This is the third in our series of posts on the Seven County case. The first post was here, summarizing the key points of the opinion. The second post is here, providing our assessment of the analysis in the opinion. In this third post, we discuss the implications of the case for what have been some of the most significant kinds of indirect effects analyses under NEPA to date.

As noted in our first post, the *Seven County* case has important implications for what has been called in the past under the regulations implementing NEPA "indirect effects," effects that are distant in time and space from the proposed action. The opinion appears to draw a line between two different sets of indirect effects. First, there are indirect effects that are the result of the proposed action, without any intervening actions by third parties or other agencies – for instance, the Court notes the erosion caused by project that "flows many miles from the project and affects fish populations elsewhere." Slip op. at 16. Then there are indirect effects that are the result of separate projects, distant in time and space, or under another agency's jurisdiction, which are outside the scope of NEPA – unless, perhaps, they are so close in time and space they should be considered "interrelated." Slip op. at 19-20.

Based on this distinction, courts may well conclude that unless the proposed federal action involves combustion of fossil fuels, the climate effects of a federal action will generally not be within the scope of NEPA. For instance, leasing of federal lands for oil and gas production, or federal approval of a gas pipeline, do not involve significant amounts of combustion of fossil fuels directly. The climate impacts of those projects are downstream, caused by other projects (refineries or the operation of gas-fired generators), not the pipeline or leasing decision itself, and may involve subsequent regulatory decisions by other agencies. Thus, they would seem to fall outside the limits of scope laid out in the decision. Note that this could mean, in many cases, there might never be any NEPA review of the climate impacts of those decisions, even though it might be by far their most important environmental impact. That is because, when it comes to combustion, most of the regulation involves air pollution regulations pursuant to the Clean Air Act, and that might either be done by states (which are not covered by NEPA), or by EPA (whose regulatory decisions have historically been exempt from NEPA). There is some uncertainty here. The opinion only mentions climate once, in an offhand example of the kinds of subsequent actions that should not be the subject of the interagency consultation requirement of NEPA ("an agency's asking another agency to assess how 88 miles of additional track in rural Utah would contribute to emissions or climate change along the Gulf coast," slip op. at 18).

Although this may be the thrust of the Court's argument, it may not inevitably follow. The Court does link the scope of the environmental review with the scope of the agency's

decisional authority. ("The ultimate question is not whether an EIS in and of itself is inadequate, but whether the agency's final decision was reasonable and reasonably explained." Slip op. at 14) If a court concludes that, in deciding whether to license a pipeline, the Federal Energy Regulatory Commission has the authority to consider climate impacts, then it might be appropriate for the environmental impact statement to cover that subject as well."

Second, some historically common versions of indirect effects may not continue to apply either. For instance, it was not uncommon for NEPA reviews of highway construction to consider the effects of the development the highway would encourage or facilitate. But those decisions arguably involve separate projects, generally under the jurisdiction of a separate agency. The Court specifically notes this as an example of a separate project: "a housing development that might someday be built near a highway," slip op. at 16. However, the Court's favorably citation of *Robertson*, slip op. at 20, which involved NEPA review of residential development on private land that would be the result of construction of a ski area on federal land, might cut in favor of NEPA review of this kind of residential development, at least where it is very proximate in time and space (i.e., the development would occur very shortly after the construction of the highway).

On the other hand, there is a range of decisions, often involving federal public land, where we think the scope limitations of *Seven Counties* will probably not produce major change. For instance, leasing of federal lands for oil and gas requires a multi-stage process of (a) identifying lands for leasing; (b) leasing those lands to the highest bidder; (c) exploratory drilling; and (d) permitting specific drilling operations. Historically, courts have required agencies taking the first step – identification and opening federal lands for leasing – to consider the impacts of development of those lands to the extent those impacts are foreseeable. That is in part because, as the courts have noted, once the land is leased, the government is sharply constrained in its ability to stop or limit leasing, at least without paying significant financial consequences. We don't think the Court's analysis likely changes that outcome. All of the stages in the process, including permitting all the subsequent drilling operations, are within the jurisdiction of one or two federal agencies working together, including the agency that does the initial leasing decision (unlike in Seven Counties). The stages can be understood as "interrelated" and "close in time and place" to each other, in that the development depends on the leasing, and will only occur on the lands covered by the lease. And the scope of the causal chains here are more limited than the kinds at issue in Seven Counties.

Finally, the most uncertainty probably relates to the use of economic analysis in NEPA reviews. For instance, consider an agency is doing an assessment of the greenhouse gas

impacts of setting automobile fuel economy standards. This is one case where we think climate impacts clearly still fall within the scope of NEPA under *Seven County*, since the agency is regulating directly the combustion of fossil fuels by automobiles. But the assessment of what those impacts will be will depend on economic forces – what will the price impacts of the regulation, plus varying costs of gasoline, be on decisions made by automobile manufacturers and purchasers. Such analyses are clearly foreseeable, as they have long been done by agencies. But are all those decisions "separate projects" outside the scope of NEPA? Perhaps, again, they are "interrelated"? Or is there a category of follow-on actions that does not count as "separate actions"? Is an individual consumer's decision to buy a car a "project" or is it somehow different? In our article, we highlighted that in many cases, aggregate decisions by large numbers of actors are much more foreseeable than the decisions by a limited number of specific actors. Economic modeling of subsequent decisions by manufacturers and purchasers is more like the former, while analyses of how one or two oil refineries might respond to individual regulatory decisions by various agencies is more like the latter. The lack of clarity and predictability that appears to be such a key motivator for the Court's decision, see slip op. at 21, is implicated much more by the latter scenario than the former. But we'll have to see how things play out.