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### SCOTUS To Review the Scope of Agencies' NEPA Review



The Supreme Court of the United States announced on June 24, 2024, that it will review a case that could have major ramifications for the development of U.S. infrastructure projects.

In [\*Seven County Infrastructure Coalition v. Eagle County\*](#), the Court will determine the proper scope of federal agency review under the National Environmental Policy Act (NEPA). *Seven County* concerns a coalition of Utah counties seeking clarification on the proper scope of a federal agency's review of the effects of a proposed Utah railway project.

The case raises the critical question of whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority. In many instances, expansive scopes of review by federal agencies that go beyond their regulatory domain have contributed to significant delays on key energy and infrastructure projects throughout the country.

In deciding the *Seven County* case, the Supreme Court will likely provide much-needed clarity over the scope of NEPA review. If the Court rules that NEPA contemplates only narrower review, the decision may help significantly reduce the years-long development cycle and related costs of energy and infrastructure development. Conversely, a ruling against the petitioner in *Seven County* could make it easier for project opponents to delay the review process and frustrate project approvals.

## **Background**

NEPA requires all federal agencies undertaking "major Federal actions significantly affecting the quality of the human environment"—such as approving large infrastructure projects—to take a "hard look" at the environmental consequences of those proposed actions. As relevant to *Seven County*, the federal Surface Transportation Board regulates the construction and operation of new interstate rail lines. The Board may approve a new line only if it finds that the line is "[ ] consistent with the public convenience and necessity." The

Board considers the environmental effects of the proposed action, as documented under NEPA, when approving new projects.

The Seven County Infrastructure Coalition (Seven County) is sponsoring the development of a rail line into Utah's relatively isolated Uinta Basin. The Uinta Basin Railway would connect the area to the national rail network and carry a variety of natural resource commodities, primarily waxy crude oil destined for refinery markets along the Gulf Coast. Following an expedited application process, the Board approved Seven County's proposal in 2021.

Eagle County, Colorado, and the Center for Biological Diversity [challenged the Board's decision](#) in the U.S. Court of Appeals for the D.C. Circuit, claiming the Board's required NEPA analysis was deficient. The challengers insisted that the Board should have considered the new rail line's potential effects on increased oil drilling in Utah and Colorado, as well as oil refining activities more than 1,000 miles away along the Gulf Coast.

The Board responded that because it has no direct authority to prevent or mitigate indirect effects of railroad development, it need not analyze them. The Board relied on a Supreme Court case from 2004, [Department of Transportation v. Public Citizen](#). In that case, the Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," its NEPA analysis need not include that effect.

### **The D.C. Circuit's Decision**

On August 18, 2023, the D.C. Circuit court [ruled](#) that the Board had violated NEPA. The court found that because the Board could prevent alleged environmental effects related to the proposed railway by denying Seven County's application, it could prevent even distant environmental effects, such as increased air emissions at Gulf Coast refineries. The court held that "the Board's argument that it need not consider effects it cannot prevent is simply inapplicable."

### ***Certiorari*-stage Briefing**

In its [petition for a writ of certiorari](#), Seven County argued that the Court should accept review to resolve a circuit split regarding the correct reading of the 2004 *Public Citizen* decision and that the D.C. Circuit is on the wrong side of the split.

The solicitor general [countered](#) that the circuits have diverged not due to any dispute about the meaning of NEPA or *Public Citizen*, but because the different agencies in those factually different cases exercised different decision-making authorities. When an agency has broad powers—here, to approve or reject new railroads based on "the public convenience and necessity"—the solicitor general argues that the agency's "ability to prevent" environmental impacts is greater, and so its NEPA analysis must be more extensive. And when the agency's authority is more limited, so is its ability to prevent distant environmental effects, meaning it need not analyze such effects.

### **What To Watch For**

The Supreme Court granted Seven County's petition earlier this week, priming the case for oral argument and a decision in the upcoming 2024-2025 term. The Supreme Court now has a chance to clarify the scope of NEPA review. The decision may have significant implications for a host of important agencies and the many industries that work with them.

In an [amicus brief](#) supporting Seven County's *certiorari* petition, the natural gas industry explained that the D.C. Circuit's decision has left developers and agencies "unable to anticipate how extensive a NEPA review will be necessary to satisfy the courts on appeal," a situation that is "profoundly injurious" to critical infrastructure development. Environmental review is already burdensome and time-consuming, often taking several years—not accounting for potential litigation, which is common. Congress recently sought to address this issue by imposing deadlines in [amendments](#) to NEPA under the Fiscal Responsibility Act, but the effect of these efforts is so far unclear.

The Supreme Court's decision in *Seven County* may address fundamental issues in the management of environmental impact analysis. For sponsors of infrastructure projects under the jurisdiction of federal agencies, this case is one to watch closely. Companies and organizations affected by NEPA review may wish to consider presenting their views and experiences to the Court as *amici curiae* in order to help the Court understand the high stakes of its decision for ongoing and future NEPA reviews.

The petitioners' opening brief is currently due on August 8, 2024, unless extended. *Amicus curiae* briefs in support of the petitioner are due seven days later—currently on August 15, 2024.

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