

LITIGATION
EPA/NPDES Approval**September 20, 2024**
Special Report #2627

On August 28, a coalition of community environmental groups petitioned the Environmental Protection Agency (EPA), seeking to withdraw approval of North Carolina's National Pollutant Discharge Elimination System (NPDES) permit program. They alleged that the state legislature is impeding the efforts of the North Carolina Department of Environmental Quality (DEQ) to: (1) adopt numeric water quality standards for per- and polyfluoralkyl substances (PFAS); and (2) implement the narrative standards. They also alleged that the legislature is threatening to take permitting authority away from state agency experts. Petitioning groups include Cape Fear River Watch, Environmental Justice Community Action Network, MountainTrue, and the Haw River Assembly.

The petition argued that the legislative supermajority enacted legislation to gain appointment power over DEQ's environmental rulemaking commissions, the Environmental Management Commission (EMC) and the Rules Review Commission (RRC), creating a recent political shift in state rulemaking. Petitioners argued that the supermajority-controlled commissions, with significant input from polluting entities, have blocked repeated attempts by the DEQ to issue water quality standards for PFAS and 1,4-dioxane. They said that the legislature has also enacted laws prescribing specific and weakened permitting conditions for specific discharges, laws which "unlawfully usurp the State's environmental agencies' authority to evaluate permit applications and issue permits tailored to the discharger and receiving waterbody" and "prevent the public from participating in the permitting process." The environmental groups also argued that the legislature has systematically underfunded DEQ for over a decade and therefore failed to comply with the Memorandum of Agreement (MOA) with EPA and the State's obligation to "create and maintain... the resources required to carry out all aspects of the State NPDES program." They said that the state legislature modified state law to give the Office of Administrative Hearings final authority over water pollution permits, cutting the public out of the permitting process and preventing DEQ from complying with the Clean Water Act.

The petition read: "North Carolina families depend on DEQ to control harmful pollution released into the State's rivers, creeks, and streams. By unlawfully stripping the agency of its ability to control this pollution, the legislature's actions not only violate the Clean Water Act and the MOA – they threaten hundreds of thousands of North Carolinians who fish, swim, play in, and get their drinking water from North Carolina waters.... The legislature has gone too far. To protect North Carolinians, EPA should withdraw North Carolina's NPDES permitting program unless these issues are resolved and the State is returned to compliance." <https://www.southernenvironment.org/press-release/>

NEPA/Environmental Impacts

On September 4, a coalition of 24 States submitted an amicus brief before the U.S. Supreme Court to overturn *Seven County Infrastructure Coalition, et al. v. Eagle County, Colorado, et al.*, #23-975. In the underlying cases, the U.S. District of Columbia Circuit Court vacated and remanded a decision of the Surface Transportation Board (STB) authorizing the construction of an 88-mile Utah railroad line to transport crude oil to the interstate network (#22-1019, #22-1020). STB authorized the railway under an exemption from the full Interstate Commerce Commission Termination Act (ICCT) application process, subject to extensive environmental mitigation conditions. Opponents challenged STB's authorization, arguing that its environmental impact statement (EIS) failed to adequately consider the "reasonably foreseeable consequences" of the decision, including: (1) an increase of oil drilling in the Uinta Basin and increased oil refining, primarily along the Gulf Coast; and (2) the cumulative impacts of the railway project on water resources, particularly the Colorado River. The lower court held that STB had to consider the effects of oil drilling and refining when it conducted an environmental review of the Uinta Basin Railway Project. The petitioners appealed the rulings, noting STB's lack of authority over drilling and refining, and asking the Supreme Court to decide "[w]hether the National Environmental Policy Act [NEPA] requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority." The Supreme Court granted certiorari in June 2023.

Amici included the States of Alaska, Idaho, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming. The States argued that the D.C. Circuit's decision should be reversed because: (1) the interpretation of NEPA undermines existing federal and state environmental regulations and duplicates efforts of other agencies; and (2) the decision undermines cooperative federalism by giving agencies an overly broad reach into matters traditionally left to the States. They emphasized the long-standing principle that States have the primary responsibility for managing their own natural resources and regulating industries within their borders.

Utah submitted a separate amicus brief, emphasizing the economic and development opportunities for rural counties with a wealth of natural resources but significant freight transportation challenges. They noted that STB's NEPA review received numerous public comments and imposed extensive mitigation measures to reduce the project's environmental impact. Utah noted a significant projected decrease in greenhouse gas emissions from shifting freight from truck to rail (an estimated 13.1 to 26.2 million tons annually). Additionally, Utah noted existing state regulations to protect the environment, including oil and gas laws, and air and water quality laws. "Given Utah's (and other States') own environmental regulations, based on their own sovereign interests and knowledge of their own State's needs and circumstances, there's simply no justification for the D.C. Circuit's overextension of NEPA review. The STB already produced an exhaustive 3,600-page environmental impact statement under NEPA – all for a relatively short 80-plus mile proposed railway in a rural and remote part of Utah. That more than satisfies NEPA's goal to ensure agencies make environmentally informed decisions. Requiring even more analysis of speculative impacts in other parts of the country ignores and intrudes on each State's sovereign interests in their own environmental regulations."

Several industries, tribes, and academics submitted amicus briefs on the same day, as well as a coalition of United States Senators. John Barrasso (WY), Ranking Member of the Committee on Energy and Natural Resources; Shelley Moore Capito (WV), Ranking Member of the Committee on Environment and Public Works; Ted Cruz (TX), Ranking Member of the Committee on Commerce, Science, and Transportation; Mike Lee (UT); Mitch McConnell (KY), Minority Leader; and Mitt Romney (UT). The Senators argued that the D.C Circuit's interpretation of NEPA exceeds Congressional intent, undermines the separation of powers, and harms the national interest. They wrote: "In the D.C. Circuit, agencies must now discuss the 'downstream' effects of their projects, even when those effects are well-beyond the agency's delegated authority. This multiplies the scope of issues that a reviewing court may use as a basis to reverse the decision of the agency. It pushes agencies to go beyond the bounds of their authority and expertise into areas that Congress has not entrusted to them. And it encourages regulatory overreach."