

Supreme Court Grants Cert To Assess Limits Of NEPA

JUNE 27, 2024

The Supreme Court will hear a challenge to the D.C. Circuit’s interpretation of agency obligations under the National Environmental Policy Act (NEPA). The June 24, 2024 grant of certiorari in *Seven County Infrastructure Coalition v. Eagle County* marks the Supreme Court’s most significant foray into NEPA since its unanimous 2004 decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). The Supreme Court will consider “[w]hether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.” Pet. at i.

Seven County arises from an application to the Surface Transportation Board (STB) to construct 88 miles of railway track connecting the remote Uinta Basin in Colorado to the national railway system. *Id.* at 5, 9. Because the goods transported by the railway would include waxy crude oil, challengers argued that the STB should consider the upstream and downstream environmental effects caused by the production and use of the oil transported by the railway. *Id.* at 5. STB declined. It concluded that it lacked “authority or jurisdiction over development of oil and gas.” *Id.* at 5–6 (citing Pet. App. 108a). The D.C. Circuit disagreed. It held that the STB “cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments.” *Id.* at 6 (citing Pet. App. 36a).

By taking up *Seven County*, the Supreme Court seeks to resolve an entrenched circuit split on the meaning of its *Public Citizen* opinion. In *Public Citizen*, the Court held that NEPA does not require an agency to review environmental effects when it otherwise has no statutory authority to prevent those effects. 541 U.S. at 770. The Third, Fourth, Sixth, Seventh, and Eleventh Circuits have taken *Public Citizen* to mean that an agency need not review an environmental effect when it “lacks the authority to regulate” [the] effect ‘wholesale.’” Pet. at 5 (quoting *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1299–1300 (11th Cir. 2019)). The D.C. Circuit and the Ninth Circuit meanwhile have adopted the rule that agencies must review any effect “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” Pet. at 18–19 (first quoting *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1371 (D.C. Cir. 2017), and then citing *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 731, 736–40 (9th Cir. 2020)). The petitioners in *Seven County* have framed this split as the difference between the agency’s regulatory authority and the foreseeable effects of the agency’s actions. See Pet. at 18.

Though the D.C. Circuit followed its *Sabal Trail* approach in rejecting STB’s analysis in *Seven County*, the circuit has itself issued inconsistent decisions on the scope of an agency’s NEPA obligations. In *Center for Biological Diversity v. FERC*, the D.C. Circuit seemingly adopted the Eleventh Circuit’s approach to *Public Citizen* by holding that the Federal Energy Regulatory Commission’s “lack of jurisdiction over export approvals also means it has ‘no NEPA obligations stemming from th[e] effects’ of export-bound gas.” 67 F.4th 1176, 1185 (D.C. Cir. 2023). Parties in other cases, such as the intervenor in *Sierra Club v. U.S. Dep’t of Energy*, No. 22-1218,* similarly challenge whether limits on an agency’s statutory authority limit the scope of required NEPA review.

The Supreme Court’s grant of certiorari in *Seven County* also comes on the heels of adjustments to NEPA passed by the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, as well as new regulations from the Council of Environmental Quality. While the **Debt Ceiling Deal’s NEPA Reforms** appear to embrace (and even implement) *Public Citizen*, CEQ’s Phase II regulations of May 1, 2024, appear to point in a different direction. In the face of the competing circuit decisions and changing statutory and regulatory landscape, the *Seven County* petitioners have asked the Court to provide a “manageable line” to guide agencies’ NEPA decisionmaking. Pet. at 6.

⌵ The authors represent Intervenor Golden Pass LNG Terminal LLC in this case.

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