:

> The D.C. Circuit erroneously required the Board to address environmental effects from projects that are separate in time or place from the 88-mile railroad project

> at hand – that is, effects from potential future projects or from geographically separate projects. Moreover, those separate projects fall outside the Board's authority and would be initiated, if at all, by third parties.

And to ensure that the reader understands the value of footnotes in the Court decision, footnote 5 deserves particular consideration:

> Even though not mandated by NEPA to do so, the Board did identify some of the potential effects and marginal risks from projects separate from the 88 miles of additional railroad track in rural Utah. *See, e.g.,* App. 354-358 (forecasting the number of oil wells that could be added in the Uinta Basin as a result of increased production spurred by the new railway); *id.,* at 420-423, 539-542 (evaluating effects from increased oil refining along the Gulf Coast).
>
> The Board should not necessarily earn bonus points for studying more than NEPA demanded. **But it should definitely not receive a failing grade just because its 3,600-page EIS was less thorough in analyzing the effects from other projects than the Court of Appeals might have preferred.** (Emphasis added.)

In summary:

> The proper judicial approach for NEPA cases is straightforward. Courts should review an agency's EIS to check that it addresses the environmental effects of the project at hand.
>
> The EIS need not address the effects of separate projects.
>
> In conducting that review, courts should afford substantial deference to the agency as to the scope and contents of the EIS.

The Sotomayor Concurrence – the Agency's Organic Statute and Case Precedent Control

Associate Justices Elena Kagan and Ketanji Brown Jackson joined Associate Justice Sonia Sotomayor in her concurring opinion that took a different approach to reach the same conclusion as the majority. The concurring Justices relied on (1) the organic statute pursuant to which the agency acts (here the Interstate Commerce Commission Termination Act, 49 U.S.C. §11101) and (2) earlier Court precedent.

Agreeing that the D.C. Circuit Court's decision was wrong, Justice Sotomayor states:

> [U]nder its organic statute, the Board had no authority to reject petitioners' application on account of the harms third parties would cause with products transported on the proposed railway. The majority takes a different path, unnecessarily grounding its analysis largely in matters of policy.

Justice Sotomayor reviewed the Board's organic statute and confirmed the Board's understanding of the scope of its review and the factors the Board must address in reviewing applications by project proponents stating:

> As common carriers, railroads subject to the Board's jurisdiction are required to provide 'transportation or service on reasonable request' to any person or commodity." (49 U.S.C. §11101(a)). In addition, the Act contains a clear presumption in favor of approving new railways.
>
> And of the 15 statutory policies the Board must consider in the exemption process, not one concerns the anticipated use of commodities that will be transported on the proposed railway. *See* §§10101(1)-(15).
>
> Unlike the Board, meanwhile, other entities do have authority "to approve oil and gas development projects" and to regulate the effects of refining. . . . All this suggests, as the Board concluded, that the Board could not have rejected petitioners' application in order to prevent the harmful effects of oil drilling and refining.
>
> But the environmental respondents, although conceding that the Board correctly understood its authority to approve or disapprove a project application, argued that the Board should have analyzed environmental impacts that the Board could not lawfully prevent. Justice Sotomayor provided an unsympathetic dismissal of that argument concluding:
>
> *Public Citizen* squarely forecloses that position. . . . Even a foreseeable environmental effect is outside of NEPA's scope if the agency could not lawfully decide to modify or reject the proposed action on account of it. NEPA thus did not require the Board to consider the effects of oil drilling and refining.

> Under NEPA, agencies must consider the environmental impacts for which their decisions would be responsible. Here, the Board correctly determined it would not be responsible for the consequences of oil production upstream or downstream from the Railway because it could not lawfully consider those consequences as part of the approval process. For that reason, I concur in the Court's judgment reversing the D.C. Circuit's holding requiring the Board to consider in further detail harms caused by the oil industry.

Cumulative Impacts or Effects?

Those of us in the midst of dealing with federal agencies and those agencies' NEPA obligations related to our projects will search in vain for any reference in either the majority or concurring opinions for any reference to "cumulative impacts" or "cumulative effects." So, will a review of the *Seven County* decision at least indirectly provide some useful guidance? Maybe.

The NEPA statute itself does not use the terms "indirect" or "cumulative impacts or effects." However, it has been generally understood for over 50 years that NEPA's requirement that an EIS should discuss "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" implies that the scope of an EIS is meant not only to consider the immediate effects of a project but also how a project might impact the environment in the long-term through indirect or cumulative effects with other projects.

Although NEPA does not use the terms explicitly, the regulations issued by the Council on Environmental Quality (CEQ) were the first to address federal agency responsibility to consider indirect and cumulative impacts and to document that analysis.[8]

And despite recent court decisions and the Trump Administration's actions that eliminate the CEQ rules[9], every federal agency (including the Surface Transportation Board) has promulgated their own NEPA regulations that require analysis of direct and indirect impacts in their environmental reviews.[10]

Consider the discussion above as a prelude to our interest in reviewing the *Seven County* decision to find further guidance as to whether and how federal agencies

will now address "cumulative impacts" of our projects. The underlying facts of the case might appear to automatically involve the need to assess cumulative environmental impacts of constructing and operating a new rail line – impacts beyond "just" the rail line itself.

Indeed, what is the "need" for the rail line? The answer: oil development! Without the need to transport oil to the "main rail lines" and distant refineries, there is no need for the line. So, how does one disengage the impacts of one from the impacts of the other?

That's exactly what the opponents of the rail line argued. For example, the Brief of Respondents Eagle County, Colorado and Center for Biological Diversity, et al in Opposition to Petition for Writ of Certiorari states in part:

> Limiting agencies to effects that they directly regulate, rather than effects Congress has authorized them to consider, does not comport with NEPA's purpose or rule of reason – "that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any potential information in the decision-making process."

Both the majority and concurring opinions limit the agency's obligation, however, to a review of the application of the Seven Counties Infrastructure Coalition for an 88-mile railroad – not the arguably "cumulative impacts" and "indirect impacts" that might occur with further oil and gas development in the Uinta Basin. And it is the underlying "organic statute" that provides the authority for this particular agency to do anything that drives the result.

In sum, these are the factors that we, our project proponents, and the federal agencies involved must consider.

1. Has the federal agency undertaking the NEPA analysis acted within the scope of authority Congress provided in its "organic" statute?
2. Has the agency incorrectly considered projects that are separate in time or place from the proposed project?
    1. Because the textual focus of NEPA is the "proposed action" – the project at hand – not other separate projects, has the agency gone too far in addressing those separate projects?

3. Has the agency addressed environmental consequences and feasible alternatives to the relevant project?
4. Is the agency's final decision reasonably explained?
5. And finally, while indirect environmental effects of the project may fall within NEPA's scope (even if they might extend outside the geographical territory of the project or materialize later in time), the fact that the project might foreseeably lead to the construction or increased use of a separate project does not mean the agency must consider that separate project's environmental effects.

This blog was drafted by John Watson, an attorney in the Spencer Fane Denver, Colorado, office. For more information, visit www.spencerfane.com.

[1] *Eagle Cty. v. Surface Transp. Bd.*, 82 F. 4th 1152, 1196 (2023).

[2] Associate Justice Neil Gorsuch did not participate in the decision.

[3] Citing *Department of Transportation v. Public Citizen*, 541 U. S. 752, 767–768, 770 (2004)).

[4] Citing *Public Citizen*, 541 U. S., at 767 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U. S. 766, 774, n. 7 (1983)).

[5] Citing *Public Citizen*, 541 U. S., at 767. A reviewing court may not "substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe*, 427 U. S., at 410, n. 21.

[6] Vermont Yankee, 435 U. S., at 557.

[7] *Marsh,* 490 U. S., at 377.

[8] The former CEQ regulations at 40 CFR 1508.1(i)(2)(3) provide this definition: cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *See* the May 1, 2024, Federal Register notice.

[9] *See* Marin Audubon Society v. Federal Aviation Administration, et al., No. 23-1067 (D.C. Cir. Nov. 12, 2024) where a split panel held that CEQ's NEPA regulations are *ultra vires* and beyond CEQ's statutory authority to issue; *State of Iowa et al. v. Council on Environmental Quality et al.,* 1:24-cv-00089 (D.N.D. Feb. 3, 2025) where the U.S. District Court for the District of North Dakota (relying on the same rationale as the *Marin Audubon Society* court) set aside CEQ's NEPA Phase II regulations that had been promulgated in 2024; Executive Order 14154, "Unleashing American Energy," (January 20, 2025) which revoked a 1977 Executive Order issued by President Carter that directed the CEQ to issue NEPA regulations; and the CEQ Interim Final Rule (90 Fed. Reg. 10610 (Feb. 25, 2025) that would remove the CEQ NEPA regulations from the Code of Federal Regulations, citing the revocation of the 1977 Executive Order and the lack of other authority for the remaining regulations.

[10] *See* the U.S. Surface Transportation Board's NEPA rules at 49 C.F.R. Part 1105). They require applicants to disclose the impacts rail projects will have on air quality, noise, biological resources, and water, even though the Board does not directly regulate those effects. *See* 49 C.F.R. §§ 1105.7(e)(5)-(6), (8)-(9). Those effects include impacts reaching beyond the direct physical impacts resulting from the Railway's construction and operation, such as "overall energy efficiency," as well as effects from increased rail traffic on existing railroads "down-line" of the new construction. Id. §§ 1105.7(e)(4)(i)-(iii), (e) (11)(v).

As another example, the U.S. Army Corps of Engineers rules at 32 CFR § 651.16 provide: cumulative impacts. (a) NEPA analyses must assess cumulative effects, which are the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. Actions by federal, non-federal agencies, and private parties must be considered (40 CFR 1508.7). (b) The scoping process should be used to identify possible cumulative impacts. The proponent should also contact appropriate off-post officials, such as tribal, state, county, or local planning officials, to identify other actions that should be considered in the cumulative effects analysis.

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