Will NEPA Reform Actually Work This Time?

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For half a century, the National Environmental Policy Act (NEPA) has been one of the most litigated federal statutes and, in all likelihood, the most heavily criticized one. Hailed as the "environmental Magna Carta" upon its passage effective January 1, 1970, NEPA requires federal agencies to evaluate the potential environmental effects of major federal actions before undertaking them. 42 U.S.C. §§ 4321–4370h.

What could be wrong with that? Well, plenty, as it turns out. As the U.S. Supreme Court recently noted, "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." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497, 1513 (2025).

Virtually every administration since President Carter's has tried and mostly failed to reduce lengthy agency NEPA reviews. Even in 1978, the White House Council on Environmental Quality (CEQ) lamented that "the environmental impact statement has tended to become an end in itself, rather than a means to making better decisions." National Environmental Policy Act, 43 Fed. Reg. 55,978 (Nov. 29, 1978).

That has been due in part to agency fears of litigation over the adequacy of its review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, through which NEPA claims are litigated. Many courts, in turn, have not been shy about second-guessing agencies' effects analyses, despite their narrow charge under the APA of determining whether agency action was arbitrary, capricious, or otherwise not in accordance with law. Critics assert that NEPA has been where complex infrastructure projects with a federal nexus go to die. At the time of its passage, NEPA was viewed as the most important federal statute in the environmentalists' toolbox. Its reach still can exceed conduct unaffected by federal laws directly regulating air and water quality. And, of course, there remains no general zoning law for public lands.

To the great surprise of weary NEPA cynics, we might be on the verge of a dramatic reduction in NEPA review delays. That's because of the U.S. Supreme Court's NEPA "course correction" ruling in *Seven County*, 2023 statutory amendments that added soft deadlines to environmental review timelines, and changes in NEPA-implementing regulations. Indeed, a baby born today now has a chance to see an environmental impact statement (EIS) completed to the satisfaction of federal agencies, third-party challengers, and the courts within its lifetime.

NEPA Background

NEPA was the first of the modern federal environmental laws and covered a whopping five pages. The statute's initial goals seemed simple enough: Federal agencies should assess the environmental impacts of proposed major federal actions before they undertake them, informing the public and their sister agencies along the way. At the same time, agencies need not refrain from acting because of the environmental impacts they uncover. "NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). Courts can vacate agency decisions not adequately reviewed but not order agencies to directly minimize the environmental impacts of proposed projects.

NEPA applies to projects that require access to federal or tribal lands or otherwise require an executive branch agency to issue an affirmative approval. The Bureau of Land Management (BLM) and the U.S. Forest Service are the leading producers of environmental assessments (EAs) and EISs annually.

Expansive and lengthy NEPA reviews have plagued proponents of major infrastructure projects for decades. Studies have

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reported that the average EIS completion time is around four years, and the median time under three years. Nat'l Ass'n of Envt'l Pros., *2023 Annual NEPA Report* § 5.3 (Charles P. Nicholson ed., Oct. 2024); Council on Envt'l Quality, *Environmental Impact Statement Timelines (2010–2024)* at n.13 (Jan. 13, 2025). Complex and unlucky projects where an EIS is required can face EIS timelines of 15 years or more. *Environmental Impact Statement Timelines (2010–2024)*, *supra*, at 5, fig. 3. And those timeframes do not account for the litigation that inevitably follows controversial major projects.

NEPA is also one of the most litigated federal environmental statutes, with an average of over 100 cases filed annually. *See* Kristen Hite, Cong. Rsch. Serv., *National Environmental Policy Act: Judicial Review and Remedies* (June 26, 2025). District court NEPA cases typically take at least a year to resolve; appellate cases can easily take two or more. One recent study found that litigation adds an average of 4.2 years of delay to the implementation of challenged projects. Nikki Chiappa et al., Breakthrough Inst., *Understanding NEPA Litigation: A Systemic Review of Recent NEPA-Related Appellate Court Cases* 5–6 (2024).

Given these challenges, NEPA reform has been on every presidential administration's agenda since the turn of the century. Initial efforts, however, resulted in mostly guidance or studies offering modest suggestions to improve the NEPA process. Until 2023, the most significant change was the passage of the 2015 Fixing America's Surface Transportation Act (FAST Act), which offered a temporary voluntary program to cut environmental review and permitting timelines for certain infrastructure projects. H.R. 22, 114th Cong., 129 Stat. 1312 (2015). Many aspects of the FAST Act were made permanent by the Bipartisan Infrastructure Law in 2021. *See* HR 3684 Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 525, 1287–95 (Nov. 15, 2021). In 2020, the Trump administration substantively revised the CEQ NEPA regulations, introducing important procedural requirements and other efforts to help streamline the NEPA process. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). The Biden administration also undertook a phased approach to alter the CEQ regulations and address changes made by the Trump administration. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024). None of these revisions altered the underlying law.

The Fiscal Responsibility Act

Congress stepped in more forcefully in 2023 by amending NEPA through the Fiscal Responsibility Act of 2023 (FRA), H.R. 3746, 118th Cong., 137 Stat. 10. As part of the FRA, Congress for the first time defined a "major Federal action" sufficient to trigger NEPA review as an action "subject to substantial Federal control and responsibility." 42 U.S.C. § 4336e(10).

The FRA amendments also clarify the basic requirements for an EIS. *Id.* § 4332(2)(C). It provides that an agency must consider the "reasonably foreseeable environmental effects of the proposed agency action," including by analyzing a "reasonable range of alternatives" that are "technically and economically feasible" and "meet the purpose and need" of the proposed action. *Id.* And the FRA establishes presumptive deadlines and page limits for environmental reviews under NEPA, including a judicially enforceable two-year limit for EISs. *See id.* § 4336a(e) & (g).

CEQ and NEPA

NEPA established the CEQ to advise agencies on the environmental decision-making process, review NEPA implementation, and coordinate the development of federal environmental policy. *Id.* § 4332(B). For decades, however, CEQ also issued regulations governing agencies' NEPA implementation based on the apparent authority of a 1977 executive order issued by President Carter. *See* Exec. Order No. 11,991, Relating to Protection and Enhancement of Environmental Quality, 42 Fed. Reg. 26,967 (May 25, 1977). Courts, in turn, used the CEQ regulations to evaluate NEPA compliance, notably with regard to the regulations' mandate that impact statements evaluate "direct, indirect, and cumulative impacts." 40 C.F.R. §§ 1502.16, 1508.07, 1508.08 (2024). Many judicial decisions turned on CEQ's regulations rather than NEPA's statutory language.

But it would not last. In late 2024, the D.C. Circuit Court of Appeals—dramatically, if belatedly—noted in dicta what many critics had long maintained: that CEQ had no statutory authority to issue regulations binding on the courts. *Marin Audubon Soc'y v. FAA*, 121 F.4th 902 (D.C. Cir. 2024). Two months later, President Trump issued an Executive Order revoking President Carter's 1977 Executive Order and calling for CEQ to rescind its regulations. *See* Exec. Order No. 14,154, Unleashing American Energy, 90 Fed. Reg. 8353 (Jan. 29, 2025). CEQ complied and removal was effective April 11. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10,610 (Feb. 25, 2025). It will take some time for cases that were decided before the CEQ's regulations were rescinded to work their way through the system on appeal.

Seven County

Meanwhile, on May 29, 2025, the U.S. Supreme Court issued its decision in *Seven County*, its first major NEPA decision in 20 years, which unmistakably told lower courts to stop second-guessing agency environmental reviews. 145 S. Ct. 1497.

The case arose out of a dispute over whether the U.S. Surface Transportation Board's EIS for a proposed 88-mile railroad in Utah's Uinta Basin complied with NEPA. The Seven County Infrastructure Coalition, consisting of several Utah counties, applied to construct a railway to connect the Uinta Basin's oil resources with the national rail network, facilitating the transport of crude oil to refineries on the Gulf Coast.

The Board prepared a 600-page EIS supported by an additional 3,000 pages of environmental impact analysis. The Board did not exhaustively analyze the effects of increased upstream oil drilling in the Basin and downstream oil refining along the Gulf Coast. The D.C. Circuit Court held that the Board's EIS was deficient for not sufficiently considering these reasonably foreseeable impacts, leading it to vacate the EIS and the Board's project approval. *Id.* at 1507–08.

Reversal was expected by most NEPA lawyers since the Supreme Court held 20 years ago that an agency need not consider an effect it had no authority to prevent. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004). All eight participating justices—Justice Gorsuch recused himself—agreed reversal was required by *Public Citizen*. Many industry amici had urged the Court to take the opportunity to remind lower courts of their limited mandate under NEPA and the APA, and Justice Kavanaugh's five-justice majority opinion did so with a flourish.

Justice Kavanaugh first summarized the consequences of decades of agency and judicial overreach:

> 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 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.

Seven Cnty., 145 S. Ct. at 1514. "A course correction of sorts is appropriate to bring judicial review under NEPA back in line with the statutory text and common sense," he wrote, adding, "Congress did not design NEPA for *judges* to hamstring new infrastructure and construction projects." *Id.*

To that end, Justice Kavanaugh's majority opinion said that deference to agency review is the "central" and "bedrock principle" of NEPA. *Id*. at 1515. Agency EIS preparation involves "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." *Id.* at 1513. That is, agency decisions on EIS preparation remain the sort of technical judgments to which deference is owed following *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

The Court explained, "[c]ourts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness." *Seven Cnty.*, 145 S. Ct. at 1513. An agency must fully analyze the "project at hand," but not necessarily "other future or geographically separate projects that may be built (or expanded) as a result of or in the wake of the immediate project under consideration." *Id.* at 1515.

The *Seven County* majority also told lower courts, should they find some fault with an agency's review, to refrain from adopting delay-causing vacatur as the default remedy. *Id.* at 1514. If heeded by the courts, this reminder that vacatur is not always appropriate should minimize project delays. *Id.* Although this standard is not a new one, too often the default remedy has been vacatur of the agency's decision. But vacatur, like preliminary injunctions, should never be automatically granted in NEPA cases. *See Winter v Nat. Res. Def. Council*, 555 U.S. 7 (2008).

The vacatur issue is illustrated by NEPA litigation regarding attempts to develop the world's largest-known lithium deposit at Thacker Pass in Nevada. After the BLM authorized the Thacker Pass mine and pending judicial review of that decision, the Ninth Circuit ruled in an unrelated case that BLM could not approve use of unpatented lode mining claims for what the court considered waste rock storage facilities "permanently" occupying the surface of those public lands without evaluating whether the proposed location contains valuable minerals within the meaning of the 1872 General Mining Act. *See Bartell Ranch LLC v. McCullough*, No. 3:21-cv-00080, 2023 U.S. Dist. LEXIS 19280, at *2 (D. Nev. Feb. 6, 2023). As a result of that decision, the District Court of Nevada in the Thacker Pass case remanded the case back to BLM, directing BLM to consider this new requirement, which was not in place at the time BLM rendered its decision. Critically, the district court chose not to vacate BLM's decision pending this additional review because it concluded that the agency was likely to reach the same decision on remand. The Ninth Circuit affirmed. *See Western Watersheds Project v. McCullough*, No. 23-15259, 2023 U.S. App. LEXIS 18063, at *9–10 (9th Cir. July 17, 2023). The *Seven County* opinion confirms this was indeed the right approach.

Seven County's Progeny

The *Seven County* ruling should dramatically reduce lower court interference and, ultimately, environmental review times. But that will only be the case if the lower courts implement the Court's holding and heed Justice Kavanaugh's associated dicta.

It appears the ruling has had an immediate impact. Most dramatically, just a week after issuance of *Seven County*, the case was cited by the D.C. Circuit in *Appalachian Voices v. FERC*, 139 F.4th 903 (D.C. Cir. 2025). There, the court approved a decision by the Federal Energy Regulatory Commission (FERC) to grant Mountain Valley Pipeline, LLC, an extension of the construction deadline for a natural gas project, rather than first requiring additional environmental review. In a concurrence that echoed the theme of *Seven County*, Judge Karen Henderson lambasted the current state of NEPA review, calling "NEPA's minefield" a "quintessentially judicial construction." *Id.* She added:

> Petitioners—a collection of environmental groups—have developed a cottage industry that uses the nation's environmental laws to retard new development. Petitioners deluge permitting agencies with dubious claims. The agencies spend years writing thousands of pages of environmental review in an attempt to stave off litigation. Often, however, no sooner do agencies approve new development than they find themselves under a tidal wave of litigation from environmental groups. These groups do not need to win their lawsuits. Indeed, they rarely do. Yet they emerge victorious because delay is the coin of the realm. Developers—overwhelmed by the torrent of challenges—often abandon their projects rather than weather the storm. Many more are cowed from even entering the market.

Id.

Agency Regulations

Although CEQ now has no authority to issue NEPA rules binding on third parties and the courts, some agencies do have their own rulemaking authority. Those agencies are required to implement new NEPA regulations by early 2026. Memorandum from Katherine R. Scarlett, CEQ, for Heads of Federal Departments and Agencies, Implementation of the National Environmental Policy Act (Feb. 19, 2025). In the interim, CEQ advised agencies to "continue to follow their existing practices and procedures for implementing NEPA" and not to delay pending or ongoing NEPA analyses while undertaking regulatory revisions. *Id.* Agencies also were instructed to use the 2020 CEQ regulation updates as an initial framework for new agency-level rules. *Id.*

On June 30, various agencies rolled out their revisions to NEPA regulations. In addition to removing references to environmental justice and climate change, the changes are a mix of new procedural regulations and guidance documents. The Department of the Interior (DOI), for example, moved most of its procedures to a nonbinding NEPA guidance document. DOI, *516 DM 1—U.S. Department of the Interior Handbook of National Environmental Policy Act Implementing Procedures*. It retained only emergency responses, categorical exclusions, and applicant/contractor preparation of documents in its new NEPA regulations. *See* 43 C.F.R. pt. 46.

The Department of Energy (DOE) similarly revised its regulations to include only those administrative and routine actions exempt from NEPA review, a list of existing categorical exclusions, and provisions for emergency circumstances. *See* 10 C.F.R. pt. 1021. A procedural guidance document will maintain the remainder of the DOE procedures. DOE, *U.S. Dep't of Energy National Environmental Policy Act (NEPA) Implementing Procedures* (June 30, 2025).

On July 3, 2025, the Department of Agriculture (USDA) issued its new regulations, consolidating most regulations for its subcomponent agencies. These regulations were designated "procedural" and considered effective immediately without notice and comment. 7 C.F.R. pt. 1b. Like other agency regulations, the USDA no longer requires the publication of a draft EIS. Further, the USDA confirms that it will permit the applicant or another third party to prepare EAs or EISs. And, like other new NEPA regulations, it has revised the definition of "significance" and removed any requirement to consider cumulative impacts.

These collective changes are aimed at streamlining the permitting process and accelerating project development. They likely will face legal challenges, and the long-term impact on projects remains to be seen. This last part is especially true considering the shift to guidance documents and procedural regulations, which will be more vulnerable to shifting political whims in the future.

A Modest Proposal

The NEPA process must change if the United States wants to build infrastructure and develop projects. To effectively align NEPA with modern project demands, courts can build on the groundwork set by recent statutory and regulatory reforms or those likely to be implemented in 2026. As discussed above, existing caselaw, including the recent *Seven County* decision, is a step in the right direction, but more needs to be done.

First, agencies must strive, where possible, to adhere to NEPA's existing time limits, and courts must acknowledge those limits when considering claims for additional analysis. The FRA introduced deadlines, but firmer mandates could curtail indefinite delays. Agencies should consider the appropriate scope of review and required timelines relative to page limits for EAs and EISs. Courts also should respect the time limits. FRA reforms have no teeth when courts demand that agencies "run down every rabbit hole" to review an EA or EIS. *Appalachian Voices*, 139 F.4th 903.

Additionally, courts should follow *Seven County* and refrain from vacatur of agency decisions to address every deficiency identified in an EIS. Instead, they should prioritize remand without vacatur when remedying the deficiencies so they will not fundamentally alter the agency's determination.

Courts also must limit NEPA reviews to impacts within an agency's statutory jurisdiction, again consistent with the principles outlined in *Seven County*. Agencies should focus their analyses on direct impacts and foreseeable indirect effects, ensuring that NEPA remains a tool for informed decision-making rather than speculative inquiry. And courts must afford agencies substantial deference when examining an EIS.

For their part, agencies can implement common sense NEPA regulations that allow efficient satisfaction of their NEPA obligations. Agencies also should develop additional streamlined compliance pathways that incorporate technology and data analytics to improve the precision and efficiency of NEPA review. *See Trump Administration Launches Permitting Technology Action Plan*, The White House (May 30, 2025). These tools can facilitate real-time data sharing among agencies, stakeholders, and the public, enhancing transparency and accelerating the review process. In the absence of uniform CEQ regulations, it is essential to maintain conformity in implementation across various agencies.

NEPA is designed to facilitate informed federal decision-making, meaningful public involvement, and coordinated agency action without imposing substantive constraints on agency choices. However, the procedural inefficiencies and litigation risks associated with NEPA have resulted in significant delays and increased costs for major infrastructure projects. The Supreme Court's decision in *Seven County* indicates a shift toward more practical NEPA reviews, but further reforms are necessary to support critical infrastructure and resource needs. By addressing these challenges, NEPA can be realigned to effectively balance environmental assessments with economic development.

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