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The U.S. Supreme Court Tames the NEPA Beast

by Jim Wedeking

The National Environmental Policy Act ("NEPA") should have been a mouse of a statute; a mere informational exercise providing a concise description of how a proposed federal project, or project requiring a federal permit, might impact its surrounding environment. Instead, NEPA grew into a monster. Project developers and federal agencies fed the beast with reports totaling hundreds, or even thousands of pages, taking years to complete. And even then, NEPA could still swallow projects whole if opponents persuaded a judge that the sacrifice was unworthy. Some environmental impacts were examined qualitatively when they should have been quantified. Or the effect was quantified but the data used was incomplete or too old or not detailed enough. Or there was one more potential alternative to the project that could have been examined but was not. Since Congress provided little guidance as to how agencies must document environmental impacts, judges created a vast body of federal common law dictating what information NEPA required and how much analysis was enough to satisfy the monster. Indeed, whereas other federal environmental laws involve detailed statutes, one could read NEPA and still have no idea what an Environmental Impact Statement ("EIS") must contain.

The Supreme Court may have finally tamed the beast in *Seven County Infrastructure Coalition v. Eagle County, Colorado*.[1] The Court reversed a D.C. Circuit decision holding that a 3,600-page EIS for a proposed 88-mile railroad line (*i.e.*, approximately 41 pages of analysis per mile) in Utah's Uinta Basin did not provide enough detail when analyzing far-off potential environmental impacts. Specifically, the court charged that the Surface Transportation Board should have provided more analysis of potential environmental impacts from future third-party oil drilling operations at unknown sites in the Uinta Basin and the air quality impacts from presumed future capacity increases at crude oil refineries on the Gulf Coast. The Supreme Court reversed, imposing significant new limits on NEPA.

The National Environmental Policy Act. Passed in 1969, NEPA is a relatively sparse statute that aspires to better understand the effects of major governmental projects on the environment and directs federal agencies to study those effects prior to taking action.[2] NEPA's core requirements are in Sections 102 and 106.[3] Under Section 106(b), an environmental assessment is "a concise public document" supporting the "agency's finding of no significant impact or determination that an environmental impact statement is necessary."[4] A more elaborate EIS is "a detailed statement" on the proposed action's "reasonably foreseeable environmental effects," "reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented," and "a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action … that are technically and economically feasible, and meet the purpose and need of the proposal."[5] Thus, "the heart of NEPA" is a

[1] 605 U.S. ___ (2024) ("Slip Op.").

[2] Pub. L. No. 91-190.

[3] 42 U.S.C. §§ 4332, 4336.

[4] 42 U.S.C. § 4336(b)(2).

[5] 42 U.S.C. § 4332(C).

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statement on the proposed project's environmental effects and a similar analysis of some alternatives that could potentially reduce those impacts will still achieving the project's intended purpose.[6]

NEPA immediately turned into an elaborate paperwork exercise. Just four years after its passage, the White House Council on Environmental Quality ("CEQ") issued regulations entreating agencies to "[r]educ[e] the length of environmental impact statements" to "less than 150 pages, or, for proposals of unusual scope or complexity, 300 pages."[7] That injunction was dashed as courts frequently sided with project opponents in finding that some aspect or another of the project could always be studied in more detail.[8] Thus, a large body of federal common law developed, detailing obligations not found in any statute or regulation. As a result, NEPA litigation not only became the weapon of choice for project opponents, but the time and pages required for an EIS ballooned as agencies attempted to "litigation-proof" them. A June 2020 CEQ survey, analyzing 656 EISs between 2013 and 2018, found that the average length of a final EIS was 661 pages and only seven percent complied with the 150-page limit described in the regulations.[9]

Project developers routinely wait years for agencies to complete bloated environmental analyses just to see them immediately challenged in court and, all too often, remanded to the agency for even more analysis. The problem attracted bipartisan criticism and unsuccessful legislative fixes. Congress passed the Fixing America's Surface Transportation Act by wide margins in 2015, establishing the Federal Permitting Improvement Steering Council to help streamline NEPA reviews and permitting processes.[10] When this led to little improvement, Congress codified CEQ's page limits for EISs and imposed a two-year deadline for completion in the Fiscal Responsibility Act of 2023.[11] However, caveats in the law give the deadline little effect,[12] as one company learned in trying to enforce it.[13] Thus, despite bipartisan efforts by both the legislative and executive branches to cut NEPA down to size, the judiciary refused to brook any reform. After more than fifty years of courts continually expanding and complicating NEPA, the Supreme Court attempted to provide a long-overdue realignment.

Seven County Infrastructure*: A 1,300 Mile Review for an 88 Mile Project*. A group of seven Utah counties applied to the U.S. Surface Transportation Board ("the Board") for approval of an 88-mile railroad line that would ship crude oil out of the geographically isolated Uinta Basin in Utah to an existing interstate freight network that would eventually transport the oil to refineries in Texas and Louisiana.[14] As part of the approval process, the Board prepared a 3,600-page EIS after holding six public meetings and reviewing over 1,900 comments.[15] Despite the Board describing numerous

[6] *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004).

[7] 43 Fed. Reg. 55,978 (Nov. 29, 1978).

[8] *See, e.g.*, *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (Second Circuit twice remanded NEPA analysis of urban renewal project for purported lack of detailed consideration of particular alternatives); *California v. Block*, 690 F.2d 753, 763-64 (9th Cir. 1982) (vacating environmental impact statement because descriptions of roadless areas that included location, acreage, landform type, Bailey-Kuchler ecosystem classification, number of associated wildlife species, numerical ratings of wildness attributes, and "Wilderness Attribute Rating System" classifications were "too generalized"); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (the "*Sabal Trail* decision") (environmental impact statement for a gas pipeline running from Alabama to Florida vacated for failure to provide detailed estimates of carbon dioxide emissions from power plants that would be built in the future).

[9] CEQ, Length of Environmental Impact Statements (2013-2018) (June 12, 2020).

[10] Pub. L. 114-94.

[11] Pub. L. 118-5.

[12] *See* 42 U.S.C. § 4336a(g)(2) (allowing agency to unilaterally extend the two-year deadline whenever it "determines it is not able to meet the deadline").

[13] *See Signal Peak Energy, LLC v. Haaland*, 2024 WL 3887386 (D.D.C. Aug. 21, 2024) (declining to enforce two-year deadline despite the Department of Interior's admission that it would not complete the environmental impact statement by the two-year deadline).

[14] Slip Op. at 3.

[15] *Id.* at 4.

potential significant and minor environmental impacts that could result from the line's construction and operation, the D.C. Circuit vacated and remanded the approval because the EIS "noted, but did not fully analyze, the potential effects of increased upstream oil drilling in the Uinta Basin and increased downstream refining of crude oil carried by the railroad" on the Gulf Coast, an area some 1,300 miles downstream from the project.[16] The D.C. Circuit rejected the Board's pleas that it has no regulatory authority over either future oil wells that could be drilled at unidentified locations throughout the Basin (an area roughly the size of Maryland) or air emissions from Gulf Coast refineries and that other regulatory agencies would consider those environmental impacts in the future.[17] Instead, the D.C. Circuit held that the Board must provide detailed consideration of all "'reasonably foreseeable impacts.'"[18]

The Supreme Court reversed in an 8-0 decision that vented considerable frustration with the lower courts by reminding them that all NEPA requires is "in essence, a report … Simply stated, NEPA is a procedural cross-check, not a substantive roadblock. The goal of the law is to inform agency decisionmaking, not to paralyze it."[19] The Court complained that lower courts have often "engaged in overly intrusive (and unpredictable) review in NEPA cases," issuing orders that "have slowed down or blocked many projects and, in turn, caused litigation-averse agencies to take ever more time and to prepare ever longer EISs for future projects."[20] It continued on to "reiterate and clarify the fundamental principles of judicial review" in NEPA cases for the benefit of those "courts [that] have assumed an aggressive role in policing agency compliance with NEPA."[21] This led to two main points for how lower courts should consider NEPA reviews.

The first point was a reminder that, while courts no longer defer to agencies regarding the interpretation of statutory ambiguities, they still do "when an agency exercises discretion granted by a statute" and reviewed under "the Administrative Procedure Act's deferential arbitrary-and-capricious standard."[22] This deference is significant given "that NEPA is a *purely procedural statute*" and "an agency's only obligation is to prepare an adequate report."[23] Therefore, "[b]ecause an EIS is only one input into an agency's decision and does not itself require any particular substantive outcome, the adequacy of an EIS is relevant only to the question of whether an agency's final decision (here, to approve a railroad) was reasonably explained."[24] Thus, it falls to the agency, based in part on the substantive statute it is working under, to determine how much detail is needed in the "detailed statement" because "[t]he agency is better equipped to assess what facts are relevant to the agency's own decision than a court is."[25] Further, where courts frequently nitpick EISs to death, even on highly technical matters,[26] courts should be most deferential when an "agency must make predictive and

[16] *Id.*

[17] *Id.* at 4-5.

[18] *Id.* at 6 (quoting *Eagle County v. Surface Transp. Bd.*, 82 F.4th 1152, 1177 (D.C. Cir. 2023)).

[19] *Id.* at 1-2.

[20] *Id.* at 12.

[21] *Id.* at 8.

[22] *Id.* at 8-9 (citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391-92 (2024)).

[23] *Id.* at 9.

[24] *Id.*

[25] *Id.* at 10; *see also id.* ("As a result, 'agencies determine whether *and to what extent* to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.'"

[26] *See, e.g.*, *Standing Rock Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 20-23 (D.D.C. 2020) (remanding EIS for, among other things, despite disclosing a pipeline operator's history of compliance problems, the agency failed to further analyze how that history may affect future oil spill risks, detection, and response operations; disagreeing that an oil spill modeling report fully supported an agency's response to a comment; and "unresolved scientific criticisms" of worst case spill modeling); *Wild Virginia v. U.S. Forest Serv.*, 24 F.4th 915, 927-28 (4th Cir. 2022) (remanding supplemental EIS because court disagreed with agencies that one particular data set was not useful for sediment modeling in hydrological analysis).

scientific judgments in assessing the relevant impacts … and alternatives" as well as "what qualifies as significant or feasible or the like."[27] "The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference."[28]

The second point was informing courts that the practice of demanding extensive analyses of far-flung "indirect" environmental effects upstream and downstream from a project, such as under the D.C. Circuit's *Sabal Trail* precedent, is over. "The textual focus of NEPA is the 'proposed action' – that is, the project at hand."[29] Courts may no longer require agencies to analyze "effects from potential future projects or from geographically separate projects," particularly where "those separate projects fall outside the [agency's] authority and would be initiated, if at all, by third parties."[30] Indirect upstream and downstream effects "may be factually foreseeable, but that does not mean that those effects are relevant to the agency's decisionmaking process or that it is reasonable to hold the agency responsible for those effects."[31] Therefore, so long as an EIS considers the effects of the project itself, "courts should defer to agencies' decisions about where to draw the line" in analyzing, or declining to analyze, upstream and downstream effects.[32]

In sum, *Seven County Infrastructure Coalition* is a "course correction of sorts," necessary "to bring judicial review under NEPA back in line with the statutory text and common sense" as "Congress did not design NEPA for *judges* to hamstring new infrastructure and construction projects."[33] To that end, courts "should afford substantial deference and should not micromanage … agency choices so long as they fall within a broad zone of reasonableness."[34] The opinion lamented how, under the status quo, "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."[35] This has not only added "[d]elay upon delay, so much so that the process sometimes seem to border on the Kafkaesque," but inflated costs and persuaded developers to forego projects entirely.[36] This "means fewer and more expensive railroads, airports, wind turbines, transmission lines, dams, housing developments, highways, bridges, subway, arenas, data centers, and the like," killing off jobs and making new projects "difficult to finance and build in a timely fashion."[37] The Court sent a clear and unanimous signal for lower courts to stop letting NEPA gum up the works.

Seven County Infrastructure Coalition *May Mean Big Changes in NEPA's Standing Doctrine*. The full impact of *Seven County Infrastructure Coalition* will not be known for years and, it is worth noting, this is not the first time the Supreme Court attempted to rein in lower courts. For instance, several courts have long ignored *Department of Transportation v. Public Citizen*'s injunction against requiring NEPA analyses to include separate projects or indirect effects where the lead agency had no regulatory authority.[38] Nevertheless, *Seven County Infrastructure Coalition* may

[27] Slip Op. at 10-11; *see also id.* at 11 (it is up to agency discretion to determine "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.").

[28] *Id.* at 15.

[29] *Id.* at 11 (quoting 42 U.S.C. § 4332(2)(C)).

[30] *Id.* at 15.

[31] *Id.* at 17. The Court also found it important that "the Board here possess no regulatory authority over" separate projects that would drill more oil wells in the Uinta Basin or expand refining capacity in the Gulf Coast. *Id.*

[32] *Id.* at 11.

[33] *Id.* at 13.

[34] *Id.* at 12.

[35] *Id.*

[36] *Id.* at 13.

[37] *Id.*

[38] For instance, several courts have long ignored the injunction of *Department of Transportation v. Public Citizen*, 541

not only accommodate the Trump Administration's push for faster, shorter NEPA reviews,[39] but may significantly constrict project opponents' standing to sue.

The decision voiced significant displeasure with what it saw as a legion of lawsuits raising non-justiciable policy questions, not concrete injuries.[40] Thus, there is a remarkable bit of *dicta* buried in *Seven County Infrastructure Coalition* that may be intended to constrain NEPA standing:

> The ultimate question is not whether an EIS in and of itself is inadequate, but whether the agency's final decision was reasonable and reasonably explained. Review of an EIS is only one component of that analysis. Even if an EIS falls short in some respects, that deficiency may not necessarily require a court to vacate the agency's ultimate approval of a project, at least absent reason to believe that *the agency might disapprove the project* if it added more to the EIS.[41]

Courts have never required plaintiffs to demonstrate standing by asserting that, if the lead agency considered additional information, or an additional alternative, then it could have led to agency disapproval. Instead, plaintiffs have only needed to assert the "reasonable probability of the challenged action's threat to their concrete interest."[42] Once a plaintiff offers that the proposed project may harm some aesthetic or recreational interest, then it may "establish standing without meeting all the normal standards for immediacy" and "the causation and redressability requirements are relaxed … because *environmental plaintiffs cannot show that compliance with NEPA would have changed the agency's decisions* – the agency may decide that other values outweigh the environmental costs."[43] The D.C. Circuit followed this same formulation in the *Seven County Infrastructure Coalition* case but it was never raised before the Supreme Court.[44]

Although *dicta*, given the Court's lengthy expression of unhappiness with how courts have reviewed NEPA analyses,[45] it likely intended the *Seven County Infrastructure Coalition* decision to be applied in a manner broader than its immediate holding. If lower courts view this as a change in NEPA standing doctrine, it remains to be seen how plaintiffs can demonstrate through argument or declarations that their complaints about an EIS could have blocked the ultimate project approval.

U.S. 752 (2004), against requiring NEPA analyses to include separate projects or indirect effects where the lead agency had no regulatory authority. 541 U.S. 752 (2004). *See*, *e.g.*, *Sabal Trail*, 867 F.3d at 1373 (rejecting *Public Citizen* by asserting that, since the Federal Energy Regulatory Commission can reject a pipeline application for environmental reasons, it must consider all reasonably foreseeable indirect environmental effects, including greenhouse gas emissions from downstream power plants that may be constructed and operated in the future by third parties and regulated by different government agencies).

[39] *See* Memorandum from Adam Suess, *et al.*, Department of the Interior, Alternative Arrangements for NEPA Compliance (requirement for environmental impact statements to be completed within 28 days for certain projects),; Council on Environmental Quality, Permitting Technology Action Plan (May 30, 2025) (outlining how various analysis technologies can reduce the time it takes to issue an EIS).

[40] Slip Op. at 21 ("'Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA provides the appropriate forum in which to air policy disagreements.'") (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983)).

[41] Slip Op. at 14 (emphasis added).

[42] *Whitewater Draw Natural Resource Conserv. Dist. v. Mayorkas*, 5 F.4th 997, 1013 (9th Cir. 2021) (quoting *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003) (cleaned up).

[43] *Id.* (internal quotations omitted) (emphasis added).

[44] *See Eagle Cty., Co. v. Surface Transp. Bd.*, 82 F.4th 1152, 1170 (D.C. Cir. 2023) (with respect to causation "the County does not need to show that but for the alleged procedural deficiency the agency would have reached a different substantive result, but, instead, all that is necessary is to show that the procedural step was connected to the substantive result.") (cleaned up).

[45] *See, e.g.*, Slip Op. at 21 ("In deciding cases involving the American economy, courts should strive, where possible, for clarity and predictability. Some courts' NEPA decisions have fallen short of that objective.").

