

In a new decision, [\*Tennessee Pipeline v. FERC\*](#), the D.C. Circuit has taken a hatchet to judicial review of environmental impact statements. The opinion by (the court's most activist conservative gave the broadest possible reading to a recent Supreme Court ruling, the [\*Seven County Infrastructure case\*](#). In doing so, the court ignored earlier NEPA precedent that the *Seven County* did not overrule, and recent administrative law rulings.

In *Seven County* the Supreme Court held that some lower courts had gone too far in their review of environmental impact statements. The Court emphasized that NEPA is an essentially a procedural statute, requiring additional judicial deference, and it imposed limits on the need for agency consideration of indirect environmental effects.

The facts in *Tennessee Pipeline*, as presented by Judge Walker's opinion, were simple. To close a coal-fired plant, TVA decided to construct a gas-fired plant. Doing so required a pipeline to supply the gas. TVA gave the pipeline credit for reducing emissions because of the transition from coal to gas, which would have required construction of a gas plant. TVA also said that the alternatives to the proposed pipeline would be a different gas pipeline. FERC apparently assumed that it had to take TVA's decision to build the case plant (rather than, say, renewables or nuclear) had to be taken as a given.

This raised two questions:

- Did FERC have to take the selection of a gas-fired plant as the replacement for the coal plant as a given?
- If so, did it need to consider the environmental impacts of the gas plant versus other alternatives in its impact statement?

The Court says, near the end of its opinion, that FERC did have to take selection of a gas-fired plant as a given in considering the Natural Gas Act. If that's right, the impact statement clearly didn't need to consider the impacts of selecting gas over other power sources like wind or solar. That seems like basic logic: what's the point of discussing something that's irrelevant to FERC's decision?

The problem is that the court wrote the opinion the other way around. It first read *Seven County* to require little in the way of judicial review and to preclude consideration of the gas plant in the impact statement. Then, it assumed that these features of NEPA review *automatically* carried over to the Natural Gas Act.

In *Seven County*, the Court did stress the importance of deference to agencies in NEPA cases where issues involved technical matters. It didn't purport to overrule its previous

decision in the [Marsh case](#). Like *Seven County*, *Marsh* also rejected a NEPA claim. At the same time, *Marsh* cautioned agencies against ignoring their responsibilities under NEPA, saying that “NEPA does require that agencies take a “hard look” at the environmental effects of their planned action.” *Marsh* also said that a reviewing court must carefully assess the record to determine that the agency considered all the relevant factors. Notably, the *Seven County* decision didn’t overrule *Marsh* or even cite it disapprovingly. (It’s actually cited with approval on a different point.) Instead, the Court claimed to be sanctioning recent decisions that had gone too far in reviewing decisions involving agency expertise.

There is language in the *Seven County* case suggesting that decisions about what to include in environmental impact statements get an extra dollop of deference because NEPA is procedural and because Congress has now imposed tight page limits on environmental documents. This seems in tension with *Marsh*, but while both cases are on the books, lower courts have a duty to try to harmonize them.

The biggest mistake of the *Tennessee Pipeline* case is to assume that the limits on NEPA review automatically translate into limits on what an agency is required to consider in making a final decision under a different statute (here, the Natural Gas Act), or that review under these non-procedural statutes now get less than the usual standard of judicial review.

The assumption that a court must simply defer to an agency’s exercise of discretion under a substantive statute is refuted by another recent Supreme Court decision, *Loper Bright*, where the Court emphasized that, if the best reading of a statute is to give an agency discretion, the Court must ensure that the agency the agency has engaged in reasoned decision making within the boundaries of its discretion.

This can require careful review, as shown in [another D.C. Circuit decision](#) the same day as *Tennessee Pipeline*, where the court reversed FERC’s determination that a natural gas rate was “just and reasonable” with no special dollop of deference to FERC. There, the court said: “While Congress has conferred substantial discretion on FERC in the context of rate setting, given the important private and public rights at stake, our review requires the agency to offer reasonable explanations for the rates it sets and to ‘articulate[] ... a rational connection between the facts found and the choice made.’”

The court may be right that, under *Seven County*, the “purely procedural” impact statement doesn’t need to consider the effects of separate projects. But the Natural Gas Act is a separate, *non*-procedural statute with different language and history. The legal requirements of that statute need to be determined with the normal rules of statutory

interpretation, not with reference to a different statute.

Based on the facts as set forth by the court, its decision may have been right. But the opinion went astray with its unrestrained enthusiasm for deference in NEPA cases, and its assumption that the same deference carries over in reviewing decisions under other statutes like the Natural Gas Act.