



DID THE SUPREME COURT REIN IN NEPA IN THE *SEVEN COUNTY* DECISION?

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The U.S. Supreme Court does not believe that judges are giving federal agencies adequate deference when completing environmental studies under the National Environmental Policy Act (NEPA). That much is clear. The more important question, however, is whether the Court's unanimous decision this past term in *Seven County Infrastructure Coalition v. Eagle County, Colorado*¹ will convince lower courts to actually grant that deference, or otherwise give agencies more certainty regarding NEPA's requirements. We question whether the *Seven County* decision will accomplish either of those objectives. The decision represents a significant shift in the Supreme Court's rhetoric on NEPA, and it will improve certainty on the margins. However, the Court did not write a new, clear test that will constrain federal courts when they scrutinize future environmental studies.

The subject of the case is a planned 88-mile freight rail line into the Uinta Basin in Utah, and the question before the Court was what impacts must be included in a federal environmental study. NEPA requires federal agencies to complete an Environmental Impact Statement (EIS) before undertaking actions with significant environmental impacts, such as a large infrastructure project.² The EIS is primarily understood as a laborious administrative process, taking roughly four-and-a-half years to complete on average and producing environmental studies that can climb into the thousands of pages.³ However, the administrative process has evolved significantly since NEPA was signed into law in 1970. That evolution began

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¹ 145 S. Ct. 1497, 1507 (2025).

² National Environmental Policy Act of 1969 §102, 42 U.S.C. § 4332.

³ See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2017) (2018).

with the landmark 1971 decision of the U.S. Court of Appeals for the D.C. Circuit in *Calvert Cliffs' Coordinating Committee*,⁴ which established the precedent of judicial review of NEPA's procedural requirements.

Ever since, federal courts have been interpreting and reinterpreting what agencies must include in an EIS in response to environmental litigation over infrastructure projects and other federal actions. The problem is exacerbated because NEPA provides little information regarding what must be included in an environmental study. In fact, the subject of judicial review of environmental studies itself is not addressed by the statute. Another early NEPA decision notes that "NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency."⁵

That open-ended judicial question translates to an uncertain permitting process for federal agencies. During NEPA consultations, opponents of a project raise environmental or social impacts that were not included in the environmental study and present those omissions as indications of a faulty permit process to federal courts. Agencies are left in an administrative game of cat and mouse. They can risk an injunction or study every environmental impact imaginable—a process referred to as "litigation proofing" an environmental study.⁶

That interplay between the NEPA administrative process and the courts has played out for decades. The Supreme Court found the Uinta Basin rail litigation to be an opportunity for a "course correction" in NEPA jurisprudence.⁷

I. LONG TRAIN TO THE SUPREME COURT

When the D.C. Circuit enjoined the Uinta Basin freight rail project, it applied a legal standard under which agencies must study environmental impacts that are "reasonably foreseeable" when completing an EIS.⁸ Although "reasonably foreseeable" is a subjective test, the D.C. Circuit took it to an extreme. The project was enjoined, in part, because the EIS did not study air quality impacts in coastal Louisiana.⁹

The Uinta Basin Railway would be the first greenfield freight railroad built in the United States in decades. Some version of the current project has been proposed, planned, and abandoned since at least the 1980s, most recently by the Utah Department of Transportation, which studied the project in 2014 before cancelling it. The current effort to develop the project is a public-private partnership between the Seven County Infrastructure Coalition and private investors and contractors, including the Ute Indian Tribe, which owns significant land and mineral rights in the Basin.

⁴ *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

⁵ *Env't Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 470 F.2d 289, 299 (8th Cir. 1972).

⁶ SUSAN M. SMILLIE & LUCINDA L. SWARTZ, *ACHIEVING THE 150-PAGE ENVIRONMENTAL IMPACT STATEMENT* (1997).

⁷ *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497, 1514 (2025).

⁸ *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1178 (D.C. Cir. 2023).

⁹ *See id.* at 1177.

Because the Uinta Basin has very limited transportation access, the project is expected to enable significant oil and gas development. Environmental groups and other stakeholders have opposed the project at every step. The environmental litigation before the Court was brought by the Center for Biological Diversity as well as some communities in Colorado, including Eagle County.

These plaintiffs asserted extraordinary environmental effects. Justice Sonia Sotomayor's concurrence in *Seven County* noted that, based on the upper end of forecasted development allowed by the train, this single project could have the same carbon footprint as Sweden.¹⁰

II. THE SUPREME COURT'S "ABUNDANCE" RHETORIC

Justice Brett Kavanaugh's opinion for the Court in *Seven County* marks a remarkable shift in the Court's rhetoric regarding NEPA. The Court concluded that lower courts have departed from the statute and "common sense" and are not granting federal agencies sufficient deference when interpreting NEPA's requirements.¹¹ In fact, the terms "defer" or "deference" appear roughly a dozen times throughout the opinion, which concludes: "The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference."¹²

Justice Kavanaugh also believes that NEPA has evolved beyond what Congress originally intended:

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.¹³

Importantly, the majority understands the broader impacts of NEPA on infrastructure development and economic growth. The vast majority of the costs of the NEPA process are not direct, easily measurable costs such as legal fees or the costs to complete environmental studies. They are instead the second and third order effects of an extremely uncertain development process. As the Court remarked:

Fewer projects make it to the finish line. Indeed, fewer projects make it to the starting line. Those that survive often end up costing much more than is anticipated or necessary, both for the

¹⁰ *Seven Cnty. Infrastructure Coal.*, 145 S. Ct. at 1520 (Sotomayor, J., concurring).

¹¹ *Id.* at 1514.

¹² *Id.* at 1515.

¹³ *Id.* at 1514 (emphasis in original).

agency preparing the EIS and for the builder of the project. And that in turn means fewer and more expensive railroads, airports, wind turbines, transmission lines, dams, housing developments, highways, bridges, subways, stadiums, arenas, data centers, and the like. And that also means fewer jobs, as new projects become difficult to finance and build in a timely fashion.¹⁴

Although not cited by the Court, Justice Kavanaugh’s language shares the concerns of Ezra Klein and Derek Thompson in their recent book *Abundance*¹⁵—namely, that because of procedural obstacles such as NEPA, America cannot build much needed housing and infrastructure, which has led to shortages and unaffordability. Although this approach is not uncontroversial, as we discuss later, it seems Justice Kavanaugh, at least, has gotten the message.

III. HAS THE *SEVEN COUNTY* COURT SUCCEEDED?

The Court’s rhetoric in *Seven County* departs significantly from its prior opinions regarding NEPA. However, that rhetoric largely beseeches lower courts to grant deference to federal agencies in NEPA cases, which is not the same as ordering them to do so. Existing precedent includes other examples of the Supreme Court calling for judicial deference of NEPA reviews. Even the landmark *Overton Park* decision, which established judicial review under the “arbitrary and capricious” standard of the Administrative Procedure Act (APA), noted that the “court is not empowered to substitute its judgment for that of the agency.”¹⁶

Yet federal courts have regularly continued to do just that for more than five decades.¹⁷ Even if lower courts find the *Seven County* decision compelling and enjoin federal infrastructure projects less often in the future, the *uncertainty* regarding the outcome of any particular NEPA lawsuit will remain.

The *Seven County* decision includes several hard tests that clarify the scope of NEPA review on the margins. The first is that agencies do not need to study environmental impacts that are outside the scope of their regulatory authority. This is straightforward enough for the Uinta Basin Railway project, as the Surface Transportation Board—which reviewed and approved the project’s construction under its streamlined exemption process—has no regulatory purview over oil refining on the Gulf Coast.

The second test is that agencies need not consider environmental impacts when they are caused by a “separate project” even if that project would not

¹⁴ *Id.* at 1513–14.

¹⁵ See generally EZRA KLEIN & DEREK THOMPSON, *ABUNDANCE: HOW WE BUILD A BETTER FUTURE* (2025).

¹⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401, 416 U.S. 402 (1971).

¹⁷ For a review of prior estimates of the rates of NEPA litigation, as well as a recently compiled dataset, see Michael Bennon & Devon Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, 53 ENV’T L. REP. 10836 (2023), <https://www.elr.info/articles/elr-articles/nepa-litigation-over-large-energy-and-transport-infrastructure-projects>.

occur “but for” the project in consideration.¹⁸ In this case, some oil and gas development in the Uinta Basin would be impossible “but for” having access to rail transportation or a pipeline, but those are separate projects to the rail line being studied. Some ambiguity around what constitutes a “separate project” may remain, but this is a helpful clarification.

These tests are clarifications of *Public Citizen*, a 2004 Supreme Court decision that also revolved around the scope of a NEPA study. That ruling clarified that agencies need not study an impact if it “has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions.”¹⁹

Petitioners in the *Seven County* case asked the Court to clarify *Public Citizen* because some of the federal courts of appeals were interpreting it to limit the scope of an environmental study to the agency’s statutory authority, while others were interpreting it to apply only when an agency is specifically barred from considering an impact by statute.²⁰

The *Seven County* decision clarifies *Public Citizen*, and then some. But the limiting tests in the decision are few. It does not overturn *Calvert Cliffs*’ or read into NEPA a major, constraining test that would significantly clarify what agencies need to include in an environmental study.

IV. IS DEFERENCE MAKING A COMEBACK?

The *Seven County* decision is the third of a series of recent Supreme Court decisions on agency deference, joining *Loper Bright Enterprises v. Raimondo*²¹ and *West Virginia v. Environmental Protection Agency*.²² One of these decisions is not like the others. There is a disconnect between those two earlier decisions and *Seven County* on the degree of deference courts should grant federal agencies. *West Virginia* reduced the deference courts grant agencies by creating the major questions doctrine. Under that doctrine, “courts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”²³ Then *Loper Bright* overturned *Chevron* deference altogether by asserting the essential role of the courts in defining agency jurisdiction. As Cass Sunstein has recently written, those cases are part of a “grand narrative” to restore the judiciary’s authority over the administrative state.²⁴

In *Seven County*, however, the Court may have departed from that grand narrative. Does it want agencies to receive deference from the lower courts only when implementing NEPA? Justice Kavanaugh’s opinion deals with this

¹⁸ *Seven Cnty. Infrastructure Coal.*, 145 S. Ct. at 1515–18.

¹⁹ *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

²⁰ *See* Petition for Writ of Certiorari, *Seven Cnty. Infrastructure Coal.*, 145 S. Ct. 1497 (No. 23-975).

²¹ 603 U.S. 369 (2024).

²² 597 U.S. 697 (2022).

²³ *Id.* at 716 (internal quotation marks omitted).

²⁴ Cass R. Sunstein, *Administrative Law’s Grand Narrative*, 77 ADMIN. L. REV. 291, 292–96 (2025).

apparent disconnect with *Loper Bright* and *West Virginia* in the following way: “As a general matter, when an agency interprets a statute, judicial review of the agency’s interpretation is *de novo*. But when an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act’s deferential arbitrary-and-capricious standard.”²⁵ But *Chevron* also used the APA standard in deciding that deference is due to agency decisions within its jurisdiction. It is hard to escape the conclusion that deference itself may be agency and mission dependent. NEPA breaks the mold or resets the narrative. Pragmatic jurisprudence may be making a comeback.²⁶

Courts have generally agreed that the arbitrary-and-capricious standard is the appropriate one for judicial review of environmental studies. Although that consensus has been little comfort for agencies in the past, *Seven County* opens up powerful arguments for judicial deference in the future.

V. JUDICIAL REVIEW OF NEPA IN THE FUTURE

Several conclusions can clearly be drawn from the Supreme Court’s *Seven County* decision. First, a majority of the Court agrees with Justice Kavanaugh that judicial review of NEPA cases has departed from both the statute and “common sense.” Second, the Court clearly believes that the uncertainty caused by an overzealous judiciary is having significant second-and-third ordered impacts on infrastructure development in the United States. Finally, the same majority is interested in granting federal agencies greater deference from courts when scoping and completing environmental studies.

Today, these concerns have begun to cross political lines. A burgeoning “abundance” movement on the American left has spurred a vigorous debate within the Democratic party, as it advocates policy reforms that facilitate the increased supply of housing, infrastructure and other major public investments.²⁷ Members of that faction have advocated various reforms to NEPA in the past, and though the movement faces resistance from other factions within the party, it opens the potential for bipartisan cooperation on statutory reforms that would reduce the uncertainty associated with the litigation that federal agencies face when completing NEPA studies.

The rhetoric in *Seven County* may incentivize lower courts to grant more deference. Appellate judges are more aware of the current disposition of the Court than anyone else. Decisions that stretch the bounds of NEPA’s statute, or common sense, will create opportunities for the Supreme Court to continue building on its progress in *Seven County*. Appellate courts that disagree with the rhetoric and decision in *Seven County* will be wary of disregarding Justice Kavanaugh’s call for deference.

²⁵ *Seven Cnty. Infrastructure Coal.*, 145 S. Ct. at 1511.

²⁶ Sunstein, *supra* note 24, at 311–12.

²⁷ See, e.g., KLEIN & THOMPSON, *supra* note 15; MARC J. DUNKELMAN, WHY NOTHING WORKS: WHO KILLED PROGRESS—AND HOW TO BRING IT BACK (2025).

In a recent essay in *The Regulatory Review*, Daniel Farber noted that the *Seven County* decision “is likely to cause further confusion” in NEPA case law and implementation, especially when combined with other recent statutory edits from Congress and the elimination of NEPA guidance from the Council on Environmental Quality by the Trump Administration.²⁸ We agree that this may be the case. The Council’s NEPA guidance has long been in a state of flux, with multiple rounds of rulemakings between the first Trump and Biden Administrations. Debates over statutory reforms in Congress have been ongoing for years. Additional case law will almost certainly be needed to clarify the boundaries of Justice Kavanaugh’s definition of a “separate project” under NEPA.

The significance of *Seven County*’s attempt to fix NEPA litigation may be to make the case for statutory reform, instead. In a political environment in which its concerns are broadly shared, that might finally be possible.

²⁸ Daniel A. Farber, *A Missed Opportunity to Clarify NEPA Law*, REGUL. REV. (July 16, 2025), <https://www.theregreview.org/2025/07/16/farber-a-missed-opportunity-to-clarify-nepa-law>.