

## The Reasonably Foreseeable Effects of Seven County Infrastructure Coalition

Update

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On December 10, 2024, the US Supreme Court heard oral argument in *Seven County Infrastructure Coalition v. Eagle County*, the first major National Environmental Policy Act (NEPA) case to reach the Supreme Court in nearly two decades. The Court's questioning suggests it is considering either curtailing the scope of NEPA review or guiding lower courts to less searching, more deferential reviews of assessments under NEPA — or both.

### The Fight About NEPA's Scope

The question before the court is whether NEPA requires an agency to evaluate environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority. Under NEPA, federal agencies have an obligation to evaluate the environmental impacts of a federal action that are "reasonably foreseeable" effects of the action. The *Seven County* petitioners assert that lower courts have gone too far in requiring that agencies address ever more remote upstream and downstream effects, despite the Court's 2004 holding in the *Public Citizen* case that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." In *Seven County*, the Supreme Court has an opportunity to clarify the proper scope of agency review under NEPA, and in doing so it may also offer guidance on how searching a court's review of NEPA compliance should be.

The infrastructure project at the center of the litigation is a proposed 88-mile-long railway in Utah's Uinta Basin. The railway's purpose is to transport goods, expected to be predominantly waxy crude oil, out of the Basin and towards refineries along the Gulf Coast. In 2020, Seven County Infrastructure Coalition (SCIC) petitioned the Surface Transportation Board (STB) to begin construction

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of the rail line. Pursuant to its NEPA obligations, the STB published its Environmental Impact Statement (EIS) detailing impacts attributable to the construction and operation of the rail line. The STB also addressed upstream impacts like increased production and downstream effects attributable to the refining process, even as the agency acknowledged that its ability to identify and evaluate these contingent developments was limited. The STB issued the requested order authorizing construction and operation of the rail line.

Eagle County, Colorado filed a petition for review in the US Court of Appeals for the DC Circuit arguing that STB violated NEPA by failing to assess the full range of environmental impacts from the railway. The DC Circuit held that STB should have considered the effect of the railway on increased oil refining along the Gulf, downline railway accidents, and wildfire risk, among other deficiencies, notwithstanding the limited authority of the STB. The DC Circuit vacated STB's order and remanded the environmental review. SCIC petitioned the Supreme Court for review, arguing that the STB complied with NEPA's requirements and relevant case law, and that the DC Circuit erred in faulting the STB's analysis of environmental impacts that "transgress the limits of proximate cause and STB's purview." [Petition at 17].

In its brief, petitioner SCIC argues that NEPA only requires an agency to examine environmental effects that are "reasonably foreseeable," citing prior Supreme Court precedent in *Department of Transportation v. Public Citizen*. In that case, the Supreme Court explained that an agency must assess environmental impacts that have "a reasonably close causal relationship" to the agency's proposed action, analogous to the proximate cause test in private tort liability. SCIC argues that an agency need not evaluate environmental effects under NEPA if the effect is either too remote or outside the agency's regulatory authority. SCIC further argues that NEPA enforces a "rule of reason" that constrains environmental reviews. This "rule of reason" allows agencies to decline to study certain effects if the agency lacks the ability or subject-matter expertise to properly evaluate the effect, or if another agency has the primary responsibility for addressing the effect. In this case, SCIC asserts that the STB's decision not to study environmental impacts on downline accidents, climate change, and Gulf Coast communities is consistent with NEPA.

Respondent Eagle County argues instead that reasonably foreseeable effects in the NEPA context are effects that a "prudent person" would consider when evaluating a decision. Accordingly, agencies must consider a wider range of effects. If an environmental effect is not within the general jurisdiction of the agency, Eagle County explains that other agencies with the requisite jurisdiction and expertise must participate in the environmental review. In this case, Eagle County argues that the STB failed to consider effects that fall within NEPA's scope, and that STB's attempts to excuse any NEPA deficiencies by pointing to the jurisdiction of other agencies fall flat.

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The federal government intervened as a respondent in *Eagle County*. The government agrees with SCIC that agencies are not required to consider effects they have no ability to prevent and that the STB in this case sufficiently considered the reasonably foreseeable effects of the railway in the Uinta Basin. However, the government disagrees with the scope of NEPA put forth by SCIC and takes issue with SCIC's arguments narrowing the scope of NEPA to where agencies no longer need to consider environmental effects that the agency does not directly regulate.

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## Oral Argument

In oral arguments on Tuesday, eight justices probed the scope of NEPA review proposed by SCIC, Eagle County, and the Biden administration. Justice Neil Gorsuch recused himself from the case and was not present. The justices keyed in on arguments surrounding the appropriate boundaries of agency evaluations of reasonably foreseeable effects under NEPA. Chief Justice John Roberts and Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson expressed hesitation about SCIC's proposed test for reasonable foreseeability, which would evaluate whether an environmental impact is (1) too remote in time and effect and (2) outside the jurisdiction of the reviewing agency. If both conditions were met, an agency is not required to analyze the impact and any discussion of such impacts, even if incorrect, would constitute nothing more than harmless error in the NEPA review. Chief Justice Roberts expressed concern about the practical application of such a test, and the difficulty and legal risk an agency may face when parsing which effects should be included in their reviews. Several justices also directed their questions on how the proposed rule would apply to a factual scenario different from a railway, such as a pipeline. Furthermore, the justices tried to clarify the government's position, as the government argued that STB's NEPA analysis was adequate, but also did not want to endorse SCIC's proposed test. The justices struggled to distinguish between SCIC's proposed test and the government's position.

The justices pressed the respondents to explain why STB needed to analyze remote effects, even if those effects were in some way linked to the railway project. Justices Jackson and Kagan focused on the railway's common carrier designation. If the railway could not reject the transportation of waxy crude, the Justices asked, then how could a NEPA analysis of induced upstream production or downstream refinery activity be a basis for STB to deny the project's application? Eagle County explained that when STB identified the impacts, it was obligated under NEPA to address them. Justice Brett Kavanaugh then seemed concerned about the role of judicial deference to agency decisions under NEPA. Justice Kavanaugh seemed skeptical that

courts should second-guess an agency in its judgment about what the agency deemed reasonable to evaluate.

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## Outlook

The direction and tenor of oral argument indicate that the justices are likely to uphold STB's environmental review in this instance (overturning the lower court's vacatur). Even so, it remains to be seen whether the Supreme Court's opinion in this case will provide a new, modified, or clarified test by which agencies should resolve the boundary of their NEPA responsibility. Although some justices may see advantages in the SCIC's proposed two-pronged test, the rigidity of the test seemed unappealing in practice to several justices. The Supreme Court must decide how far it goes in revisiting the substance of its approach in *Public Citizen* to narrow the agency's responsibility under NEPA — and perhaps also recalibrating the deference lower courts should extend in reviewing an agency's judgment under NEPA.

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