

D I A L O G U E

THE FUTURE OF NEPA REVIEW: UNPACKING SEVEN COUNTY

SUMMARY

On May 29, the U.S. Supreme Court released its decision in *Seven County Infrastructure Coalition v. Eagle County*, holding that substantial judicial deference to agencies is required in National Environmental Policy Act (NEPA) cases, including in deciding “(i) how far to go in considering indirect environmental effects from the project at hand and (ii) whether to analyze environmental effects from other projects separate in time or place.” The decision narrows the scope of NEPA review and will likely have lasting impacts on federal infrastructure proposals. On July 10, 2025, the Environmental Law Institute hosted a panel of experts to unpack the decision and discuss its potential implications for the future of NEPA. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Jarryd Page (moderator) is a Staff Attorney at the Environmental Law Institute.

Justin Pidot is a Professor of Law and Ashby Lohse Chair in Water and Natural Resources at the University of Arizona James E. Rogers College of Law.

Fred Wagner is an Environmental Consultant at Jacobs.

Kirti Datla is Director of Strategic Legal Advocacy at Earthjustice.

James M. McElfish Jr. is a Senior Advisor at the Environmental Law Institute.

Jarryd Page: There’s a lot going on with new developments in the areas of energy, the environment, natural resources, and climate. The National Environmental Policy Act (NEPA)¹ is no exception. The Environmental Law Institute (ELI), in fact, has been tracing developments in this law since we were founded in December 1969, the same month that NEPA was passed by the U.S. Congress.

The law has only been amended significantly once, in 2023,² and regulations by the Council on Environmental Quality (CEQ) have stayed more or less the same for most of the law’s history until a series of changes that began during the first Donald Trump Administration. Given the relatively moderate developments for most of the past 50 years, the past several months have brought a series of ground-shifting changes.

In April, ELI co-hosted a webinar with the Tulane Center for Environmental Law titled *NEPA in 2025: Rumor, Reality, and the Way Forward*.³ That event looked at some of the developments from late last year and early this year,

including unexpected decisions from federal courts, executive orders, the rescission of CEQ regulations via an interim final rule, empirical data on NEPA permitting timelines, and more. But hanging over that discussion was the prospect of a U.S. Supreme Court decision in *Seven County Infrastructure Coalition v. Eagle County*.⁴ That decision and its implications are the focus of our conversation today.

Our discussion will be divided into four segments. First, I’m going to briefly introduce *Seven County* and our panelists. Then each panelist will offer remarks on the decision from their perspective, the biggest takeaway from what they saw, and some lingering questions or things to look out for on the horizon. After that, we’ll move to a moderated discussion to better understand what it means to be working in the NEPA space these days. Then, we’ll take questions from the audience.

So, what was *Seven County*, and what did the Court say in the decision? As brief backstory, the Surface Transportation Board (STB) conducted an environmental impact statement (EIS) in connection with the approval of an 88-mile rail line in Utah. The board’s EIS indicated that oil production was a foreseeable result of the rail line. It included greenhouse gas emissions estimates that might result from the crude oil that was carried on the line, but it did not do a detailed analysis of these emissions or other environmental impacts from the increase in oil production and refining.

After the board approved the rail line, Eagle County and environmental organizations filed suit alleging, among other things, that the board did not take the requisite “hard look” in the EIS—that in looking upstream at more oil production and downstream at more refining and combustion, it did not look adequately at those impacts. In 2023,

1. 42 U.S.C. §§4321 et seq.

2. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10.

3. ELI, *NEPA in 2025: Rumor, Reality, and the Way Forward*, <https://www.eli.org/events/nepa-2025-rumor-reality-and-way-forward> (last visited Aug. 7, 2025).

4. 605 U.S. __ (2025).

the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit issued an opinion finding that the EIS was inadequate and that the board should have done more to look at these upstream and downstream impacts.⁵ A coalition of Utah counties sought review in the Supreme Court, which issued its decision on May 29 by an 8-0 vote (with Justice Neil Gorsuch recused), and the decision was reversed and remanded to the D.C. Circuit.

Justice Brett Kavanaugh wrote for five justices—the majority of the Court that included Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Amy Coney Barrett. The majority held that the D.C. Circuit failed to afford the board the “substantial deference” that NEPA requires, and that the court incorrectly interpreted NEPA to require the board to consider environmental effects of upstream and downstream projects that were separate in time and place from the rail line. Note this temporal and geographic element, because I think it’s important for our discussion later on.

I also want to point out that the Court didn’t say that the agency necessarily went too far when it identified upstream and downstream impacts. Just that it need not go further. Broadly, the Supreme Court held that courts, when determining whether an EIS complies with NEPA, should afford substantial deference to the agency. The majority emphasized NEPA’s procedural nature, saying that as long as an EIS addresses the environmental effects from the project at issue, then courts should defer to an agency’s decisions about where to draw the line when considering the indirect environmental effects and whether to analyze effects from other projects separate in time and place.

The decision narrowed the scope of NEPA review, and will likely have lasting impacts on federal infrastructure project proposals. Observers, practitioners, and legal academics have been parsing its meaning. Reactions have varied from suggestions that the decision won’t change much with NEPA practice, to claims that the entire world of NEPA has been turned upside down. While there’s still substantial uncertainty with how this will play out over the next several years, it’s certain that it’s already having an impact. Federal agencies are already citing the decision in announcements about their NEPA procedures.

I’ll introduce our panelists and dive right in. Justin Pidot holds the Ashby Lohse Chair in Water and Natural Resources at the University of Arizona and co-directs the Environmental Law Program there. He also served as the general counsel of CEQ during the Joseph Biden Administration.

Fred Wagner is an environmental consultant at Jacobs. He has worked extensively on public- and private-sector environmental proposals, including as a partner at Venable. While there, he was a counsel of record for the petitioners in *Seven County*.

Kirti Datla is the director of strategic legal advocacy at Earthjustice. Kirti’s team focuses on cross-cutting issues and changes in judicial doctrines writ large. She was a

counsel of record for the environmental respondents in *Seven County*.

Jim McElfish is a senior advisor here at ELI. Jim began his career in 1979 with the U.S. Department of the Interior (DOI). He spent several years in private practice representing corporate and public interest clients in litigation, and since 1986 as a senior attorney at ELI, where he’s published numerous reports, including NEPA policy studies. At ELI, Jim trained various federal agencies on NEPA best practices and techniques, and is the author of NEPA regulations chapters in both editions of the American Bar Association’s *The NEPA Litigation Guide*.⁶

Justin Pidot: I was asked to provide my take first, in part because it’s intentionally provocative. You heard Jarryd suggest that *Seven County* will cast a long shadow. I want to at least raise the question of whether *Seven County* is more of a sideshow than the main event when it comes to NEPA.

Why do I say that? If you look at what’s happening in Congress and in the executive branch right now, it’s much bigger and more ambitious than anything *Seven County* contemplates. You have DOI announcing newfound emergency authorities under which it plans to complete EISs for mining projects in a matter of weeks—not months, not years—which will totally obliterate any history around what NEPA looks like for mining. You have Congress almost passing a provision that would have allowed project sponsors to buy their way out of a judicial review. We will no doubt see more permitting reform coming.

All of these things, if they’re successful, will be much more radical in terms of how they reshape NEPA than the *Seven County* decision. Although, as Jarryd noted, agencies are pointing to *Seven County* as part of the justification for some of the changes that they want to make. I’m skeptical, however, that those changes aren’t already the changes that were going to be made before the *Seven County* decision occurred.

When I look at the decision, I wonder how much is really new. So much of it is a restatement of things that we already know. We’re told that NEPA is a procedural statute. We knew that. We’re told that the Administrative Procedure Act (APA) arbitrary-and-capricious standard review applies. We knew that. We’re told it’s a deferential standard. We knew that. We’re told that some effects are too attenuated for agencies to need to analyze them. We knew that.

So, in large part, we have the Supreme Court telling lower courts that it means the things that it has said over the past 30 or 40 years when every case involving a NEPA issue presented to the Court ends up with a victory for the government. We have the Court saying to the lower courts, “you’re not being deferential enough,” but “not deferential enough” is a pretty open-ended standard. We’ll see how it plays out if the congressional and executive branch activities that I described don’t manifest.

5. *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1196 (2023).

6. *THE NEPA LITIGATION GUIDE: SECOND EDITION* (Karin P. Sheldon et al. eds., ABA Book Publishing 2012).

I think it's worth asking ourselves why lower courts have been where they are and how much will change. Again, I'm probably in the minority on the panel with those last points, but I wanted to open with some questions that would be useful to all of us who think about NEPA, and that I'll be thinking about during our conversation and in the months and years to come.

Fred Wagner: As one of the folks who litigated *Seven County* and was thinking about it for the better part of the past year, my sense is that while the principles Justin articulated are true in the sense of the idea of deference and a reasonable scope of review in NEPA documents, the impetus of the case and the result of the case were products of years and years of concern about how NEPA was being first implemented and then reviewed by courts.

In that way, this case is extremely important. It is an accompaniment to all the other administrative actions that Justin outlined, that we've seen from the agencies, that we'll see in Congress from a legislative perspective, and then ultimately—and it'll happen very soon—what we'll see from the judiciary when they try to apply the teachings of *Seven County*.⁷

The most important term in the case by far is “deference.” For example, I saw a great legal sidebar recently published by the Congressional Research Service, titled “Deference Squared.”⁸ How is that going to play out? We know that NEPA has always been a common-law statute. In other words, how do you know that you're doing enough as an agency? You know when the courts say you're okay, and the contours of that is defined by judicial review.

What the Supreme Court stressed is that so long as the agencies and project proponents are doing a reasonable amount of work to assess impacts and make an educated decision, that's what deference really means. Why did it have to say that after all these years? Because of the bulk and the intensity and the scope of NEPA analysis over the years. Justice Kavanaugh called it a “course correction.”

Numerous papers have estimated the time it took to prepare an EIS prior to recent legislative reforms. Figures ranged, but most placed the average time between four and five years.⁹ Recent reports showed an average decline of many months. That was viewed as a good thing. But was it really? Then, Congress said it should be done in two years. So, the question is, from a policy perspective, is concluding a major EIS in 4-5 years really what we need to build the infrastructure we need in this country? The Supreme Court, I think, said no. That's the course correction that it noted in terms of deference.

There are two other areas to look at. One is the scope of review. It has always been focused on the project in context. What are the indirect effects of the project? What are the cumulative effects of the project when viewed in the context of other things that are going on in the environment? I think the Court's decision emphasized attention to the project in its appropriate context. For many years, NEPA review had been focused on things beyond the project and other policy objectives, and not so much on the project itself.

Finally, the Court also talked about the role of NEPA, of NEPA analysis vis-à-vis the agency's decision on the project and on the policy itself. The NEPA analysis should educate and inform that decision. It should inform the decision-maker. It should inform the affected public.

But it's not the action itself, is it? It really is the underlying action. In this case, it's the building of the 88-mile rail line in Utah. That's what the Court also stressed, which was the important role of the statute—and that will continue—but placing the analysis and the consideration of impacts in the context of what the agency actually has to do: approve a permit, deal with funding, and those sorts of things that agencies have done in the past when NEPA is triggered. Those are the big takeaways.

In the scheme of things, this case is going to be cited for decades to come. Just like Jim and I have for years been citing *Metropolitan Edison*,¹⁰ and *Kleppe*,¹¹ and so many cases from the 1970s and 1980s. To that extent, I think it is a very big deal. The way we see it being relied on by agencies currently reinforces that. It's going to have a tremendous impact for years to come.

Kirti Datla: I don't think it's going to shock anyone that I am critical of the decision, but what I'm going to try to do to set things up is to be critical on the Court's own terms rather than any priors I might have myself.

7. Center for Biological Diversity v. Bureau of Land Mgmt., 141 F.4th 976 (9th Cir. 2025) (citing *Seven County* for deference principle and remanding without vacatur for additional alternatives analysis); *Sierra Club v. Federal Energy Regul. Comm'n*, No. 24-1199 (D.C. Cir. Aug. 1, 2025) (citing *Seven County* to affirm agency's scope of impacts analysis and range of alternatives considered); *Appalachian Voices v. Federal Energy Regul. Comm'n*, 139 F.4th 903 (D.C. Cir. 2025) (citing “broad deference” to agency review; concurring opinion by Judge Karen Henderson citing to “course correction”); *American Wild Horse Campaign v. Raby*, No. 24-8055 (10th Cir. July 15, 2025) (citing *Seven County* in finding Bureau of Land Management was entitled to deference in determining an alternative like land swaps was so slow and expensive as to be infeasible, and was not required to examine the environmental impacts of potential increased livestock grazing in its NEPA review); *Xerces Soc'y for Invertebrate Conserv. v. Watson*, No. 3:22-cv-00790-HZ (D. Or. June 23, 2025) (refusing plaintiffs' remedy of injunctive relief despite having found NEPA violations); *Save Long Beach Island v. Dept of Com.*, No. 3:23-cv-01886 (D.N.J. June 11, 2025) (agency's use of categorical exclusion for offshore wind project was entitled to deference).

8. KRISTEN HITE, CONGRESSIONAL RESEARCH SERVICE, LSB11333, “DEFERENCE SQUARED”: SUPREME COURT LIMITS NEPA'S SCOPE AND COURTS' REACH IN *SEVEN COUNTY INFRASTRUCTURE COALITION* (2025), https://www.congress.gov/crs_external_products/LSB/PDF/LSB11333/LSB11333.1.pdf.

9. See, e.g., Piet deWitt & Carole A. deWitt, *Preparation Times for Final Environmental Impact Statements Made Available From 2007 Through 2010*, 15 ENV'T PRAC. 123 (2013) (average of 4.2 years for an EIS); NATIONAL ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS, ANNUAL NEPA REPORT 2016 (2017), https://naep.memberclicks.net/assets/annual-report/2016/nea_annual_report_2016.pdf (average of 5.1 years for an EIS). But see David E. Adelman et al., *Dispelling the Myths of Permitting Reform and Identifying Effective Pathways Forward*, 55 ELR 10038 (Feb. 2025), <https://www.elr.info/articles/elr-articles/dispelling-myths-permitting-reform-and-identifying-effective-pathways-forward>.

10. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

11. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

The Court's opinion proceeds in basically two parts, and I'm going to do the same. On my reading of the opinion, each of the two parts raises more questions than it answers. I think that's in pretty clear conflict with the opinion's stated goal. Toward the end of the opinion, the Court tells lower courts that they should be really concerned with providing clarity and predictability in this specific context. I don't think the opinion meets its own instruction to courts.

Before going further, it's probably worth saying what the question was before the Court. The Court took the case to decide whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has authority. But the opinion goes well beyond that, and in so doing opens up some of these questions. That takes us to the first part of the opinion.

The Court begins by saying, as has been mentioned, that the central principle of judicial review in NEPA cases is deference. It goes on to spend basically seven pages traversing the landscape of various NEPA cases and touching on how courts should approach the meaning of the word "detailed" in the statute, the question of which effects are significant under the statute, and how agencies should think about the requirement to consider alternatives under the statute. Then after all of that, it spends two paragraphs discussing how courts should look at an agency's choice to discuss certain environmental effects and not others. It ends by criticizing the way some courts have reviewed agencies' NEPA analyses.

But what's odd about the opinion is that it doesn't identify any part of the D.C. Circuit's decision that was insufficiently deferential. It doesn't point to some part of the opinion and say, "this is where the D.C. Circuit got it wrong." That, I think, would have provided the kind of clarity that the Court says is important, because agencies would know what they don't have to do and courts would know what they shouldn't do in the future; but instead, we get an opinion that doesn't provide guidance on what judicial review should look like in the Supreme Court's view. It doesn't allow people to anticipate what does or doesn't count as a defect going forward.

That takes us to the second part of the opinion. That's the part that actually does address the question presented about the scope of what is in and outside of NEPA, as Fred framed it up. The opinion says a few times that NEPA is focused on the proposed action or, as the amended statute refers to, the proposed agency action. But it doesn't discuss the text preceding those words that refers to the reasonably foreseeable environmental effects of the agency's action.

So, someone reading the opinion—whether that be the agency, a project proponent, a commenter on a project, or a court—is left to figure out how the text of NEPA works as a whole when you consider all the words in the text. The part of the Court's opinion that discusses what indirect effects of the proposed action are within NEPA's scope was sort of caveated and hedged with "may" and "can" and "might," in a way that unsettles what was a relatively universal understanding of "indirect effects," which is a term that had been defined in the regulations from the beginning.

Last, the Court is pretty clear that it thinks separate projects are outside of NEPA's scope. But then it injects a lack of clarity into that discussion because it twists itself into knots, I think, to describe how that decision is consistent with its earlier precedent. Particularly in *Robertson*,¹² where the Court was quite clear that the development of a ski resort would obviously facilitate development of housing—to provide homes to the people who'd work at the ski resorts and things like that—and was within NEPA's scope. Then the Court says, well, of course there's going to be a gray area. And it doesn't give any guidance on how to wade through that gray area when it comes to looking at the statutory text.

There are other things I could say about the opinion, but those are some of the biggest parts that I think inject a lack of clarity into the law, despite an emphasis on the importance of clarity in this specific statute.

James McElfish: I'm going to agree with everybody. The important takeaways for me from the decision deal with what the Court means by "deference." As Fred and Justin point out, deference has always been part of the landscape of NEPA litigation.

What's interesting is that we still have a long history of Supreme Court precedents cited by this Court, not repudiated, all of which call for agencies to take a "hard look" at the environmental effects of a proposed agency action—*Kleppe* in the 1970s, as Fred mentioned, and *Baltimore Gas & Electric*¹³ in the 1980s, plus *Robertson*, as Kirti referenced.

All of these say that taking a hard look is one of the core functions of NEPA analysis. The Court has gone so far as to say that's the main reason, or one of the two core reasons for NEPA. In *Robertson*, it was one of the reasons along with informing the public and others who may need to know about environmental effects. So, what does it mean to be deferential to an agency's implementation while also ensuring that the hard look is still occurring?

The majority opinion suggests at least three dimensions to the deference that I think are important. One is what details are included and what is the level of detail. Justice Kavanaugh, writing for the Court, says long doesn't mean detailed and short doesn't mean not detailed, but we're going to suggest that agencies get deference on the level of detail.

The second area is what significant environmental effects are included in the analysis and what feasible alternatives are included or excluded. So, we'll defer to an agency's choice of alternatives and its decision to include or exclude certain environmental effects.

The third area is the scope of the analysis, and here particularly the Court calls for deferring to an agency's decision to include or not include indirect effects and how far to go up or down the chain and/or with respect to cumulative effects.

12. *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989).

13. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983).

So, it's interesting that we now have some guidance as to what the deference is applied to, but we don't have much guidance as to how that interacts with a "hard look."

One of the other things raised by recent developments, with the sweeping away of the CEQ regulations and the recent changes in agency regulations and procedures, is how much public participation there will be. The Court had no reason to address that. In this case, there was plenty of public participation. But if in fact agencies decide that there will be *no* public participation on the preparation of a draft EIS, or no public participation of any kind on an environmental assessment (EA), does the court still defer? To what extent does the court defer on that particular issue, and query whether that has any interplay with the agency's decision on what environmental effects to include or exclude?

One of the beauties of the public participation system we've had is that commenters could say "include this," and the agency would say "we've looked at it and we decided it's not worth including for various reasons." We're now a little bit at sea in this area and we're left with only the statutory amendments from 2023,¹⁴ which provided that there would be scoping done on any notice of intent to do a full EIS. That may be the one and only opportunity. This leads me to wonder to what extent deference has any guardrails or guideposts in the absence of this other kind of input.

Jarryd Page: Jim, I want to pick up on a point you made about deference and take a question from the audience. The audience member says it's interesting that the Supreme Court seemed to say that deference should be given to agencies in complying with NEPA, but it overruled the *Chevron*¹⁵ decision just last term. What are your thoughts on how this idea of substantial deference from *Seven County* interacts with *Loper Bright*?¹⁶

James McElfish: I actually don't find those at all inconsistent or contrary. The Court in *Loper Bright* says the courts will decide what a statute means, and they don't have any obligation or duty to defer to the agency's interpretation if they think there's a better one. In *Seven County*, if discretion is committed to an agency by a statute, then the courts will allow the agency to exercise that discretion.

I don't find anything unclear or contrary about those two things. Part of that may be that I'm old enough to remember when *Chevron* was new. Back in the day, the courts interpreted the statutes and they would look at what an agency thought, but that was not the rule of thumb for the first decade and a half of NEPA. So, it's not inconsistent.

Justin Pidot: I don't disagree with Jim, although I do think that the extensive discussion that you see is an effort for the Court to try to justify the fact that on the one hand it is becoming increasingly anti-deferential, and on the

other courts can't do a lot of the things that agencies do. This is always going to be the challenge of how you implement *Loper Bright*—the fact that courts are not positioned to do a lot of the things that could be described as interpretive versus application. So, the courts are trying to draw a line there.

An interesting wrinkle though, and I'd be interested in others' thoughts on this, is that in some ways the analysis is aided by the fact that this case is dealing with a NEPA process that is not under the Fiscal Responsibility Act (FRA), because the FRA added the language "reasonably foreseeable" to the statute for the first time.¹⁷ It's something that courts had said a long time ago and CEQ has said and everyone else has done.

It does seem like what the Court is really doing here is deferring to the agency's interpretation of what is reasonably foreseeable, which is in some ways somewhat easier for it to do before the FRA amendments, when those words were added to the statute. It does begin to look more like an exercise in interpreting the language of the statute after the FRA, rather than applying the language of what it means for there to be a detailed statement. That's where the Court was able to say, well, there's lots of discretion created around that because Congress didn't tell us when it first enacted NEPA what a detailed statement meant with some limitations.

I'm curious to see, when we begin to see NEPA analyses that occur under the FRA with the reasonable foreseeability language in the statute, how courts then reconcile this deference in *Seven County* and *Loper Bright*.

Fred Wagner: I don't think there's any conflict at all. What we're going to see, and what we've seen already even after *Loper Bright*, is the preservation of the notion of *Skidmore*¹⁸ deference. It's still the agencies and the scope of their expertise in their technical areas, getting deference based on that. In other words, that's not a statutory interpretation. That's agencies doing their homework.

The other audience question I saw that is related to the question of deference is reconciliation of the "hard look" with deference. If we look at it through the lens of *Skidmore* and the existing preservation of agency deference and application of the agency's expertise, if the agency makes a call with respect to the scope of the reasonably foreseeable effects on any particular project based on the record of the project itself, experience based on development in that area, experience in reviewing and detailing similar projects in similar places, and so on—if that analysis is detailed and it's apparent on the face of the record—I think that will get deference because it falls within the agency's expertise and analysis of that particular area.

For example, in the transportation world, we routinely analyze expected traffic and mobility effects. What are the reasonably foreseeable effects of doing such and such transit project? Of doing a rail project, building additional

14. NEPA §107(c), 42 U.S.C. §4337(c).

15. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

16. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

17. NEPA §102(2)(C)(i), 42 U.S.C. §4332(2)(C)(i).

18. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

road capacity? The agency has done that for years and years, applied standards and models, and so forth. If the agency details it and shows you how it's done its work in accordance with the traditional *Skidmore*-type deference, I think that will still happen, and the hard look can fit within that context.

Jarryd Page: I'm going to pick up on a thread that Justin mentioned about the inclusion of the "reasonably foreseeable" language in the statute. I think this ties into a couple of audience questions about what impacts are in and what impacts are out in terms of what's reasonably foreseeable. A lot of the people who've worked in this space think about it in terms of direct, indirect, and cumulative impacts. I'm curious about your thoughts on whether cumulative impacts are now in or out. How should we be thinking about that question?

Kirti Datla: To state the obvious, the opinion doesn't discuss the phrase "cumulative impacts." It doesn't discuss the phrase "reasonably foreseeable." It doesn't really provide guidance on this question. I think the question is, do you think of cumulative impacts of the project? If you think about what the project's doing when considered in the context in which the project is occurring, do you think of those as effects of the project under the Court's decision?

That's a perfectly reasonable reading of the decision, but I think other panelists can speak in more detail to what's in agency regulations that are coming out. At least some of them seem to take a different reading of the opinion.

Fred Wagner: The question is why. Why are they taking a different reading of the opinion and how did we get here? I think what has happened over time is that the concept and the analysis of cumulative effects have become outwardly focused on those other actions on the past, present, and reasonably foreseeable actions. An error in many instances was the agency reviewing those effects in some sort of additive way. So, the focus ended up being about what are the impacts of all those other things.

I think the focus on the project and the cumulative effects of the project is exactly what Kirti just said: an analysis of context. There will still be a cumulative effects analysis in future NEPA documents. I think it's going to be called something different; it could easily be called "contextual effects"—a new phrase that says, where are we building, where are we operating, what are the stresses that we see in this area from the past and what's going on, and how will this project deal with that.

In some ways, that's going to be a better, more effective analysis of cumulative effects, because by placing attention on the project and its role in that context, it's easier than addressing avoidance minimization and mitigation measures. Whereas in years past, I worked with agencies that would say they don't mitigate for cumulative effects because their focus was on the other stuff and not on the project. I think that the notion of creating a contextual analysis is paramount, and I think that's going to be the new generation of cumulative effects.

Justin Pidot: Two quick points. One, the 2020 proposed rule the Trump Administration promulgated¹⁹ basically said to never talk about cumulative effects. Then, in the final rule, the Administration stripped out that language and said, well, sometimes cumulative effects are probably reasonably foreseeable, so we're just going to stick with reasonable foreseeability.²⁰

To make that concrete, I think about projects like highway expansions and pollution from cars that may result in neighboring communities with increased asthma rates in children. How do we know what the risk to children is unless we look at other air pollution sources in the area so we can actually understand the exposure that people are experiencing? That's one kind of cumulative effect, but it is pretty closely connected.

If you want to understand what the effects of increasing auto emissions are, you have to look at the other sources of air pollution in the area. You can also think about that with habitat fragmentation. There are all sorts of circumstances where this category of cumulative effects, as we've described it, is really about the effects of this project. Because as Fred suggested, if you don't understand the context in which you're operating, then you're not actually looking at effects to the environment. You're just creating an abstract universe where you're saying, well, the effects would be x if there are no other sources of pollution or if there's no other habitat fragmentation, for example.

I think it will be quite challenging for projects in deep analysis to succeed if they entirely blind themselves to context. Maybe we follow cumulative effects, maybe we don't. I don't know that the terminology matters that much. But looking at that question of what effects a project will have given things that are existing in the environment in which they operate is something that is going to be very hard for agencies to escape.

Jarryd Page: We keep talking about "projects," and of course EISs are sometimes conducted for things other than direct infrastructure projects. I want to get thoughts from the panel about whether the decision applies only to infrastructure projects, or if it applies to any EIS. Do you think the Supreme Court correctly understands to what NEPA applies or not? Does it matter what type of project it is? Does it matter if it's a rail line, or an oil and gas project, or renewables?

Fred Wagner: It clearly still applies to everything, although the case was litigated in the sense of infrastructure. The emphasis in the majority of the amicus briefs filed was the impact on approving what we're building. Even thinking more broadly than this case, we're hearing a lot about the

19. CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020).

20. CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020).

“abundance movement.”²¹ It focuses a lot on what we have to build and so forth, and that’s always been the emphasis.

But clearly if you’re doing a land management plan, a resource management plan, a forest plan, a leasing plan for energy development—any of those broad planning-type documents—these principles are going to apply even if that wasn’t the emphasis of the Court’s thinking based on the ruling or the emphasis of the amicus briefs. It has a broad application, and I will note that some amicus briefs did focus on the planning aspects of NEPA as well.

Justin Pidot: The Court did us a disservice by using the term “project” over and over again. The statute talks about agency actions. The FRA amendments also muddied the waters by talking about federal actions and private actions. When I was at CEQ, we spent a fair bit of time talking with agencies about the fact that the locus, the focus, of their analysis was the action they were taking—whether that be a planning decision, a permitting decision, or a funding decision.

The private activity that they are permitting or funding may be a reasonably foreseeable effect of their action to provide funding or to issue a permit. But I think it is very helpful to create some analytic separation so that you can describe, in a logical fashion that people, agencies, and project proponents can follow, how the federal action is connected to whatever the universe of effects are that you are considering.

By substituting the word “project” for federal action, the Court suggests the two are the same thing, which they are not. The federal action is the granting of the STB’s authorization for a project that is not going to be carried out by the federal government. But those concepts are not clearly delineated by the Court, nor the statute anymore to some extent, and I think it will be a source of confusion at times. We tried to create some clarity in the regulations that were in effect for nine months or so, but I think it will continue to be a real question for people to try to sort out.

Kirti Datla: This isn’t a disagreement with the idea that the opinion applies to everything. It’s an interpretation of NEPA, so it applies to NEPA for sure. But I think there is one odd aspect of the opinion, or a way it could have odd effects—it takes the position that the STB couldn’t have considered the effects at issue when making its ultimate decision. Setting aside whether that’s right or not, it raises the question of what NEPA looks like when agencies can consider effects that might fail the Court’s test of what’s in or out of NEPA’s scope in the earlier part of this section of its opinion.

Imagine if there was a statute that said you can consider downstream effects when deciding whether to approve this railroad or not. I’m not really sure if, under the Court’s decision, that would mean you don’t have to consider them under NEPA because it doesn’t fall within the definition of “environmental effects” under NEPA, but you do have to consider them under the substantive statute, which then

gets standard APA review and maybe not super-deferential review. It creates these weird potential divergences of when agencies consider environmental effects. It seems potentially inefficient.

It also puts a lot of pressure where I think the pressure didn’t exist before—on understanding the precise scope of agencies’ ability to consider various factors under various statutes and how they’re supposed to weigh them—because NEPA reviews have historically taken care of everything all at once, and you didn’t need to go into those details.

Jarryd Page: I want to pick up on the last thing you said about the different NEPA reviews, and ask another question about applicability. The EISs, of course, only make up a small slice of NEPA reviews; EAs and categorical exclusions (CEs) account for a much greater percentage of these actions.

How do you all understand the relationship between this idea of substantial deference for an agency’s line-drawing in an EIS and for other NEPA reviews that they might be undertaking, like EAs or some adoption or application of a CE? Do you read this decision to provide substantial deference in those circumstances as well, or are we just talking about EISs?

James McElfish: I think the standard clearly would apply to EAs. Courts have always treated EISs and EAs with similar standards of review. CEs are a little more interesting. One question is whether there is deference at the point at which the CE is adopted.

Of course, now we have the ability to apply or adopt CEs that other agencies have created.²² I suppose I expect the courts to want to apply deference to those applications of CEs just because of the disposition of (particularly) the Supreme Court, but I’m uncertain how that will work in practice.

I’ve seen many instances in which CEs don’t fit very well for the activities that the agency is claiming they apply to. Activities that agencies may call for deference, but I’m not at all sure it’s the same kind of deference that Justice Kavanaugh outlined in the majority opinion.

Fred Wagner: I think we’re going to see a bunch more litigation and challenges over the body of CEs in the federal government. My friends from the National Association of Environmental Professionals do an annual NEPA case law summary. There seem to be more CE cases creeping into the summary year in and year out. That’s only going to be exacerbated, because I think there’s going to be pressure for agencies to write more CEs.

There’s going to be pressure for agencies to borrow CEs pursuant to the FRA from other agencies. There’s going to be pressure to apply CEs, as Jim said, to things that may or may not fit squarely on point. I think there’s going to be a lot more attention at large on that practice. We are going to see a stress test on the deference principle in that world because I think it’s going to be done more and more.

21. EZRA KLEIN & DEREK THOMPSON, *ABUNDANCE* (Avid Reader Press 2025).

22. NEPA §109, 42 U.S.C. §4339.

Justin Pidot: I'll add that the deference agencies are receiving when they interpret their regulations continues to exist. If the Supreme Court decides to eliminate that form of deference, then that will really complicate the matter of what deference agencies get in applying CEs. But for the time being, that form of deference continues and it looks much more interpretive. It's an interpretation of a legal provision like the CE.

As long as that persists, there will be pressure around it. But I think courts will remain somewhat deferential if that goes away. Courts are really going to have to figure out what it means to interpret the text of a CE versus apply the CE, and how to sort out which thing is happening in any particular case.

Jarryd Page: Let's drill down on a couple additional questions about how lower courts might grapple with this. I welcome your general thoughts on that point. I know audience members are asking about how lower courts are going to react more generally.

But I'm also curious about your response to what the remedy is for a court that actually finds an EIS is inadequate. I think there's talk about "harmless error" and things like that.

James McElfish: A lower court has done this in an opinion issued after *Seven County*. The U.S. Court of Appeals for the Ninth Circuit decided a NEPA case involving oil and gas drilling in the National Petroleum Reserve, *Center for Biological Diversity v. Bureau of Land Management*.²³ There, the court cited *Seven County* for the proposition that the Bureau of Land Management (BLM) could limit its range of alternatives in the way that it had, but the court also found that BLM's final selection of an alternative was not explained and was not clearly included in that limited range. So, the Ninth Circuit majority was of two minds.

It's like BLM is within the range of deference to define the alternatives, but their outcome doesn't fit within this range. So, on the one hand, the first thing we'll defer to, but the second is arbitrary and capricious. Then the court is left with, what is the remedy? The majority said, yeah, it's arbitrary and capricious, but BLM can probably explain this; so we're going to send it back for them to explain it, but the activity or federal action can proceed. The dissenter said no, we should vacate until BLM shows us they can explain it.

The court has already had trouble with wanting to be deferential, and cited *Seven County* for that purpose. We also know that even a NEPA violation doesn't always result in an injunction. That's been black-letter law for a long time. But certainly the decision reflects some uncertainty about what to do where you're deferred to on the one hand, but you're also arbitrary and capricious at the same time.

Kirti Datla: As Justin said, everybody has always known NEPA claims are brought under the APA. The APA's default

remedy is vacatur. There's basically a universal understanding among the courts of appeals that have addressed the question that that's the default. There's a test for overcoming that default. That test gets applied in NEPA cases, but it gets applied in hundreds and thousands of APA cases every year.

There's no special NEPA rule for how to deal with remedy, either in NEPA itself or in the APA. It seems to me like the Court is saying something about what it thinks should happen in these cases. It seems to think that vacatur should be less frequent than it is, but it's not tying that to any discussion of the doctrine that governs how courts assess this remedy. It's not distinguishing, except to say over and over again that NEPA is a procedural statute. There are other procedural obligations that are enforced under the APA that sometimes lead to vacatur or sometimes don't.

It doesn't explain how its decision interacts with that broader body of law. It is another part of the opinion that raises more questions for lower courts than it answers. If the Court wants to come out and say NEPA is just its own body of law despite all of these common statutory underpinnings, I guess it can do that, but it hasn't done that. That creates a bunch of confusion for lower courts to have to sort through.

Jarryd Page: Here's an audience question: Do any of you see an "anti-hard look" standard in footnote 4?²⁴ It seems to indicate that an agency denying approval of a project could face a potential argument that it weighed the environmental consequences too heavily. Did any of you pick up on that or have any thoughts about that?

Kirti Datla: There are multiple exclamation points next to that footnote in my copy of the opinion. I think it's odd. The footnote says, unlike in this case, if a project applicant is denied, it can say that the agency improperly weighed environmental considerations and elevated them over other factors, and it can argue that the agency can't even consider the environment.

It says NEPA doesn't change any of that. I fundamentally don't understand the footnote because that's not an argument that only applicants can make. Anybody who has standing to challenge the decision can argue that the agency improperly considered a factor that Congress didn't authorize it to consider. It's not a one-way decision. If NEPA doesn't have anything to say about how challenges should work under the agency's organic statutes, why say anything about it at all?

24. *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, No. 23-975, slip op. at 14, n.4 (U.S. May 29, 2025):

When, unlike this case, an agency *denies* approval of a project, the denied applicant may ordinarily challenge the denial under the APA or the relevant agency's governing statute. The denied applicant may argue, among other things, that the agency acted unreasonably in denying approval by weighing environmental consequences too heavily in light of the agency's governing statute and other relevant factors, or perhaps that the agency erred because the governing statute did not allow the agency to weigh environmental consequences at all. NEPA does not alter those judicial inquiries.

23. No. 23-3624 (9th Cir. June 13, 2025).

It seems to be related to something I said earlier, which is about the hydraulic pressure the decision creates, pushing more of the fight into what the agency's organic statute means. It seems to be an invitation for people to think more about that and to raise those kinds of claims. Obviously, given the tenor of the opinion, it's an invitation to one side. It's a very strange footnote.

Justin Pidot: I don't have a comment on the footnote *per se*, but I do have a follow-up on the deference issue that I think was intimated by the question in the comments. Deference is a two-way street. The principle of deference is being considered right now in the context of the current Administration and the pressures being put on NEPA review and whatnot. But the question rightly asked, what if the world changes and, all of a sudden, we're doing more expansive reviews and the interpretation of the scope of analysis is broader and not narrower? Would there be deference to that? The answer should be yes. Deference is a two-way street as long as it's reasonably exercised.

One of the things that I hope we'll discuss moving forward is how we as professionals and as lawyers navigate the roller coaster in terms of NEPA policy and decisions to come up with a more reliable and durable practice to apply NEPA that's deserving of deference. But clearly deference is a two-way street. If we're talking about a different administration with different priorities and different agencies implementing NEPA, the notion of deference to what they do is going to be equally applicable.

Fred Wagner: You don't need to wait for another administration because this Administration is using NEPA as a cudgel against renewable energy development. We will see a desire for extremely expansive and long NEPA reviews when it comes to offshore wind and onshore renewables and the like as one of the tools. We're already seeing that happen and how that plays out, how courts treat it, how parties treat it. It's going to create this potentially very bifurcated process where you have extremely limited NEPA reviews for certain categories of projects, and very expansive NEPA reviews for other categories of projects by the same agencies at the same time.

Jarryd Page: I'm going to follow up with an audience question about multiple agencies and their ability to cooperate under NEPA. How do you think the case would change the scope of cooperation between agencies during the development of an EIS, especially when there are multiple agencies with regulatory authority over a project? Does this decision change the way you've understood that? If so, how?

Fred Wagner: Everyone's thinking about that one. It seems to me that one of the principles from the FRA and the amendments to NEPA was the incorporation of the concept of "one federal decision"²⁵ from the early days of

the first Trump Administration that got built into law. That whole concept was codified.

I think there's pretty broad agreement that there's an emphasis on bringing the agencies together to get the analysis done at the same time so that there isn't a gap between a lead agency's decision under its authority and the decision that's necessary from a resource agency, for example, that is permitting authority over that same project.

That needs to be considered jointly. The notion of one federal decision that's been put into law now stresses that. I think there can be some stresses between the notion of the lead agency and what's in its scope versus the permitting agencies on their narrow authority over a particular place or crossing the waters of the United States for a highway, or a rail line, or something like that, for instance.

But my sense is that the better practice is going to prevail, which is the only way to meet deadlines. The only way to meet the new requirements under the FRA is to get those processes done jointly as much as possible. So, those issues are considered together, and decided and analyzed at the same time.

James McElfish: I agree with that, but that'll be extremely hard to do if federal agency staffing is reduced substantially, because the demands on coordination are going to be immense. There is a question also about the deference standard, where one of the cooperating agencies or non-lead agency wants to have certain things included and the lead agency gives it a half paragraph or excludes it altogether. I think there are some live issues there that would be a lot easier to resolve with adequately staffed federal agencies.

Jarryd Page: We've spent quite a bit of time unpacking what's happening at the agencies and at the federal lower courts, and what this means. I'm curious then, Fred, from your perspective, obviously in representing petitioners in this case, does this change anything if you're a project proponent? If you're a proponent, how are you viewing this decision?

Fred Wagner: From my current chair working for a firm that partners with project proponents to prepare NEPA documents, I'm viewing this as a unique opportunity in time. By that I mean that we can use this opinion and all the things that are going on around it to figure out different ways to do what we've been doing for many, many years.

It isn't just about squeezing things into 150 pages. That would be too facile, too superficial. What I'm talking about is a substantial rethinking of how we frame documents, how we frame public participation, and how we maximize input during scoping to make a better-focused document, a document that pays attention to the things that are truly at issue and then implements the discipline on avoidance minimization and mitigation to the focused attention of those documents.

One of the things project proponents may be putting on the table for agencies is that for years, there have been forms and formats for preparation of EAs and EISs. There's chapter one, two, three, four, five, six, seven. Chapter one

25. NEPA §107(b), 42 U.S.C. §4336a(b).

says this, chapter two says this, and so forth. I think it's time to revisit all of that and to look at it afresh and say that, if we take the opinion on its face and the procedures that are coming out from the agencies on their face, we need to have better scoping and better assessment of what should be in the documents and what should be out, what that attention should be, and how we deal with the analysis of those effects. Then, I think the way we present information and what we write can look completely different than what we've done before.

Project proponents who are looking to the future and thinking creatively are going to say, look, we want approvals obviously, but we also want to build better projects. We want to build projects that work. What type of analysis matches with that? That isn't necessarily the kind of format we've been using.

I'm in the process of thinking with my colleagues about how we do that. How do we make recommendations for project proponents who partner with federal agencies? Again, we're talking about infrastructure projects. How do we create the kind of focus that builds a better mousetrap, a better analysis that doesn't just fit within page limitations but gives better, more focused, detailed attention to the things that truly matter? We've been trying to do that for years in NEPA and never really got to it. I think this is an opportunity for us to do just that.

Jarryd Page: Kirti, what about advocates? What about litigants? How does this change your strategy, your approach, how you're thinking about the ways that NEPA cases will get argued in courts moving forward?

Kirti Datla: I don't have a simple answer. I think the discussion today has touched on but not comprehensively catalogued all the things that are in flux, about how agencies are going to go about their business, and what the ultimate decision documents are going to look like. All of that shapes how the people most affected by those projects are or aren't going to be able to use NEPA as a way to mitigate the harm of those projects that they see as potentially happening to them. I think too much is up in the air for me to give you a helpful answer. Maybe that sounds like a dodge, but that's where my head is at in hearing the question.

Jarryd Page: Let's talk about the public for a minute. You were just talking, Kirti, about the people. Of course NEPA fulfills an important disclosure function, identifying the issues so that the public is informed and has a chance to comment on them. Jim, does *Seven County* in any way change or alter the relationship that the public has with their opportunity to engage through the NEPA process?

James McElfish: I don't think *Seven County* does. It was really the Administration's move to do away with the CEQ regulations.²⁶ In the past several weeks, federal agencies also

removed their agency procedures and substituted guidance documents. For years, we've had requirements in CEQ regulations that, if you do an EIS, you do a draft. Then the public has 45 days or more to comment on the draft, and you have to respond to all the substantive public comments in preparing the final document, usually 30 days before the record of decision.

With EAs, generally even if there's no public comment, there's a period of time after the finding of no significant impact (FONSI) is issued that the public or others can say, wait a minute, you got it wrong. All of that is gone from CEQ's point of view, and many of the federal agencies are not keeping it. So, we don't know what's going to happen.

DOI replaced its regulations almost entirely with a short guidance document that has nothing on public participation other than saying "you can ask." You're allowed to ask for public comment, but there's no guidance on when it's required. I think we're left in a very different world than even the Supreme Court may have anticipated in deciding *Seven County*, which was really against the backdrop of very robust public participation.

Jarryd Page: Anybody else have any thoughts on the ability for the public to engage around either some of the new things that have been coming out of the Administration or any other aspects of the NEPA process?

Fred Wagner: Just know it's not only DOI; others are saying you may now make public comment on the EIS optional. It's really a broadside against public participation and a whole variety of manifestations. I don't know exactly why. My sense is that the 45-day public comment period is not a substantial time for EIS completion.

That said, they're trying to complete EISs within a few weeks. You don't have 45 days to comment because DOI is trying to complete EISs in less than that period altogether. So, it's really all these things working in tandem that are suggesting a world of NEPA that is very different than the one that we've seen before, and where the public really won't have any meaningful opportunity to participate, I suspect, if it succeeds.

James McElfish: It's really too bad in terms of decision-making, not only if you believe in public involvement. I always said NEPA had the one set of procedures that didn't regard the government as smarter than everybody else. My go-to example was a draft EIS that the U.S. Army Corps of Engineers did years ago on introducing genetically modified oysters into the Chesapeake Bay. A retired Naval Academy professor went through the tables and determined that they had made a math error that was off by an order of magnitude. That opportunity between the draft and final EIS resulted in a completely different outcome in the decision. I hate to lose these opportunities.

Jarryd Page: Let me ask a detailed, fact-specific follow-up on this idea that 45 days is no longer possible if you're trying to do things in 14 or 28 days. Any thoughts on the interaction of *Seven County* deference with the declaration

26. CEQ, Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025).

of an “energy emergency”? That was the impetus for outlining 14-day and 28-day timelines for EAs and EISs. In your view, can the executive branch unilaterally define the factual circumstances and how NEPA reasonably applies to them? How do you interpret this action?

Justin Pidot: I am not sure there’s direct applicability. What I would say is that the Court does note, before moving on to all the forms of deference that apply, that when it comes to interpreting the statute, it’s a question for the courts.

Of course, the NEPA statute says nothing about emergencies or emergency exceptions. The CEQ regulations that were in place for a long time addressed circumstances where there was substantial risk to life or property. You needed to have an emergency response that couldn’t accommodate the ordinary NEPA process. That is totally different from what we’re seeing DOI doing.

It’s not obvious to me that this novel invocation of a non-statutory emergency authority that overrides or limits the statute is the kind of determination that the Court is envisioning receiving deference. That strikes me as a circumstance where we’re getting more into an interpretation of the statute. That would require the courts to wade in and decide whether some language in the statute anticipates this kind of alternate process when you have an invocation of an emergency of any sort.

Jarryd Page: There are a few more audience questions about the relationship between permitting and timelines. I think part of the majority opinion comes from the idea that NEPA is slowing things down, slowing infrastructure projects down. How do you read the opinion’s interaction with the broader permitting debate? Do you think this opinion is going to have any impact on permitting timelines? Is this going to speed up infrastructure development in your opinion or not?

Fred Wagner: The opinion itself won’t. It’s the opinion in conjunction with everything else, and the consideration of other reforms, that will. I think there is an absolute movement now to look at the phrase “course correction” not just in terms of writing an EIS, or an EA, or new CEs, but in terms of how we work within the process writ large. I really do mean that. Working together with permit requirements and environmental analysis is the way to do that.

For years, we’ve tried to say, look, we can’t segregate out what a permitting agency needs and what permit requirements are from the underlying analysis. Otherwise, we’re not doing our jobs; we’re not being comprehensive and we’re not getting to a point where our sister agencies can act in a timely manner. It’s one thing to say, oh, if you want federal action, let’s do it within a certain amount of time. It’s another thing to properly understand what those requirements would be and fitting them into the project analysis.

My colleagues that were in leadership at the U.S. Department of Transportation when I was there said the role of this whole process is not just to understand what

we’re doing, it’s to build better projects. You build better projects often through harmonization of the permitting requirements into your environmental analysis. That’s where your conditions come in. That’s where your mitigation often comes in to do those things properly and to do them together.

I absolutely anticipate a movement on Capitol Hill to further try to understand what opportunities there are to build permitting into this process and to do things more quickly and more efficiently. It isn’t this court decision that’s going to make things go quicker in and of itself. It’s going to be the willingness to think comprehensively with partnering the analysis and permitting requirements to do those things together effectively.

Kirti Datla: I broadly agree with the top-line conclusion that it’s not this decision. It’s everything else. One fact-specific piece of context that might illustrate that is, if you look at the EIS that’s at issue in this case, ballparking the stuff that was at issue in the case before the D.C. Circuit, it’s like 10% of the EIS. I don’t know what chopping off 10% from the inquiry gets you in terms of time saved, but it’s not what I think the majority thought it was doing with that opinion.

Maybe that helps to provide at least one example of how lopping off some of the effects that agencies are supposed to consider under NEPA doesn’t really get you to where you need to go if what you’re concerned about is delay.

Fred Wagner: But it’s never solely been about pages and what percentage of a document covers something. There’s been 1,000-, 2,000-, 3,000-page EISs and the focus of a court’s attention often is on 10 pages. That’s nothing new. That happens all the time.

The point is, if you’re trying to build a better project and you have a true understanding of where the thrust of the effects are and where the thrust of community concerns are and you’re focusing your attention on those issues, I don’t care if you describe it in 10 pages or 100 pages. I’m more worried about the conditions for building the project and whether you are building that project in a way that addresses those concerns.

If the permitting process and the NEPA process get to that result, that’s great. It may result in fewer pages in the document. I don’t care about that. What I care about is the results. That’s where I’m paying attention more.

Justin Pidot: It strikes me that where this opinion is going to bite or not is in the following circumstances. In this case, there were thousands of pages of analysis and extensive public comment. The Court looked at it and said, all right, it feels like enough. At bottom, there was an intuition from the justices that they looked at this record and thought that the STB did enough, and that the D.C. Circuit was asking too much.

What happens when you have a 28-day EIS with no public comment on the approval of a new mine in a previously undeveloped area that is eight pages long, or 28 pages long, and provides almost no information?

It doesn't consider any alternatives. I don't know what you're going to be doing in 28 days. It's not going to be very much. Maybe it's long, but it's meaningless, because what can the agencies do in that much time when they are already understaffed?

Do we apply the same intuition where the Court is going to say, well, *Seven County* told us to be super-deferential? So, the fact that DOI said, we don't need to consider anything other than whether these minerals could be used in some better fashion elsewhere, that's the only thing that we're going to think about? Are they going to shut up the public? Do they get deference over that or do they not?

When those issues bubble up in the courts, that is going to be the application of *Seven County*. One way or another, that will really determine how NEPA, as it's currently constituted, applies moving forward.

Jarryd Page: We have one last audience question. Shifting away from federal NEPA and thinking about state

environmental review laws, like the California Environmental Quality Act (CEQA), do you think the opinion will have any effect on the development or implementation of those laws?

James McElfish: I don't think we'll see a whole lot in the near term. A dozen or so states adopted environmental impact assessment laws in the 1970s. I'm not sure there will be a great desire by states to gap-fill with so many other things going on.

The most robust of those is, of course, California. This legislative session, California reduced some of the CEQA requirements in order to make it possible to construct more housing and the like. That's not a terrible surprise. Unlike NEPA, CEQA has been amended in numerous legislative sessions. I suspect that in states that currently have robust state environmental impact laws, we will see more amendments, but I don't think there will be a rush by others to enact new ones.