Our last post explained the background of the *Seven Counties* NEPA case, which is currently pending in the Supreme Court. Today, we discuss the radical arguments that have been made in the case and why they should be rejected. NEPA requires that agencies consider the environmental effects of their projects, but the petitioners raise hairsplitting arguments to exclude obvious effects due to technicalities. We consider their arguments one by one. More detailed analysis can be found in our new working paper.

Argument 1. An agency's environmental impact statement shouldn't cover any issues where a different agency has regulatory jurisdiction.

One issue in the *Seven Counties* case is whether the impact statement should discuss air pollution caused by refining the oil shipped over the proposed rail line. The argument is that the Board shouldn't have to consider that because EPA has authority to regulate air pollution, not the Board.

In our view, it makes no sense to limit consideration to effects over which the agency has independent regulatory authority. The Bureau of Land Management has no regulatory authority over wildlife, public health or fires beyond the boundaries of the land it manages. It would be absurd to say that it must ignore possible harm on private or state lands adjoining federal property because BLM has no jurisdiction there. It's equally absurd to prevent BLM from considering impacts on adjacent National Forests, which are administered by another agency.

Or suppose BLM is deciding whether to approve a private project on its land that will produce a lot of air pollution. The emissions may require a permit from EPA as a major source, but EPA has authority over the facility's pollution control system rather than whether it should be built. Only BLM has authority to consider the situation as a whole and ask whether "the juice is worth the squeeze."

NEPA itself recognizes that the agency will consider impacts under the regulatory authority of other agencies. Section 102(2)(C) requires the agency preparing an impact statement to obtain comments from any other agency that "has jurisdiction by law… with respect to any environmental impact involved." There would be nothing for those other agencies to comment about if the impact statement excluded any effect subject to the jurisdiction of another agency.

Argument 2: Impact statements shouldn't discuss impacts that are remote in space or time from a project.

The argument in the *Seven Counties* case is that the Board should limit consideration to impacts that happen immediately and near the rail project. That would exclude, for instance, consideration of the climate impacts of burning huge amounts of oil shipped over the line.

Language in NEPA cuts against any effort at ringfencing consideration of environmental effects. Section 102(2), the very provision imposing the requirement of environmental impact statements in subsection (C), also provides in subsection (F) that agencies must recognize the "worldwide and long-range character of environmental problems." Such limits would have absurd consequences. A temporal limitation would mean that an agency would have to ignore serious cancer risks, because many cancers often do not appear until decades after exposure. Discharging pollution into rivers can cause harm many miles downstream. For an agency to ignore these effects would be senseless.

Moreover, in amending NEPA in 2022, Congress didn't impose any requirement of geographical or temporal proximity; instead, it only required that effects be "reasonably foreseeable." The 2020 CEQ regulations did contain language that presumptively limited the geographic scope of the impact statement, so Congress would have had no trouble writing such limits into law if it had wished to do so. It chose not to do so. The omission is even more glaring because earlier versions of the bill did contain such language.

Argument 3. The impact statement should only cover impacts that follow directly from a project.

This again is part of an effort to ignore highly foreseeable effects, such as the fact that building the line will lead to dramatic increase in oil production once a market is available. This is another example of how imposing arbitrary limitations would lead to results that defy common sense. Consider a proposal to fund a lab to experiment with dangerous viruses. If there's a leak, a virus could be set loose, but its spread would go through many intervening steps and involve uncertainties about what precautions would be taken or which individuals might transmit the virus to which other individuals. Other agencies may have jurisdiction over disease control. Quite possibly, a court would deny tort liability on policy grounds. Yet would anyone say that the government should therefore ignore the risk of a lab accident.

The arguments for these positions say that agencies should only consider effects that are "proximately caused" by a decision. Yet, they repeatedly ask the Supreme

Court to consider possible effects of its decision that violate these artificial constraints – that aren't "proximately caused" by the Court, like how the decision might impact permitting for future infrastructure projects in unknown places. These arguments belie their expressed views about what effects of a decisions are relevant to decision makers.

Congress could decide to provide sharp limits on NEPA causation if it decides to rethink the costs and benefits of environmental assessment. But that is a legislative task. The judicial task is to apply the statute as it is. In the next post, we explain how to do that in a sensible way.