Seven County Infrastructure Coalition v. Eagle County: A New Era in Federal Environmental Law

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Introduction

"One can say, without exaggeration, that the 'modern era' of environmental law began with the signing of [the National Environmental Policy Act (NEPA)] by President [Richard] Nixon on New Year's Day 1970."[1] One could equally say, without exaggeration, that the modern era of environmental law ended, at least with respect to NEPA, in *Seven County Infrastructure Coalition v. Eagle County*.[2] NEPA requires federal agencies to assess the environmental impact of proposed major federal projects and to consider environmentally less-damaging alternatives. Over the decades following NEPA's enactment, certain lower federal courts transmogrified NEPA's purely procedural obligation into a powerful tool to defeat major infrastructure projects. It is this anti-development contortion of the law that, one hopes, has ended with *Seven County*.

At one level, the decision really does nothing new. The Supreme Court has never ruled in favor of a NEPA challenge, and the NEPA challengers lost again in *Seven County*. What is new is the decision's clear, decisive and definitive rejection of the lower courts' practice of hyper-enforcing NEPA's procedural obligations, with little deference given to agencies—all with the result of converting NEPA into a formidable substantive statute oftentimes fatal to federal projects. What is also remarkable is how *Seven County* achieves this course correction: Justice Brett Kavanaugh's majority opinion repeatedly cites common

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[1] William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 Ind. L.J. 205, 205 n.2 (1989).

[2] 145 S. Ct. 1497 (2025).

sense and the economic drag of an over-inflated NEPA as leading reasons for rejecting the lower courts' excessively zealous enforcement.

We begin this article with a brief review of the legislative process that produced NEPA, as well as of the quick-to-emerge and too-long-enduring divergence between the Supreme Court and lower courts over how to apply NEPA. We next analyze the *Seven County* majority as well as Justice Sonia Sotomayor's concurrence. We then conclude with a few broader observations about *Seven County*'s impact on environmental and administrative law, as well as the decision's relationship to recent political efforts to reinvigorate American infrastructure and natural resource development.

I. Environmental Law's Modern Era Begins: NEPA in Congress

The 1960s was a time of shifting view among Americans about the environment: what started in the 18th century as a fear of wilderness and matured in the 19th century as an attitude of confident mastery had devolved by the mid-20th century into a timidity born of perceived overuse and self-poisoning.[3] This was the age of Rachel Carson,[4] Stuart Udall,[5] and Paul Ehrlich.[6] A general fear and malaise beset America by the end of the decade.[7] *Time* named 1969 the "Year of Ecology" and labeled ecologists the "New Jeremiahs."[8] Even the

[3] *See* Subcomm. on Sci., Rsch. & Dev. of the H. Comm. on Sci. & Astronautics, 90th Cong., Managing the Env't 13–15 (Comm. Print 1968).

[4] *See* Richard A. Epstein, *The Many Sins of NEPA*, 6 Tex. A&M L. Rev. 1, 4 (2018) ("Congress passed NEPA at the dawn of the environmental movement as part of the vast public appeal of Rachel Carson's *Silent Spring*. . . .").

[5] *See* Ved P. Nanda, *The Environment, Climate Change, and Human Rights: The Significance of the Human Right to Environment*, 50 Denv. J. Int'l L. & Pol'y 89, 91 (2022) (noting the significance of Udall's *Quiet Crisis* in "spurring," among other things, NEPA).

[6] Erik Podhora, *Lessons for Climate Change Reform from Environmental History: 19th Century Wildlife Protection and the 20th Century Environmental Movement*, 30 J. Envtl. L. & Litig. 1, 28 (2015) ("Widely read books like . . . Paul Ehrlich's *The Population Bomb* highlighted the scope of problems caused by pollution and the need to take immediate action.").

[7] *See* A. Dan Tarlock, *The Story of* Calvert Cliffs*: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in Environmental Law Stories 77, 80–81 (Richard J. Lazarus & Oliver A. Houck eds. 2005).

[8] Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 Duke Envtl. L. & Pol'y F. 113, 124 (2010).

U.S. Chamber of Commerce that year published a pamphlet entitled "The Need: To Manage Our Environment."[9]

This environmental alarmism[10] was not without some warrant. The Santa Barbara oil spill,[11] the New York City smog event of Thanksgiving 1966,[12] and the burning of the Cuyahoga River[13] put people on edge. Many believed that the Earth would soon become overpopulated, with no food left to eat and no air left to breath.[14] Others were beset by a Luddite-inspired concern that technology had become too effective, and too destructive, in harnessing natural resources.[15] A national legislative response was thought to be needed.[16]

The first bill for federal environmental coordination had been submitted back in 1959[17] and, about the same time, the Eisenhower Administration considered the establishment of a Department of

[9] *See National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. on Interior and Insular Affs.*, 91st Cong. 31 (1969) [hereinafter *Hearing*].

[10] *See, e.g.*, S. Comm. on Interior and Insular Affs., 90th Cong., A Nat'l Pol'y for the Env't 1 (Comm. Print 1968) [hereinafter Nat'l Pol'y] ("But there is, nevertheless, general consensus throughout most walks of life that a serious state of affairs exists . . . .").

[11] *See* Epstein, *supra* note 4, at 4 (noting "the extensive public outrage that stemmed from the . . . massive oil leaks into Santa Barbara waters in 1969").

[12] Barry Friedman, *What Is Public Safety?*, 102 B.U. L. Rev. 725, 743 (2022) ("[D]uring Thanksgiving weekend of 1966, ground-level smog in New York City caused an estimated 168 deaths and health problems for some 10% of city residents.").

[13] *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 Fordham Envtl. L.J. 89, 94 (2002) ("The June 22, 1969, fire on the Cuyahoga is the 'seminal' event in the history of water pollution control in America. . . .").

[14] S. Comm. on Interior and Insular Affs. & H. Comm. on Sci. and Aeronautics, 90th Cong., White Paper on a Nat'l Pol'y for the Env't 3 (Comm. Print 1968) [hereinafter White Paper] ("It is clear that all segments of the world—all soils, waters, woods, mountains, plains, oceans, and ice-covered continents—will be occupied and used by man. . . . Everything between soil and sky will be moved about, redistributed and degraded as man continues to exploit the surface of the planet."), https://ceq.doe.gov/docs/laws-regulations/Congress-White-Paper.pdf.

[15] *See, e.g.*, Nat'l Pol'y, *supra* note 10, at 5 ("In summary, within the present generation the pressures of man and technology have exploded into the environment with unprecedented speed and unforeseen destructiveness.").

[16] S. Rep. No. 91-296, at 5 (1969) ("In spite of the growing public recognition of the urgency of many environmental problems and the need to reorder national goals and priorities to deal with these problems, there is still no comprehensive national policy on environmental management.").

[17] John R. Sandler, Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 Brook. L. Rev. 139, 140 (1970).

Natural Resources. But at this stage the problem was perceived largely as one of insufficient coordination among agencies.[18]

Soon, however, interest in legislation accelerated, in part because of the publication of two influential congressional committee reports[19] and the convening of a congressional "colloquium" on a national environmental policy.[20] Thereafter, legislative interest deepened, from seeking to require mere heightened coordination among federal agencies to establishing a substantive federal environmental policy informed by the developing science of ecology.[21] As Professor Dan Tarlock observes, "NEPA was enacted just as the idea of environmental protection was making the transition from a public policy problem identified and defined by elites to a mass political issue that demanded swift Congressional and Executive response."[22]

Senator Henry Jackson of Washington and Representative John Dingell of Michigan became the leaders of that congressional response.[23] Senator Jackson's initial legislative proposal envisioned simply a federal environmental entrepot—an agency that would research how government programs affect the environment and distribute that information throughout the federal bureaucracy.[24] The Dingell bill did the same but went further than the original Jackson bill in articulating a national environmental policy.[25]

The Nixon administration was not opposed in principle to these proposals.[26] Its preference, though, was for legislation limited to the establishment of an environmental clearinghouse within the Executive Office of the President.[27]

[18] Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 Nat. Res. J. 243, 245 (1976).

[19] Andreen, *supra* note 1, at 212–13.

[20] Kalen, *supra* note 8, at 136–38.

[21] Dreyfus & Ingram, *supra* note 18, at 245–46.

[22] Tarlock, *supra* note 7, at 84.

[23] Kalen, *supra* note 8, at 135–39.

[24] *Hearing*, *supra* note 9, at 1–3, 35. *See also* Nat'l Pol'y, *supra* note 10, at 20.

[25] Andreen, *supra* note 1, at 218–19.

[26] *Hearing*, *supra* note 9, at 69 ("The present administration is delighted with the interest of this committee and with the Congress generally in this environmental problem.") (statement of Dr. Lee A. DuBridge, President's Science Adviser).

[27] Sandler, *supra* note 17, at 140–41.

Only later in the legislative process did the idea surface of adding a requirement that all federal agencies analyze the environmental impact of their activities.[28] That was likely the direct result of hearing testimony given by Professor Lynton K. Caldwell, [29] author of the influential *National Policy on the Environment* committee print, under the instruction of professional commitee staff members Van Ness and Daniel Dreyfus. He testified that Senator Jackson's bill needed "action-forcing or operation measures."[30] After the hearing, Senator Jackson conferred with his staff and then produced the embryo of the environmental impact statement (EIS) requirement as we know it today. As explained by his staffers, the requirement that the agency decisionmaker issue a "finding" that the environmental impacts of the proposed action had been studied and considered, and any unavoidable adverse impacts justified, was conceived to overcome the Nixon administration's perceived hostility to the environmental policy preferred by Congress.[31] The full Senate approved the committee bill through unanimous consent.[32]

In the House, the Dingell bill sailed through,[33] although it was moderated somewhat by a last-minute amendment from Representative Wayne Aspinall, to the effect that "nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal official or agency created by other provision of law."[34] Shortly thereafter, the House requested a conference with the Senate. But a "curious thing then occurred before the Senate agreed to the conference: It amended the bill."[35]

[28] Andreen, *supra* note 1, at 215–17.

[29] *See* Kalen, *supra* note 8, at 141 (observing that Senator Jackson had already recognized the need for an action-forcing mechanism and that the senator's and the committee's staff had "effectively scripted" Caldwell's testimony).

[30] *Hearing*, *supra* note 9, at 116.

[31] Dreyfus & Ingram, *supra* note 18, at 251. Nixon was "the most protective president of the environment since President Theodore Roosevelt." Denis Binder, *NEPA at 50: Standing Tall*, 23 Chap. L. Rev. 1, 3 (2019). But the environmentalism that Nixon advanced is much more of the "housekeeping" than the "commissars" variety. *See generally* Richard Neuhaus, In Defense of People: Ecology and the Seduction of Radicalism 276–78 (1971).

[32] Andreen, *supra* note 1, at 218.

[33] *Id.* at 218–19.

[34] *See* H.R. Rep. No. 91-765, at 9 (1969) (Conf. Rep.); Kalen, *supra* note 8, at 147.

[35] Andreen, *supra* note 1, at 219.

This amendment would become known as the Muskie-Jackson Compromise. Senator Edmund Muskie of Maine[36] chaired the Public Works Committee and had been somewhat turned off by what he viewed as Senator Jackson's attack on the jurisdiction of the former's committee.[37] Publicly, Muskie stated that he was concerned that merely requiring federal agencies to make a factual "finding" regarding environmental impacts was not enough. He proposed changing the requirement of a "finding" to a "detailed statement" for which input would first have to be sought from outside agencies.[38] Muskie, very concerned about supposedly blinkered single-mission federal agencies, believed that the change was necessary to ensure that these agencies would faithfully implement the EIS requirement.[39] The finding-to-statement change, arising from the "protracted and bitter" negotiations between the senators and their staff,[40] would prove momentous: it would convert the EIS process from one primarily intended to be internal to the agency to one that would create a forum for "public participatory policymaking."[41] It would also, as we shall see, enable litigants to obtain a more demanding level of judicial scrutiny because courts could more easily characterize their review of an agency's NEPA document as procedural rather than substantive.

The bill that emerged from conference largely preserved the Jackson bill as amended by the Jackson-Muskie compromise. The most significant change was the deletion of language from the Jackson bill that would have recognized that "each person has a fundamental and inalienable right to a healthful environment."[42] This is particularly notable because Senator Jackson and others thought that such language was necessary to make NEPA actionable by citizen-plaintiffs.[43] Another significant change was the deletion of the Aspinall

[36] Senator Muskie's environmentalism was sufficiently zealous to earn him the moniker "Mr. Clean." *See* Heream Yang, Note, *NEPA's Environmental Vision: Close, But Not Quite*, 42 Va. Envtl. L.J. 120, 154 (2024).

[37] Kalen, *supra* note 8, at 144.

[38] Andreen, *supra* note 1, at 220–21; 115 Cong. Rec. 29051 (1969).

[39] Dreyfus & Ingram, *supra* note 18, at 253.

[40] The dispute was caused in part "by the desire of both Senators to gain reputations as 'good' environmentalists, especially since the presidential primary season was in the offing." Andreen, *supra* note 1, at 220 n.107.

[41] Dreyfus & Ingram, *supra* note 18, at 258.

[42] H.R. Rep. No. 91-765, at 8 (Conf. Rep.).

[43] Kalen, *supra* note 8, at 155.

amendment to the House bill, which explicitly affirmed that NEPA did not affect existing agency authorities to regulate or to protect the environment. This might suggest that the conference intended the bill to have a substantive component, yet the conference report conceded that agencies must comply with NEPA "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."[44] Such was also the view of Senator Jackson's staff.[45]

Little debate occurred over the conference report, perhaps because of the fast-approaching Christmas recess, and the amended bill was swiftly approved by both Houses.[46] At the western White House, President Nixon signed the bill on New Year's Day 1970.

NEPA as enacted has three main sections in two titles. The first establishes the national policy on the environment and directs all federal agencies to use their authorities to further that policy as follows:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[47]

The statute's second main part establishes the EIS obligation, directing that, for all "major Federal actions significantly affecting the

[44] H.R. Rep. No. 91-765, at 9 (Conf. Rep.).

[45] Kalen, *supra* note 8, at 154.

[46] Andreen, *supra* note 1, at 223.

[47] 42 U.S.C. § 4331(b).

quality of the human environment," the responsible agency prepare a "detailed statement" on the following:

> (i) reasonably foreseeable environmental effects of the proposed agency action;
> (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
> (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.[48]

The statute's third main section establishes the Council on Environmental Quality (CEQ) in the Executive Office of the President.[49] CEQ's duties are principally to advise the president on environmental issues, relay agencies' compliance with NEPA, and act as a repository of environmental data for the executive branch.[50]

II. A Federal Environmental "Common Law": NEPA in the Courts prior to *Seven County*

A. Calvert Cliffs*: Environmentalism Ascends to the Courts*

The role of the courts in policing agency compliance with NEPA was initially unclear.[51] Nevertheless, judicial review under the new statute began in earnest in 1971, when Judge Skelly Wright of the

[48] *Id.* § 4332(C).

[49] *Id.* § 4342. The template for CEQ was the Council of Economic Advisers. Dreyfus & Ingram, *supra* note 18, at 248.

[50] *See* 42 U.S.C. § 4344. Note that, as discussed further below, CEQ's 1978 decision to promulgate detailed regulations—ostensibly governing *all* agencies' compliance with NEPA—significantly expanded CEQ's role in NEPA's administration.

[51] *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1507, 1515 (2012) ("NEPA's drafters . . . apparently believed that the primary enforcement mechanism of NEPA's EIS requirement would not be lawsuits. . . ." (citing Tarlock, *supra* note 7, at 87–88)).

District of Columbia Circuit issued his opinion in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*.[52] In *Calvert Cliffs* a group of environmentalist plaintiffs challenged rules recently adopted by the Atomic Energy Commission (since abolished and reconstituted as the Nuclear Regulatory Commission[53]). These rules established procedures to govern the consideration of environmental impacts in the approval of new nuclear power facilities.[54] The D.C. Circuit determined that the commission's rules did "not comply with the congressional policy" set forth in NEPA and remanded them for further rulemaking.[55]

The lasting significance of *Calvert Cliffs* is less in its specific controversy—which was grounded in the unique socio-political debate surrounding nuclear technology prevalent in the middle of the 20th century[56]—and more in the court's broad statements regarding the judicial role in policing agency environmental compliance under NEPA. Judge Wright began his opinion by announcing that "[t]hese cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment."[57] This announcement was driven by Judge Wright's discerning "the commitment of the Government to control, at long last, the destructive engine of material 'progress,'" and his view that it is the "duty" of the courts "to see that [such] important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[58] Judge Wright then announced a framework for NEPA review that drew a "sharp distinction between what he described as NEPA's 'general substantive policy,' outlined in Section 102(1), and its 'procedural' mandate, set forth in Section 102(2)."[59] In Judge Wright's view, while NEPA's "general substantive policy" might be a "flexible one," its

[52] 449 F.2d 1109 (D.C. Cir. 1971).

[53] *See Our History*, U.S. Nuclear Reg. Comm'n (Feb. 20, 2025), https://www.nrc.gov/about-nrc/history.html.

[54] *See Calvert Cliffs*, 449 F.2d at 1111–12.

[55] *Id.* at 1112.

[56] *See generally* Tarlock, *supra* note 7, at 79–82.

[57] *Calvert Cliffs*, 449 F.2d at 1111. As Professor Lazarus notes, perhaps the most striking aspect of the opinion "is how Wright took the notion of a 'flood' and turned it from a negative into a positive." Lazarus, *supra* note 51, at 1516.

[58] *Calvert Cliffs*, 449 F.2d at 1111.

[59] Lazarus, *supra* note 51, at 1516-17 (quoting *Calvert Cliffs*, 449 F.2d at 1112).

procedural requirements "establish a strict standard of compliance" to be "rigorously enforced."[60]

Calvert Cliffs was subsequently pared back by the Supreme Court.[61] Nevertheless, as we will discuss further below, the specter of Judge Wright's expansive view of NEPA never fully dissipated.[62]

B. NEPA at the Supreme Court: Narrow Review of a Purely Procedural Statute

The first NEPA case to reach the Supreme Court on the merits came two years after *Calvert Cliffs*: the Supreme Court ruled against a group of environmental plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*.[63] Following *SCRAP I*, environmental plaintiffs then lost 16 cases in a row at the high court[64]—in most instances unanimously.[65]

The Supreme Court's NEPA decisions were generally quite technical and often dictated by the cases' factual or statutory peculiarities.[66] One discernable throughline in the Court's NEPA opinions, however, is the "procedural-substantive" distinction first announced by Judge Wright. In stark contrast to Judge Wright's vision, the Supreme Court applied NEPA's procedural-substantive distinction time and time again, to emphasize the narrow scope of judicial review. In the Court's view, as a statute that "imposes only procedural requirements,"[67]

[60] *Calvert Cliffs*, 449 F.2d at 1112, 1114. *See also* Lazarus, *supra* note 51, at 1517.

[61] *See* Tarlock, *supra* note 7, at 104.

[62] *See* Lazarus, *supra* note 51, at 1516 (describing *Calvert Cliffs* as "a harbinger of what followed").

[63] 412 U.S. 669 (1973).

[64] *See* Aberdeen & Rockfish R.R. Co. v. Students Challenging Regul. Agency Procs., 422 U.S. 289 (1975) (*SCRAP II*); Hint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776 (1976); Kleppe v. Sierra Club, 427 U.S. 390 (1976); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978); Andrus v. Sierra Club, 442 U.S. 347 (1979); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980); Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87 (1983); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Marsh v. Or. Nat. Res. Council, 490 U.S. 360 (1989); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992); U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004); Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

[65] *See* Lazarus, *supra* note 51, at 1536–65 (surveying the cases).

[66] *Cf. id.* (summarizing the cases).

[67] *Winter*, 555 U.S. at 23.

NEPA "does not mandate particular results, but simply prescribes the necessary process" for an agency's environmental review of a proposed action.[68] In the Court's telling, because "NEPA merely prohibits uninformed—rather than unwise—agency action," an "agency is not constrained" in its substantive discretion to "decid[e] that other values outweigh the environmental costs."[69] The role of the courts is merely to police the outer bounds of agency environmental decision-making by ensuring "that the agency has taken a 'hard look' at environmental consequences," while declining to "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[70]

C. NEPA in the Lower Courts: A Quasi-substantive Environmental "Common Law"

Despite the Supreme Court's consistently—and again, often unanimously—narrow view of the judicial role in NEPA review, Judge Wright's vision lived on in the lower courts. Since *Calvert Cliffs*, a virtual "'common law' of impact assessment with substantial consequences for agency noncompliance" has arisen in the lower courts.[71] This "common law" has primarily developed in the D.C. and Ninth Circuits—which hear the vast majority of NEPA disputes.[72]

The framework for NEPA review that has arisen in the Ninth Circuit is especially out of step with the deferential orientation of the Supreme Court's NEPA pronouncements. For example, the Ninth Circuit has added four additional NEPA-specific factors for reviewing agency action.[73] It has "substantially enlarged the universe of

[68] *Methow Valley Citizens Council*, 490 U.S. at 350.

[69] *Id.*

[70] *Sierra Club*, 427 U.S. at 410 n.21 (quoting Nat. Res. Def. Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

[71] Tarlock, *supra* note 7, at 102. *See also* Lazarus, *supra* note 51, at 1518 ("The courts created, in effect, a virtual 'common law' of detailed NEPA procedural requirements. . . .").

[72] *See* David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 3, 33 (2018) (finding that courts in the Ninth Circuit hear roughly half of all NEPA cases, with the D.C. Circuit hearing roughly 10 percent).

[73] *See* Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, Federalist Soc'y: Regul. Transparency Project 7–8 (Oct. 16, 2018), (collecting cases), https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf.

agency decisions requiring an EIS,"[74] by holding "that an agency must also prepare an EIS if a plaintiff does no more than present 'substantial questions whether a project *may* have a significant effect.'"[75] And it has provided for the issuance of near-"automatic" injunctions in NEPA cases,[76] by prioritizing NEPA-derived environmental concerns in its equitable balancing of the injunction factors.[77] Applying this framework, courts within the Ninth Circuit have ruled in favor of environmental NEPA plaintiffs at staggering rates.[78]

The development of this demanding common law of NEPA was further abetted by CEQ's 1978 promulgation[79] of "a comprehensive set" of NEPA regulations.[80] These regulations are credited as lying "at the heart of NEPA's unexpected impact."[81] In an interesting (although not unexpected) turn, these regulations were recently vacated by the D.C. Circuit on the grounds that CEQ never had the authority to issue them[82]—a fact that does little to remedy the legal framework they helped establish.

D. Two-track Judicial Review and Its Negative Consequences

The key takeaway is that over time, a two-track approach to NEPA review emerged. The lower courts—throughout the course of thousands of NEPA decisions[83]—developed a federal common law that broadly imposed quasi-substantive duties. The Supreme Court

[74] *Id.* at 8.

[75] *Id.* (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998)) (emphasis added).

[76] *Id.*

[77] Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984) ("[T]he policies underlying NEPA 'weight the scales in favor of those seeking the suspension of all action until the Act's requirements are met. . . .'" (quoting Alpine Lake Prot. Soc'y v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975)).

[78] *See* Adelman & Glicksman, *supra* note 72, at 39 n.152 ("Plaintiffs in the Ninth Circuit during the Bush Administration prevailed in 42 percent of the NEPA cases versus 15 percent in all other circuits collectively. . . ."); *see also* Rutzick, *supra* note 73, at 7.

[79] *See National Environmental Policy Act—Implementation of Procedural Provisions*, 43 Fed. Reg. 55978 (Nov. 29, 1978) (codified at 40 C.F.R. pt. 1500 et. seq.).

[80] Lazarus, *supra* note 51, at 1518.

[81] Rutzick, *supra* note 73, at 5.

[82] Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902, 914 (D.C. Cir. 2024).

[83] *See* Rutzick, *supra* note 73, at 11 ("[E]nvironmental advocates have filed at least 4,000 federal lawsuits alleging violations of NEPA and the CEQ regulations.").

periodically intervened in a small number of cases to announce "decisions which vary between indifference and hostility toward NEPA,"[84] and which narrowly imposed purely procedural duties. Two negative practical consequences of this phenomenon are worthy of emphasis.

First, on the litigation side, the lower courts' treatment of NEPA "created an unparalleled opportunity for environmental advocates to use NEPA litigation to block proposals that require a federal permit or approval, or use federal funds."[85] As one judge recently observed, the "unyielding decline" that has occurred in "productivity growth in the construction industry" since 1970 can be confidently attributed to environmentalist NEPA litigation.[86]

Second, on the agency side, the development of NEPA in the lower courts resulted in the advent of so-called "defensive NEPA"[87]—whereby "the length, preparation time and cost of" NEPA documents increased over time as a result of "federal agencies' understandable inclination to seek to avoid litigation by addressing every imaginable environmental issue in detail."[88] In other words, as environmentalist-driven litigation became more perilous for agencies, the burdens of the NEPA process very quickly overwhelmed the federal government.

Taken together these negative consequences have imposed nothing short of a straitjacket on the American economy,[89] a well-documented problem that in recent years has become the object of increasingly bipartisan public ire.[90]

[84] Tarlock, *supra* note 7, at 104.

[85] Rutzick, *supra* note 73, at 10.

[86] Appalachian Voices v. Fed. Energy Reg. Comm'n, 139 F.4th 903, 916 (D.C. Cir. 2025) (Henderson, J., concurring).

[87] *See* Michael J. Mortimer et al., *Environmental and Social Risks: Defensive National Environmental Policy Act in the US Forest Service*, 109 J. Forestry 27, 27 (2011).

[88] Rutzick, *supra* note 73, at 11 n.52.

[89] *See Appalachian Voices*, 139 F.4th at 925 (Henderson, J., concurring) ("Because of judicial tinkering with NEPA's original design, litigation became a fixed feature of agencies'—and developers'—efforts to undertake any new action. . . .").

[90] NEPA is perhaps the most singularly important issue animating the newfound bipartisan "Abundance" movement. *See* Andres Picon, *Bipartisan "Abundance" Caucus Sets Sights on NEPA*, E&E News (July 8, 2025), https://www.eenews.net/articles/bipartisan-abundance-caucus-sets-sights-on-nepa/.

III. The Supreme Court Unanimously Sets the Record Straight: The *Seven County* Decision

A. Litigation History and Background

Seven County began with a rather parochial dispute over the U.S. Surface Transportation Board's decision to approve the construction of an approximately 88-mile-long railroad line in the Uinta Basin of northeastern Utah.

The Interstate Commerce Commission Termination Act (ICTA) dictates that the construction of new railroads must first be approved by the Surface Transportation Board.[91] After receiving an application for approval, the board must issue a public notice and initiate an administrative proceeding—which may be streamlined.[92] In addition to complying with ICTA's requirements, the board must follow NEPA's requirements—including the preparation of an EIS, should a proposed railroad project be "major."[93]

The Uinta Basin is a sparsely populated region of the Mountain West, rich in crude oil. Due to its geographical remoteness, it is not served by existing railroad infrastructure, and as a result, crude oil extracted in the Basin must be carried out via trucks, navigating perilous mountain roads. To rectify this problem, in early 2020, Petitioner the Seven County Infrastructure Coalition—a group of seven Utah counties—sought approval from the board to construct a railroad line connecting the basin to the interstate rail network.[94]

In response to the coalition's request, the board initiated the statutory proceeding required by ICTA; conducted the environmental review required by NEPA; and in December 2021, approved the project.[95] In doing so, the board concluded that the substantial economic and transportation benefits of the project "outweighed the environmental impacts identified" in its EIS.[96]

[91] *See* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1508 (2025) (citing 49 U.S.C. § 10901).

[92] *See id.* (citing 49 U.S.C. §§ 10101, 10502, 10901).

[93] *See id.*

[94] *Id.*

[95] *Id.* at 1508–09.

[96] *Id.*

The board's NEPA review was of the "standard"[97] variety—burdensome and lengthy. The board first prepared a draft EIS and invited public comment. It held six public meetings. And it then collected more than 1,900 public comments. In August 2021, the board then published a whopping 3,600-page final EIS.[98] In its EIS the board analyzed at length a number of potentially significant environmental consequences, including "disruptions to local wetlands, land use, and recreation."[99] The board also thoroughly addressed several "minor impacts," which included air pollution and disruptions to wildlife.[100]

The EIS additionally acknowledged the potential environmental impact of increased oil drilling "upstream" of the railroad and increased "downstream" processing of crude oil.[101] Its analysis of these issues, however, was necessarily more limited given their speculative nature—and because many of these activities are outside the board's control. As for "upstream oil drilling," such activity remains unplanned, and in any event, the board possesses no "authority or control" over such development, which is instead subject to permitting by other governmental agencies.[102] As for "downstream" impacts, the board acknowledged that crude oil transported along the proposed railroad would reach markets in Louisiana and Texas, increasing environmental impacts associated with industrial oil refining.[103] However, the board had no reliable data predicting which specific destinations would receive the oil. And again, as an agency with statutory authority limited to the construction and operation of railroads, the board would be powerless to regulate (and thus alleviate) impacts associated with oil refining.[104]

After the railroad's final approval, there followed the now customary next step: NEPA litigation to block the project. In early 2022, a

[97] *Id.* at 1508.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 1508–09.

[102] *Id.* at 1509.

[103] *Id.*

[104] *Id.*

Colorado county and several national environmental organizations sued the board by filing petitions for review in the D.C. Circuit.[105] The D.C. Circuit ultimately vacated the board's approval order and EIS on the grounds that the board had violated NEPA by limiting its analysis of the railroad's "upstream" and "downstream" effects.[106]

The Supreme Court then granted certiorari,[107] and unanimously reversed the D.C. Circuit. Justice Kavanaugh wrote the majority opinion, joined by Chief Justice John Roberts, and Justices Clarence Thomas, Samuel Alito, and Amy Coney Barrett. And Justice Sotomayor wrote an opinion concurring in the judgment, joined by Justices Elena Kagan and Ketanji Brown Jackson.[108]

B. The Majority Opinion

Justice Kavanaugh's majority opinion can be summarized in two parts. First, the majority clarified the deferential standard of review applicable in NEPA litigation. Second, the majority resolved the specific question at issue—the extent to which attenuated upstream and downstream impacts must be analyzed under NEPA.

1. Deference: The touchstone of NEPA review

In clarifying and restating the standard of review applicable to NEPA litigation, the majority began and ended its analysis by stating that "the central principle of judicial review in NEPA cases is deference."[109] The majority deemed it necessary to restate this principle on account of the "aggressive role in policing agency compliance

[105] *Id.*

[106] *Id.* (citing Eagle Cnty. v. U.S. Surface Transp. Bd., 82 F.4th 1152, 1175–80 (D.C. Cir. 2023)). The D.C. Circuit also voided the project's approval for failure to comply with several additional statutory requirements, such as those imposed by the Endangered Species Act. *See Eagle Cnty.*, 82 F.4th at 1186–96. These additional grounds for vacatur were not at issue in the Supreme Court. They do, however, serve as an important illustration of how the many layers of environmental review imposed upon federal agencies can work in tandem to frustrate development. *See* Jonathan Adler, *Permitting the Future*, 75 Case W. Res. L. Rev. 1, 7–9 (2024).

[107] *See* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 144 S. Ct. 2680 (2024).

[108] *See Seven Cnty.*, 145 S. Ct at 1504. Justice Neil Gorsuch took no part in the consideration or decision of the case.

[109] *Id.* at 1511. *See also id.* at 1515.

with NEPA" assumed by certain lower courts.[110] The majority recognized how the judicial role assumed by the lower courts has resulted in "litigation-averse agencies . . . tak[ing] ever more time . . . to prepare ever longer EISs for future projects."[111] And it recognized how this shift has "transformed" NEPA from "a modest procedural requirement into a blunt and haphazard tool employed by project opponents . . . to try to stop or at least slow down new infrastructure and construction projects."[112] In other words, the majority's decision to restate and clarify the NEPA standard of review was borne out of its express recognition of the two primary negative consequences of the lower courts ignoring the Court's prior NEPA pronouncements—"defensive" NEPA and obstructionist litigation. In the majority's view, these consequences have become so dire[113] that a "course correction of sorts is appropriate to bring judicial review under NEPA back in line with the statutory text and common sense."[114]

And correct course the Supreme Court did. The majority made clear that NEPA decisionmaking must be reviewed under the deferential arbitrary-and-capricious standard of the Administrative Procedure Act (APA).[115] Under this standard, "a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained."[116] This standard is commonly known as the *State Farm* standard, named for the first Supreme Court decision in which it was explicated.[117] Under *State Farm*, an agency decision is reasonable—and must be deferred to—provided the agency has identified a "rational connection between the facts found and the choice made,"[118]

[110] *Id.* at 1511.

[111] *Id.*

[112] *Id.*

[113] *See id.* at 1514 ("A 1970 legislative acorn has grown over the years into a judicial oak that has hindered infrastructure development 'under the guise' of just a little more process.") (quoting *Vermont Yankee*, 435 U.S. at 558).

[114] *Id.*

[115] *Id.* at 1511.

[116] *Id.*

[117] *See* Mot. Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[118] *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

and has not otherwise "failed to consider an important aspect of the problem[.]"[119] The majority also recognized the application of a subprinciple to *State Farm*: where agency decisionmaking involves "speculative assessments or predictive or scientific judgments"—as it often the case in the NEPA context—"a court must be at its 'most deferential.'"[120] This subprinciple is commonly known as *Baltimore Gas and Electric* deference—named for the first Supreme Court decision in which *it* was explicated.

Importantly, the majority explained that when applying these deference doctrines, courts "must account for the fact that NEPA is a *purely procedural statute*."[121] NEPA imposes no "substantive constraints" on the agency's ultimate decision and thus "'the only role for a court' is to confirm that the agency has addressed environmental consequences and feasible alternatives as to the relevant project."[122] As for the choices made in addressing environmental consequences and alternatives, a court must accept those choices provided "they fall within a broad zone of reasonableness."[123]

Even more importantly, the majority made clear that because "an EIS is only one input into an agency's decision," the focus of judicial review must be the agency's *final* decision (not simply the EIS itself)—that is, in *Seven County*, the board's ultimate decision to approve the railroad.[124] And as a corollary, even if the EIS "falls short in some respects," any such deficiency does not necessarily require

[119] *Id.* at 29. This variety of "deference" is distinct from that which the reader may be most familiar with: so-called *Chevron* deference, under which courts were required to defer to agency *legal* interpretations of statutes which they administered. *See* Jack M. Beermann, *Chevron Deference Is Dead, Long Live Deference*, in 2023–2024 Cato Sup. Ct. Rev. 31 (2024) (discussing *Chevron* deference and its demise). *State Farm* deference comes into play at a separate phase of the decisional process: all agreeing that a statute confers unambiguous legal authority on an agency to exercise discretion, the agency has leeway in which to make rational factual and policy choices in exercising that discretion. *See Seven Cnty.*, 145 S. Ct. at 1511. While *Chevron* deference has given way to *de novo* review on statutory interpretation questions, deferential review of reasoned agency decisionmaking under *State Farm* lives on. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

[120] *Seven Cnty.*, 145 S. Ct. at 1512 (quoting *Balt. Gas & Elec.*, 462 U.S. at 103).

[121] *Id.* at 1511.

[122] *Id.* (quoting *Strycker's Bay Neighborhood Council, Inc.*, 444 U.S. at 227).

[123] *Id.* at 1513.

[124] *Id.* at 1511.

vacatur of the final decision.[125] A party seeking vacatur on NEPA grounds must demonstrate that the agency might actually reverse course should it add the overlooked information.[126]

All in all, an EIS is not to be reviewed as if its adequacy were an end in itself, but rather to determine whether some choice made in an agency's analysis of environmental consequences is so patently unreasonable as to call into question the agency's ultimate decision to approve a project—a decision which will generally involve weighing many factors beyond the environment. In assessing the gravity of a purportedly unreasonable NEPA choice vis-à-vis the ultimate decision, courts must give significant leeway to the agency under the deferential *State Farm* standard—supplemented with the even more deferential *Baltimore Gas and Electric* principle where an agency's choice involves predictive or scientific judgment. And prior to vacating an agency decision on NEPA grounds, a court must find that the NEPA deficiency—if rectified—might change the ultimate outcome.[127]

2. Upstream and downstream effects: Limiting the scope of NEPA to the direct effects of the project at hand

Applying these principles, the majority easily concluded that the D.C. Circuit had erred. As the majority explained, under the Court's longstanding precedents, "the textually mandated focus of NEPA" is "the project at hand."[128] Future projects or geographically separated projects that might result from the immediate project are simply beyond NEPA's scope. Even though such projects—and their environmental effects—might be "factually foreseeable," that does not make them relevant.[129] In reaching this conclusion, the court invoked the legal concept of "proximate causation"[130]—the "causal chain" between the project at hand and a geographically or temporally separate project is simply "too attenuated."[131] However, this invocation

[125] *Id.* at 1514.

[126] *Id.*

[127] *See generally id.* at 1511–15.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1516.

[131] *Id.* (quoting *Metro. Edison Co.*, 460 U.S. at 774).

of proximate causation is better understood as being illustrative—as opposed to an affirmative "proximate causation *rule*" for NEPA. We believe it is more accurate to understand the operative rule in the negative: a "mere but for causal relationship" between the immediate project and some future project "is insufficient to make an agency responsible for a particular effect."[132] And under no circumstances may a court "invoke" such a causal relationship to order agency review of far flung projects.[133]

The majority further emphasized that where an agency "possess[es] no regulatory authority" over a geographically or temporally separate project, the causal chain will be definitively broken, and the agency presumptively need not consider the effects of that project.[134] Direct regulatory control is the key.

To be sure, the majority recognized that there may be difficult and close cases—there might often be a "gray area" in defining whether two projects are one or distinct.[135] But here is where the majority's earlier deference pronouncements become important. Under such uncertainty the only relevant question for a reviewing court is whether "the agency drew a reasonable and manageable line."[136]

In any event, to the majority, the relationship between the Uinta Basin railroad and the "upstream" and "downstream" effects identified by the D.C. Circuit was not a close question. The board properly explained "that the environmental consequences of future oil drilling in the Basin are distinct from construction and operation of the railroad line."[137] Likewise, it correctly explained that oil refining along the Gulf Coast is "well outside" its scope.[138] NEPA requires nothing more. Making the question even easier was the fact that the board possesses no regulatory authority over oil drilling and refining.[139]

[132] *Id.* at 1517 (quoting *Pub. Citizen*, 541 U.S. at 767) (cleaned up).

[133] *Id.*

[134] *Id.* at 1516.

[135] *Id.*

[136] *Id.* (quoting *Pub. Citizen*, 541 U.S. at 767) (cleaned up).

[137] *Id.* at 1518.

[138] *Id.*

[139] *Id.* at 1516.

C. The Concurrence

In the concurring Justices' view, the majority had "unnecessarily ground[ed] its analysis . . . in matters of policy," because resolution of the case "follows inexorably" from the Court's NEPA precedents.[140]

The concurring Justices viewed two precedents as most pertinent: *Public Citizen*[141] and *Metropolitan Edison Company*.[142] In the concurrence's view, taken together, these cases set forth "dual limitations" on an agency's duty to consider environmental information under NEPA, which in turn give rise to a "two-step analysis" to guide judicial review.[143] First, a court must inquire into whether an agency is precluded under its organic statute from considering a particular issue—because it is powerless to modify or mitigate the effects of that issue. Where such inability to act exists, a court cannot demand that the agency consider that issue.[144] This rule follows from *Public Citizen*.[145] Second, where an agency decides not to review a particular impact because of its causal attenuation from the project at hand, a reviewing court's only role is to ask whether the agency's decision not to consider such impacts was arbitrary. This second step follows from *Metropolitan Edison* and the general principles of deference governing a court's review of agency decisionmaking.[146]

In the concurring Justices' estimation, *Seven County* was an open-and-shut case to be resolved at the first (*Public Citizen*) step: the board has no statutory authority to reject a railway application because of how products transported along that railway might be used by third parties.[147] The agency stated as much in its EIS, and NEPA requires nothing more. An agency simply need not consider environmental consequences it is powerless to prevent.[148]

The reasoning and conclusion of the concurrence are not so very different from the majority—save for the majority's broader

[140] *Id.* at 1519 (Sotomayor, J., concurring).

[141] 541 U.S. at 752.

[142] 460 U.S. at 766.

[143] *Seven Cnty.*, 145 S. Ct. at 1523 (Sotomayor, J., concurring).

[144] *Id.*

[145] *See id.* (citing *Public Citizen*, 541 U.S. at 766–67).

[146] *See id.* (citing *Metro. Edison Co.*, 460 at 774–76).

[147] *Id.* at 1523–24.

[148] *See id.*

pronouncements regarding the ill effects of NEPA's historical misapplication. The concurrence substantially agreed with the majority's statement of the deferential standard of review applicable in NEPA litigation. And it agreed that the board's being statutorily precluded from mitigating the environmental consequences of potential upstream and downstream projects clearly excused the board from considering such consequences.[149]

IV. A New Era: *Seven County*'s Significant Implications for Federal Environmental Law

A. NEPA Overtaken by State Farm

Seven County represents a reforming of NEPA into principally an information-distributing and accountability-assigning statute. The decision flatly rejects the lower courts' contortion of the statute into a quasi-substantive control of agency decisionmaking. Of course, even after *Seven County*, NEPA will still require agencies to research and assess the impact of their "major" actions; agencies will still need to solicit public comment; they will still need to publicize their analysis and take public responsibility for their proposals. These aspects of NEPA, which certainly were intended by its framers,[150] will perdure.[151] But what will end after *Seven County* is the practice of NEPA regulating the substance of agency decisionmaking by stopping projects because an agency's "detailed statement" of a project's effects on the human environment is suboptimal.

This consequence comes from *Seven County*'s reaffirmation of three points: (1) NEPA is a purely procedural statute, (2) even in NEPA cases the focal point of judicial review is the reasonableness of the *ultimate* agency decision, and (3) vacatur should not issue as a matter of course for NEPA violations but rather only where the error is so significant that compliance might well lead the agency to a different *overall* result.[152]

[149] *See id.*

[150] *See, e.g.*, S. Rep. No. 91-296, at 19–21 (1969) (discussing the statute's EIS requirement).

[151] *Accord Seven County*, 145 S. Ct. at 1510 (majority opinion) ("Properly applied, NEPA helps agencies to make better decisions and to ensure good project management.").

[152] *Seven County*, 145 S. Ct. at 1511–12.

In other words, the quasi-substantive component of NEPA developed over the decades in the lower courts has been largely overtaken by the equally quasi-substantive *State Farm* standard for agency decisionmaking under the APA: for agency action to survive judicial review, the agency must identify a "rational connection between the facts found and the choice made."[153] To be sure, NEPA undoubtedly strengthens that review: it's a lot easier for a court to determine whether, for example, an agency has failed entirely to consider a major (environmental) aspect of the problem, or has selected a course of action decidedly against the weight of the (ecological) evidence, when the court has before it an environmental impact statement addressing (or purporting to address) those issues. But whether the agency action will be affirmed or vacated will depend, after *Seven County*, on the reasonableness of the decision itself, not the legal or factual sufficiency of the NEPA documentation in isolation.

This does not mean the many years of environmentalist litigation and favorable lower court NEPA rulings have been for nought. The subsuming of NEPA into *State Farm* is at least partly the result of the lower court case law developing so-called "hard look" review for informal agency rulemaking and adjudication in NEPA cases in the decade or so between the statute's passage and the Court's 1983 ruling in *State Farm*. Moreover, it's fair to say that NEPA as written and NEPA as interpreted by the lower courts have helped to color federal administrative common law "green."[154] Just as with costs, the environment has become a background consideration for virtually all agency action. Moreover, as another decision from this term suggests, for an agency truly to "consider" an aspect of the problem before it, the agency cannot merely acknowledge the problem but instead must explain how the problem will be resolved or why resolution is not possible or advisable.[155] Thus, even after *Seven County*, one should expect lower courts to continue to require agencies to take environmental considerations into

[153] *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[154] *See* Tarlock, *supra* note 7, at 78 (observing that "advance environmental impact assessment" is now "one of the foundational principles" of environmental law).

[155] *See* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2505 (2025).

account.[156] Indeed, environmental considerations are perhaps even more legally justified as part of APA review than costs, precisely because the former have an explicit statutory warrant in NEPA.

Still, without doubt, *Seven County* represents a major loss for environmental litigants, especially those dozen or so organizations that bring the significant majority of NEPA cases.[157] Going forward, those organizations will likely have little reason to advance a NEPA claim because the (very few, given the Court's deference discussion) NEPA errors that might require vacatur of the decision could just as easily be reformulated as violations of the APA's arbitrary and capricious standard, under *State Farm*. Moreover without vacatur, and the delay that comes with such relief, NEPA's potency for strategic litigants will be much reduced.[158]

This result comes from *Seven County*'s definitive rejection of NEPA as, ironically enough, a hyper-procedural statute. What made NEPA so formidable was the lower courts' demand that its complex and often confusing requirements, as articulated by CEQ regulations and lower court rulings, be punctiliously observed—on pain of the project approval's vacatur and the project's relegation to the start of the administrative process. Lower courts felt authorized to take such drastic action because they were, after all, only enforcing procedure, not dictating substance.[159] Now, in *Seven County*, the Court has made clear that violation of NEPA's procedure does not necessarily mean the agency's decision was unreasonable or was inadequately explained—which is the only basis for vacatur.[160]

[156] There is arguably in the Supreme Court a countervailing trend as well, namely, requiring agencies as a default rule to take economic impacts into account. *See, e.g.*, Michigan v. U.S. Envtl. Prot. Agency, 576 U.S. 743, 752–53 (2015).

[157] *Cf.* Br. Amicus Curiae of the Prop. & Env't Rsch. Ctr. in Support of Petitioners at 19, Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497 (2025) (No. 23-975) ("Indeed, more than a third of NEPA cases litigated before appellate courts in the last decade were brought by just ten organizations. . . .")

[158] *See* Binder, *supra* note 31, at 43–44.

[159] *Cf.* Bennett v. Spear, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking. Since it is the omission of these required procedures that petitioners complain of, their . . . claim is reviewable. . . .") (quotation modified).

[160] *Seven County*, 145 S. Ct. at 1514.

B. Seven County *as Abundance Policy Statement*

The Justices comprising the majority in *Seven County* surely believed they were simply interpreting NEPA as written. Nevertheless, it is hard to come away from the opinion without thinking that their statutory interpretation was affected by NEPA's reputation as a powerful litigation tool of NIMBYs (green and otherwise) to defeat lawful projects. That policy concern is, after all, the object of the only component of the concurrence critical of the majority.[161] And the language of Justice Kavanaugh's majority opinion gives significant grounds to support that interpretation.

For example, Justice Kavanaugh writes that the "goal of the law is to inform agency decisionmaking, not to paralyze it."[162] He notes, "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."[163] He laments that the judicially transformed NEPA "means fewer and more expensive" infrastructure projects, as well as "fewer jobs."[164] He therefore concludes that a "course correction of sorts is appropriate to bring judicial review under NEPA back in line with the statutory text and common sense," given that "Congress did not design NEPA for *judges* to hamstring new infrastructure and construction projects."[165]

Given these statements of the majority opinion, we tentatively assert that the Court is developing a new statutory canon, akin to the major questions doctrine,[166] triggered by economic impact: courts should interpret statutory language to bolster rather than hinder the American economy. Indeed, Justice Kavanaugh concludes his opinion explicitly on these lines: "In deciding cases involving the American economy, courts should strive, where possible, for clarity

[161] *Id.* at 1519 (Sotomayor, J., concurring in the judgment).

[162] *Id.* at 1507 (majority opinion).

[163] *Id.* at 1513.

[164] *Id.* at 1514.

[165] *Id. Accord* Dreyfus & Ingram, *supra* note 18, at 256 ("It is certainly true, however, that the conferees never contemplated anything so extravagant as the multiple volume dissertations which now are commonly produced.").

[166] *See* Luke Wake & Damien Schiff, *Practical Applications of the Major Questions Doctrine*, 2024 Harv. J.L. & Pub. Pol'y Per Curiam 20, 20.

and predictability."[167] One might detect here the influence of the second Trump administration's neo-Rooseveltian public lands policies[168] as well as that of the Abundance Agenda,[169] particularly the latter's critique of environmental and land-use regulation in depressing the production of housing.[170]

Is the majority guilty of the concurrence's claim that the former's analysis is based mainly on policy? The foregoing quotes certainly establish that the majority was acutely aware of the negative policy effects of the lower courts' interpretation of NEPA. But the majority's legal analysis appears to be founded principally on text and deference to agency fact-finding, not pure policymaking. As for text, the Court's conclusion as to "upstream" and "downstream" effects is based on "the textually mandated focus of NEPA [being] the 'proposed action.'"[171] And the Court's strong affirmance of judicial deference to an agency's NEPA decisionmaking is based on decades of the Court's case law interpreting the APA's indulgent "arbitrary or capricious" standard of review.[172]

It is true that the majority supports its analysis in part by reference to "common sense." But contrary to the concurrence, this analytical defense injects policymaking into legal analysis no more than any of a number of established canons of interpretation.[173] In any event, perhaps the Court's use of "common sense" to reform NEPA finds

[167] *Seven County*, 145 S. Ct. at 1518.

[168] As expounded by Gifford Pinchot, Theodore Roosevelt's principal "environmental" deputy:

> The first duty of the human race on the material side is to control the use of the earth and all that therein is. . . . Conservation is the foresighted utilization, preservation, and/or renewal of forests, waters, lands, and minerals, for the greatest good of the greatest number for the longest time.

Gifford Pinchot, Breaking New Ground 505 (Island Press 1974) (1947).

[169] *See* Kevin Frazier, *Abundance Constitutionalism: Heralding an Age of Liberty by Learning from the Nation's Foundational Legal Documents*, 100 Notre Dame L. Rev. 197, 201 (2025) ("What the Abundance Agenda aims to correct is a government prone to inaction or, worse, to frustrate or delay societally-beneficial action.").

[170] *See* Alexander D. Lewis, *Fix Housing to Fix America: Unlocking Housing Abundance with Land-Use Reform*, 50 J. Corp. L. 775, 795–98 (2025).

[171] *Seven County*, 145 S. Ct. at 1515 (quoting 42 U.S.C. § 4332(C)(i)).

[172] *Id.* at 1511–12.

[173] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 110 (2010) ("[I]t is generally recognized that substantive canons advance policies independent of those expressed in the statute.").

a parallel in another Justice Kavanaugh opinion from this term—*Diamond Alternative Energy, LLC v. EPA*.[174] There, writing for the majority, Justice Kavanaugh again employed "common sense," as applied to market economics, to reject the government's attack on the industry petitioner's standing.[175]

Conclusion

"Just as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede."[176] The Supreme Court in *Seven County* fully adopted that circumspect view of lower courts' longstanding over-enforcement of NEPA. To be sure, the Supreme Court has always been antithetical to NEPA enforcement, and *Seven County* continues that trend. But where *Seven County* breaks new ground is to reject lower courts' practice of demanding strict compliance with NEPA on pain of the rejection of an entire project. Now, courts must defer to agencies' NEPA decisionmaking just as they must with other administrative actions. Now, agencies do not need to review environmental effects that are far removed in time or place from the proposed project, or that are not subject to the agencies' direct regulatory review. Now, a project approval should be vacated only if the agency's decision is unreasonable or inadequately explained, a conclusion that doesn't necessarily follow from NEPA noncompliance.

But not all has changed—or better, some part of the old regime persists. Most importantly, the "hard look" review of *State Farm* will still govern project approvals both within and outside of NEPA; and that review is something that arises as much from the lower courts' mis-enforcement of NEPA as it does from any statute authorizing judicial review. What also persists is the Supreme Court's notable lack of interest in environmental law as a special discipline, as something requiring special expertise or solicitude over and above any other component of the modern federal regulatory apparatus, and—in counterbalance with the foregoing—a growing sympathy with the regulated public which must bear the oftentimes excessive burdens, occasionally judicially abetted, imposed by the administrative state.

[174] 145 S. Ct. 2121 (2025).

[175] *See id.* at 2137.

[176] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991) (Thomas, J.).