Holland & Hart

SCOTUS Reins In NEPA: A Game-Changer for Infrastructure Development

Laura Granier

Partner
775.327.3089
Reno
lkgranier@hollandhart.com

Benjamin Longbottom

Associate
303.295.8474
Denver, Phoenix
BALongbottom@hollandhart.com

Christopher D. Thomas

Partner
602.507.9704
Phoenix
cdthomas@hollandhart.com

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The U.S. Supreme Court instructed lower courts to make a dramatic "course correction" in how they handle claims under the National Environmental Policy Act (NEPA) in its first major NEPA ruling in nearly two decades. Writing for a five-justice majority, Justice Brett Kavanaugh opined that it was time to "bring judicial review under NEPA back in line with the statutory text and common sense" in *Seven County Infrastructure Coalition v. Eagle County, Colo*., 605 U.S. ___ (2025), No. 23-975, slip op. at 13.

Procedural History

The eight participating justices all agreed that the D.C. Circuit had erred in vacating approval by the Surface Transportation Board of a proposed 88-mile rail corridor in the Uinta Basin in rural Utah. The 88-mile stretch was the only section subject to the approval of the Board, whose statutory mandate favors approval. While the new trackage would primarily serve to haul waxy crude oil out of the Uinta Basin, it would also serve to bring goods and products into the Uinta Basin. The DC Circuit had agreed with project opponents that the Board's environmental impact statement fell short of NEPA's requirements.

The Board's 600-page EIS—supplemented by another 3,000 pages of analysis—had fully evaluated impacts only along the rail corridor. The Board did "identify some of the potential effects and marginal risks" of upstream oil drilling in the Uinta Basin and downstream oil refining along the Gulf Coast. But it declined to quantify those effects and risks, concluding they arose from separate and independent projects that were also outside its jurisdiction. Slip op. at 15, n. 5.

The D.C. Circuit disagreed, ruling that those environmental impacts were a reasonably foreseeable result of linking the basin to the stream of commerce and that the Board's evaluation of them was impermissibly limited. With Justice Gorsuch not participating, eight justices disagreed with the circuit court's analysis.

A "Course Correction"

The Supreme Court's reversal first reiterated the *Public Citizen* rule that agencies need not evaluate impacts they cannot regulate. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004).

"Even apart from failing to afford sufficient deference to the Surface

Shawn Welch

Partner
801.799.5889
Salt Lake City
stwelch@hollandhart.com

Transportation Board, the D.C. Circuit's decision was mistaken on the merits under NEPA," the majority opinion stated. Slip op. at 15. "The D.C. Circuit erroneously required the Board to address environmental effects from projects that are separate in time or place from the 88-mile railroad project at hand—that is, effects from potential future projects or from geographically separate projects. Moreover, those separate projects fall outside the Board's authority and would be initiated, if at all, by third parties." *Id.*

The three concurring justices—Justices Sotomayor, Kagan, and Jackson—agreed that the effects of separate projects need not be evaluated based on mere "reasonable foreseeability" or "but for" causation but declined to join the majority's lambasting of NEPA caselaw. *See* slip op. at 9–11 (Sotomayor, J., concurring in the judgment). Justice Sotomayor's opinion zeroed in on *Public Citizen*'s rule that "[a]n agency is not responsible for environmental impacts it could not have lawfully acted to avoid, either through mitigation or by disapproving the federal action." *Id.* at 7.

This point was relegated to a footnote in the majority opinion, *see* slip op. at 20–21 n.6 (majority op.) which took the opportunity to recalibrate NEPA review more broadly. The majority lamented that "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." Slip op. at 12 (emphasis added).

The majority likewise took note of complaints by several amici that environmental groups often invoke NEPA to delay projects they ostensibly should support, such as renewable energy infrastructure. Slip op. at 13. Law professors J.B. Ruhl and James Salzman published in 2023 an exhaustive analysis of the NEPA and other impediments to timely constructing climate infrastructure. Among other stalled projects, they noted that NEPA delays have extended to 18 years the approval process for what would be the largest land-based wind farm in U.S. history, proposed in 2008 for federal land in Wyoming. And that was assuming no further litigation. *See* J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 Emory L.J. 1 (2023). In 2024, the Department of Defense was relegated to investing in private cobalt and graphite mines in Canada because those minerals—"essential to national defense"—were not expected to be available domestically "in a timely manner." *See Department of Defense Awards $14.7 Million to Enhance North American Cobalt and Graphite Supply Chain* (May 16, 2024), U.S. Dep't of Defense, https://tinyurl.com/yp7ebhvw. It says something when NEPA delays defeat even the Defense Department.

Against that backdrop, the majority opinion is an endless source of quotable material. Here's a passage in which twenty years of frustration at stalled or defeated infrastructure projects leaps off the page:

> 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.

Slip op. at 13. Justice Kavanaugh summarized: “Congress did not design NEPA for judges to hamstring new infrastructure and construction projects.” *Id.* at 14.

Both the majority and the concurrence stressed that courts must defer to agency decisions about the nature and scope of impacts that must be considered. Indeed, Justice Kavanaugh's majority opinion said deference to agency review is the “central” and “bedrock principle” of NEPA. Slip op. at 8, 15. That's because 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.” Slip op. at 12.

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.” Slip op. at 12. Essentially, the rule is that 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.” Slip. op. at 16.

NEPA Under Review

The majority opinion should reassure those who feared the Court's recent pivot away from deference to executive branch agencies might create more room for judicial intervention under NEPA. Two judges on a three-judge panel of the D.C. Circuit concluded last November that the White House Council of Environmental Quality never had authority to issue NEPA regulations binding on third parties in *Marin County Audubon Society v. Federal Aviation Administration*, 121 F.4th 902 (D.C. Cir. 2024). And the thread by which the CEQ's rulemaking authority hung—a 1977 Executive Order by President Carter—was rescinded by President Trump's Executive Order No. 14154 on January 20.

The demise of the CEQ regulations puts the focus on the provisions of the NEPA statute itself and rules promulgated by agencies with their own rulemaking authority, and not all agencies are prepared for that. Notably absent from the Supreme Court's opinion was reference to *any* agency rules, an implicit rebuke of courts (like the DC Circuit below) who use them as a rote checklist of NEPA compliance.

And easily distinguished by the Court was its recent ruling that courts should not defer to agency interpretations of ambiguous statutes they enforce in *Loper Bright Enterprises v. Raimondo*, 603 US 369 (2024). In

evaluating environmental impacts, the majority said, agencies are not merely interpreting the statutory term “detailed.” *Loper Bright* accordingly does not give the courts license to second-guess agency policy and fact-dependent choices. Slip op. at 8–9.

The majority offered still another bit of hope to project proponents faced with NEPA litigation and its attendant delays. Justice Kavanaugh told courts they should not assume vacatur of an agency decision should always be the remedy when agency environmental review is found wanting: “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.” Slip op. at 14. Avoiding vacatur alone offers the prospect of saving at least a year of additional litigation at the District Court and 18–24 months at the Court of Appeals. Because the authorization remains in place during any remand, construction can proceed.

What's Next?

The majority left us with this: “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. . . . Citizens may not enlist the federal courts, 'under the guise of judicial review' of agency compliance with NEPA, to delay or block agency projects based on the environmental effects of other projects separate from the project at hand.” Slip op. at 21–22 (emphasis added).

Of course, as with any slate-clearing Supreme Court opinion, the lower courts' implementation of the Court's directions is an open question. But at a minimum, *Seven County* marks something of an attitude change in NEPA litigation. Project proponents have good reason to hope that the Court's opinion will finally produce more efficient NEPA review and litigation.
