No. 23-975

In the
Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION and UINTA BASIN RAILWAY, LLC,
Petitioners,

v.

EAGLE COUNTY, COLORADO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

PARTIES TO THE PROCEEDING

Petitioners (intervenor-respondents below in Case No. 22-1012) are Seven County Infrastructure Coalition and Uinta Basin Railway, LLC.

Respondents are Eagle County, Colorado (petitioner below in Case No. 22-1019); the Center for Biological Diversity, Living Rivers, Sierra Club, Utah Physicians for a Healthy Environment, WildEarth Guardians (petitioners below in Case No. 22-1020); the United States of America, the Surface Transportation Board (respondents below in both cases); and the U.S. Fish and Wildlife Service (respondent below in Case No. 22-1020).

CORPORATE DISCLOSURE STATEMENT

Petitioner Seven County Infrastructure Coalition is an independent political subdivision of the State of Utah. Its member counties are Carbon, Daggett, Duchesne, Emery, San Juan, Sevier, and Uintah. It has no parent corporation and no shareholders.

Petitioner Uinta Basin Railway, LLC, is a wholly owned subsidiary of Uinta Basin Railway Holdings, LLC, which is an affiliate of DHIP Group, LP. No publicly held company owns 10% or more of either Uinta Basin Railway Holdings, LLC, or DHIP Group, LP's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulation

Other Authorities

INTRODUCTION

The National Environmental Policy Act ("NEPA") plays an important role in ensuring that agency actions account for "ecological systems and natural resources important to" the United States. 42 U.S.C. §4321. But NEPA was designed to ensure that agencies did not proceed heedless of environmental consequences, not to require exhaustive consideration of remote contingencies or tie infrastructure projects in endless red tape. If a new rail line in Utah will displace habitat for bighorn sheep or alter the topography in ways that threaten a pristine mountain stream, the Surface Transportation Board ("STB") must consider those issues. In contrast, imponderables such as whether the new rail might contribute to an accident hundreds or thousands of miles downline or somehow affect "environmental justice [in] communities [on] the Gulf Coast," Pet.App.70a, are not issues STB must run to ground. According to the D.C. Circuit, however, STB needed to do that—and more. The decision below saddles STB with endless make-work far outside its wheelhouse, requiring the agency to evaluate remote effects ranging from potential upstream economic activity to potential downstream "effects of increased crude oil refining on Gulf Coast communities in Louisiana and Texas." Pet.App.12a. That boil-the-ocean approach has no basis in statutory text or this Court's precedent, and it fares even worse as a matter of common sense. It makes no sense to force an agency with a pro-construction mandate to put development projects on hold pending an exhaustive analysis of uncertain and far-downstream ramifications directly in another agency's lane.

Congress recently reinforced that reality by enacting the BUILDER Act—short for "Building United States Infrastructure through Limited Delays and Efficient Reviews"—clarifying that NEPA only requires agencies to consider "*reasonably foreseeable* environmental effects of [a] proposed agency action." 42 U.S.C. §4332(2)(C)(i) (2023) (emphasis added). As reflected in that statutory title, Congress effectively codified what this Court has long held: An agency's NEPA analysis need only consider environmental effects with "a reasonably close causal relationship" to the agency action, and can safely ignore far-downstream potentialities in another agency's lane. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). When another agency more directly regulates small and uncertain effects of a proposed agency action, but the reviewing agency does not regulate those things *at all*, it cannot be the case that those potential effects have a reasonably close (i.e., proximate) relationship to the project. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

If respondents brought a tort claim against STB on the theory that approving a new 88-mile rail line in rural Utah proximately caused downline rail accidents thousands of miles away and air pollution on the Gulf Coast—to say nothing of global increases in atmospheric temperatures—they would be laughed out of court (and not just because of sovereign immunity). The result should not change just because respondents brought a NEPA claim. The decision below converts NEPA from a sensible procedural check on agency actions into an anti-development treadmill. This Court should reverse.

OPINIONS BELOW

The D.C. Circuit's opinion, 82 F.4th 1152, is reproduced at Pet.App.1a-71a, and its order denying rehearing, 2023 WL 8375640, is reproduced at Pet.App.72a-73a. STB's decision granting final project approval, 2021 WL 5960905, is reproduced at Pet.App.74a-189a.

JURISDICTION

The D.C. Circuit issued its opinion on August 18, 2023, and denied rehearing on December 4, 2023. Petitioners timely sought certiorari on March 4, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of NEPA and STB's organic statute, the ICC Termination Act of 1995, are reproduced in the accompanying statutory appendix.

STATEMENT OF THE CASE

A. Legal Background

Congress passed and President Nixon signed NEPA with the lofty aim of "encourag[ing] productive *and* enjoyable harmony between man and his environment." 42 U.S.C. §4321 (emphasis added). To balance these "sweeping"—and often conflicting—"policy goals," Congress took a light touch. *Robertson v. Methow Valley City Council*, 490 U.S. 332, 350 (1989). Rather than "mandate particular results," Congress "simply prescribe[d]" "a set of action-forcing procedures that require agencies take a hard look at environmental consequences" of proposed actions. *Id.* For legislative proposals and "other major Federal actions significantly affecting the quality of the human environment," NEPA requires "all agencies of

the Federal Government" to prepare "a detailed" environmental impact statement ("EIS") describing, *inter alia*, "the environmental impact of the proposed action," any "adverse environmental effects which cannot be avoided should the proposal be implemented," and any "alternatives to the proposed action." 42 U.S.C. §4332(2)(C)(i)-(iii) (2019). As long as an EIS "adequately identifie[s] and evaluate[s]" "the adverse environmental effects of the proposed action," "the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350. In other words, "NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.* at 351.

But what began as a modest procedural check to ensure that agencies did not proceed heedless of proximate environmental impacts soon took on a life of its own, with "environmental and industry groups" seizing on NEPA compliance in litigation seemingly aimed at "tak[ing] financial resources away from developers and creat[ing] such delay as to completely impede the progress of a project." Sarah Imhoff, Note, *A Streamlined Approach to Renewable Energy Development: Bringing the United States into a Greener Energy Future*, 26 Geo. Int'l Envtl. L. Rev. 69, 91 (2013). In one well-known example, "a staggering cast of well-funded opponents" leveraged NEPA and other "environmental compliance laws to grind" the Cape Wind offshore wind farm project in Nantucket Sound "into oblivion after a fight lasting over 16 years and costing the developers $100 million." J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 Vt. L. Rev. 693, 716 (2020).

On multiple occasions, this Court intervened to rein in other egregious examples of agency excess. In several early cases, the Court made clear that NEPA does not demand "contemplat[ing] the environmental impact of an action as an abstract exercise," *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983), and that agencies need not "ferret out" every possible consideration, *Vt. Yankee v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978). A few years after that, the Court unanimously held that an agency need only study environmental effects proximately caused by the proposed agency action, while emphasizing that "[t]he political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metro. Edison*, 460 U.S. at 777. The Court reaffirmed that proximate-cause limit in 2004, while also making clear that the scope of an agency's environmental review under NEPA is governed by a "rule of reason." *Public Citizen*, 541 U.S. at 767.

But in the Ninth Circuit and in the D.C. Circuit, these interventions have gone unheeded. Those two courts take a distinctly (and unduly) capacious view of NEPA's scope, holding—among other things—that an agency "cannot avoid its responsibility under NEPA to identify and describe the environmental effects of" agency action "on the ground that it lacks authority to prevent, control, or mitigate those" effects. Pet.App.36a; *see also, e.g.*, *Sierra Club v. FERC* ("*Sabal Trail*"), 867 F.3d 1357, 1373-75 (D.C. Cir. 2017); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736-40 (9th Cir. 2020); Pet.18-20. Other circuits take a decidedly more balanced view, consistent with this Court's emphasis that agencies

need only study effects that are both proximate and environmental and do not fall outside the agency's scope of authority. *See, e.g.*, *Protect Our Parks v. Buttigieg*, 39 F.4th 389, 400 (7th Cir. 2022); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299-1300 (11th Cir. 2019); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014); *N.J. Dep't of Env't Prot. v. U.S. Nuclear Reg. Comm'n*, 561 F.3d 132, 139 (3d Cir. 2009); *Ohio Valley Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009); *see* Pet.14-17.

Fueled by the demands of the Ninth and D.C. Circuits, NEPA litigation has flooded in, swelling agency wait-times and project costs. On average, completing an EIS takes an agency 4.5 years; 25% take more than 6 years; some take more than 15 years. Council on Envtl. Quality, Exec. Office of the Pres., *Environmental Impact Statement Timelines (2010-2018)*, at 4 (2020). The average length of a final EIS runs 661 pages; 25% stretch past 748 pages; some—including the 3,600-page EIS here—balloon to over 2,000 pages. Council on Envtl. Quality, Exec. Office of the Pres., *Length of Environmental Impact Statements (2013-2018)*, at 5 (2020).

Fearing the risk of being sued in the D.C. Circuit—where most agencies are headquartered—"[a]gencies will seek to protect EISs from legal challenges by producing piles of paperwork that exhaustively discuss every potential impact of the proposed action." James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions of Agency Reform*, 12 N.Y.U. Envtl. L.J. 74, 83 (2003). Although that may

sometimes help "creat[e] a 'bullet-proof' EIS," it also engenders "prolonged delays" in a world where agencies are working on hundreds of EISs at any given time. *Id.*; *see* Council on Envtl. Quality, Exec. Office of the Pres., *A Citizen's Guide to NEPA*, at 7 (Jan. 2021); *see also Length of Environmental Impact Statements*, *supra* (acknowledging that "the length of EISs may be affected by agency considerations relating to potential future legal challenges").

This de-evolution has not gone unnoticed. Congress has repeatedly adjusted the NEPA process with an eye toward streamlining it. *See* Linda Luther, Cong. Rsch. Serv., RL33267, *The National Environmental Policy Act: Streamlining NEPA* i (Dec. 6, 2007), https://t.ly/0v5Dq; David Stepovich, Note, *Is FAST-41 Permitting All that Fast? Why Congress Must Take a More Serious Approach to Streamlining Federal Permitting*, 35 Geo. Envtl. L. Rev. 211 (2022). The recently enacted BUILDER Act—shorthand for "Building United States Infrastructure through Limited Delays and Efficient Reviews"—is the latest and arguably most emphatic of those developments. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, §321, 137 Stat. 10, 38-49 (2023) (codified as amended in scattered sections of Title 42 of the U.S. Code).

As its name makes obvious, the BUILDER Act sought to restore NEPA from the bloated, anti-development form it has taken on in the D.C. and Ninth Circuits to the more modest procedure that Congress originally intended. The Act requires agencies to finish most EISs within 2 years and generally limits EISs to 150 pages. *Id.* at 41-43

(codified at 42 U.S.C. §4336a(e)(1) & (g)-(h)). The Act also amends §4332(2)(C) to clarify that—as this Court had long held under the prior version of the statute that STB followed here—agencies need only consider "*reasonably foreseeable* environmental effects of the proposed agency action," "*reasonably foreseeable* adverse environmental effects which cannot be avoided," and "a *reasonable* range of alternatives to the proposed agency action … *that are technically and economically feasible, and meet the purpose and need of the proposal*." *Id.* at 38 (emphasis added) (codified at 42 U.S.C. §4332(2)(C)(i)-(iii)).

B. Factual Background

The Uinta Basin is a 12,000-square-mile area—roughly the size of Maryland—primarily in northeast Utah. Early Mormon explorers declared it a "vast 'contiguity of waste' … valueless except for nomadic purposes, hunting grounds for Indians, and to hold the world together." Christa Sadler, *The Shape of the Land*, CornerPost (Mar. 24, 2021), https://bit.ly/3LRVktj. Today, its wild and open landscape remains foreboding and sparsely populated, with windy springs, baking summers, and freezing winters. *See id.* At least until recently, its economy has been similarly stark and isolated, with the relevant counties all ranking in the bottom half of Utah for per capita income, and ranking even lower for economic diversity. Utah.Cert.Am.Br.4. Its few residents live off the land alongside members of the Ute Indian Tribe, effectively cut off from the national economy—because the only way to reach the basin is over two-lane roads crossing high mountain passes, a

natural chokepoint raising costs, blocking diverse commerce, and stifling local businesses. Pet.App.7a.

The basin does have extensive deposits of valuable minerals, including coal, phosphate, natural gas, gilsonite, natural asphalt, and, as especially relevant here, waxy crude oil, a low-sulfur form of petroleum named for its shoe-polish-like consistency at ambient temperatures. Pet.App.7a; *see* David Tabet, *Energy News: Development of New Markets for Uinta Basin Crude via Rail*, Utah Geological Survey (Jan. 2015), https://bit.ly/4d6VpW1; Tim Fitzpatrick, *The oil business is booming in Utah's Uinta Basin*, Salt Lake Trib. (Aug. 18, 2023, 9:21 AM), https://bit.ly/3yumUd9. Those qualities make waxy crude both more environmentally friendly to use and safer to transport relative to others forms of crude—though transportation is expensive, because today it must be shipped in heated tanker trucks. *See* Fitzpatrick, *supra*.

Oil producers in the Uinta Basin began exporting waxy crude to markets outside of Utah in 2013. *See* Tabet, *supra*. Ten years on, despite the limitations of existing infrastructure, oil production is the basin's largest industry, creating thousands of jobs and driving up contributions to local tax revenues. *See* Fitzpatrick, *supra*. As one local government official put it, "[a]griculture is [the basin's] backbone, but oil and gas are [its] bread and butter." *Id.*

C. Proceedings Below

1. The Seven County Infrastructure Coalition formed as an independent political subdivision in 2014 with the goal of connecting the Uinta Basin to the national economy. Seeking to benefit ranchers,

farmers, tribal citizens, and others, the Coalition focused its efforts on rail—a cheaper, safer, and cleaner alternative to trucking. In partnership with Uinta Basin Railway, LLC, the Coalition sought approval from STB to build a new 88-mile rail line running southwest from the basin to central Utah that would carry diverse commodities to and from the heart of the basin via the national rail network. Pet.App.192a.

The successor to the Interstate Commerce Commission, STB "is an independent federal agency … charged with the economic regulation of various modes of surface transportation, primarily freight rail," but extending to "certain passenger rail matters, the intercity bus industry, non-energy pipelines, household goods carriers' tariffs, and … non-contiguous domestic water transportation" between "the mainland United States, Hawaii, Alaska," and the territories. Surface Transp. Bd., *About STB*, https://bit.ly/3AjwrUO (last visited Aug. 28, 2024). As relevant here, Congress made STB responsible for authorizing construction of new railroad lines. *See generally* 49 U.S.C. §10901. Responsibility for safety, as distinct from economic, regulation of the rails lies elsewhere, in the Federal Railroad Administration, housed within the Transportation Department. *See* 49 U.S.C. §103(d); U.S. Dep't of Transp., Fed. R.R. Admin., *About FRA*, https://railroads.dot.gov/about-fra/about-fra (last visited Aug. 28, 2024). Reflecting STB's relatively limited remit, Congress requires members of the Board to have experience in transportation, economic regulation, or business. *See* 49 U.S.C. §1301(b)(2).

2. To help secure financing for the new rail line, the Coalition asked STB to conditionally approve the Uinta Basin Railway project pending full NEPA review. Pet.App.204a. Multiple environmental groups objected, including the Center for Biological Diversity, which argued, among other things, that the new rail line would not be financially viable because (it said) the basin did not need additional crude-oil transportation capacity. Pet.App.197a. STB ultimately granted conditional approval, but made clear that "[c]onstruction may not begin unless and until the Board issues a final decision" "addressing any potential environmental impacts." Pet.App.209a.

STB began its NEPA review of the proposed railway in 2019. Roughly a year and a half later, it issued a draft EIS describing the environmental effects of three alternative rail alignments and a no-build alternative. Pet.App.79a. STB took the next ten months to finalize the EIS, reviewing thousands of comments from the public and requesting a report from the Fish & Wildlife Service about the project's impact on protected species of fish in the Upper Colorado River basin. Pet.App.10a-11a, 50a-51a. The resulting final EIS spanned 3,600 pages and analyzed how "construction and operation of the Railway" would impact "water resources, air quality, special status species like the greater sage-grouse, land use and recreation, local economies, cultural resources, and the Ute Indian tribe," among other things. Pet.App.11a; *see* JA94-105 (EIS table of contents).

The EIS extensively discussed the possibility that the railway might export waxy crude. "To the extent that the crude oil would be refined into fuels that

would be combusted to produce energy, emissions from the combustion of the fuels would produce," under the maximum production scenario, "0.8% of nationwide [greenhouse gas] emissions and 0.1% of global [greenhouse gas] emissions." Pet.App.106a. The EIS predicted that roughly half of the oil would be delivered to the Texas Gulf Coast, and another third to the Louisiana Gulf Coast, though it could not "identify specific refineries." Pet.App.34a, 111a.

Closer to the project itself, the EIS estimated the number of oil wells that would be added in the Basin due to increased oil production enabled by the rail project, while acknowledging that the location of such "as yet unknown and unplanned independent projects" was uncertain. Pet.App.31a. The EIS also studied the impact of additional rail traffic on the national rail system, using modeling and historical data to "determine[] that the new Railway would lead to increased downline traffic, ranging from 0.4 to 9.5 trains per day" and, at most, "0.89 additional predicted accidents per year." Pet.App.40a. STB ultimately concluded that these "minimal increases in train traffic on existing rail lines over which trains already operate [were] unlikely to cause significant impacts" to vehicle safety and delay, rail safety, noise and vibration, air quality, or greenhouse gases. Pet.App.110a.

In the end, the EIS concluded that one of the alternative rail alignments (the "Whitmore Park Alternative") would "result in the fewest significant impacts on the environment." Pet.App.115a. The EIS also recommended extensive environmental

mitigation conditions. Pet.App.76a; *see* Pet.App.149a-189a.

After considering the EIS, the Fish & Wildlife Service's biological opinion, a separate geological study evaluating the risk of landslides and other geologic movements, and more, STB issued a final decision approving construction and operation of the Whitmore Park Alternative, subject to the mitigation recommendations. Pet.App.10a-11a. STB's final approval of the 88-mile railway tracked Congress' directive in the agency's organic statute—which instructs STB to approve rail-construction proposals "unless [it] finds that such activities are inconsistent with the public convenience and necessity," 49 U.S.C. §10901(c); *see Mid-States Coal. for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003) (§10901 creates "a statutory presumption that rail construction is to be approved")—as STB found no basis to conclude from the EIS that any adverse impacts of the new rail line would outweigh the benefits to public convenience and necessity, particularly in light of the extensive mitigation requirements the EIS imposed.

3. Various environmental groups led by the Center for Biological Diversity sought review of STB's decision in the D.C. Circuit. They were joined by Eagle County, Colorado, which lies hundreds of miles distant from the Uinta Basin, and is significantly closer geographically to Denver than the Utah border. The court of appeals consolidated the cases and allowed Seven County and Uinta Basin Railway, LLC, to intervene in defense of STB's decision.

As relevant here, the Center faulted the EIS for not "analyz[ing] the potential for tens of thousands of

additional barrels of oil shipments daily and their processing in [Gulf Coast] locales to further worsen pollution burdens." Pet.App.30a. The Center likewise turned the potential for the railway to spur economic development in a "vast area" against the project, flyspecking the EIS for failing to analyze the potential for "well and road construction, drilling, and truck traffic [to] destroy and degrade habitat." Pet.App.30a. And the Center knocked the EIS for not taking enough of "a 'hard look' at the increased risk of rail accidents downline," "the risk and impact of wildfires," or the potential impacts on "the Colorado River" "given the increased rail traffic resulting from the Railway." Pet.App.40a, 42a, 46a.

STB's response was straightforward: Under *Metropolitan Edison* and *Public Citizen*, it did not need to consider those far-downstream (or down-track) potentialities, all of which lay outside STB's limited remit. STB "cannot regulate or mitigate" any of the alleged potential "impacts" the Center raised. Pet.App.31a. Nor can it accurately predict them. "[A]ny … development in the Uinta Basin occurring as a result of the [Railway] will be done in the future as part of as yet unknown and unplanned independent projects that would occur on as yet unidentified private, state, tribal, or federal land." Pet.App.31a (second alteration in original). The amount of new construction is "unknown and unknowable" given the interplay between and among market forces, private decisions, and regulatory actions outside STB's control. Pet.App.31a. Likewise, although STB could identify "general geographic regions" where any oil might go to be refined, "there [wa]s no way to predict or assess impacts to specific nearby communities from

refining that oil," because it was impossible to identify any one refinery. Pet.App.31-32a. And although STB estimated that marginal increases in rail traffic could cause 0.89 new accidents per year, accidents *involving a loaded crude train* would occur far less frequently, and the evidence in the record suggested that marginal wildfire risk "would not be significant." Pet.App.40a, 42a-43a, 46a.

None of that was enough for the D.C. Circuit. The decision below concluded that STB's "argument that it need not consider effects it cannot prevent is simply inapplicable." Pet.App.37a. The court further held that STB "fail[ed] to adequately explain why it could not employ 'some degree of forecasting' to identify the aforementioned upstream and downstream impacts." Pet.App.35a. Invoking its decision in *Sabal Trail*, the court found that by taking the trouble to trace increased waxy crude production in rural Utah to refineries on the Gulf Coast, STB had bound itself to go further to analyze the impact of refining activities on Gulf Coast communities, including contributions to climate change. Pet.App.33a-36a; *see also* Pet.App.66a. The court thus vacated the order and remanded for STB to redo the EIS. Pet.App.70a-71a.[1]

SUMMARY OF ARGUMENT

NEPA imposes a sensible procedural requirement that federal agencies consider a proposed project's environmental impact before greenlighting it. It is not supposed to operate as a substantive obstacle to

[1] The D.C. Circuit also remanded for STB to address non-NEPA issues and for Fish & Wildlife to address an aspect of its biological opinion. Those non-NEPA issues are not before this Court.

projects, requiring agencies to consider remote possibilities or empowering project opponents to win a war of attrition by repeatedly forcing agencies to consider just one more possibility. This Court's precedents ensure that NEPA strikes a reasonable balance by limiting an agency's obligations to considering environmental effects with a "reasonably close causal relationship" to the agency's proposed action, and then reviewing the agency's analysis under NEPA's "rule of reason." *Metro. Edison*, 460 U.S. at 774; *Public Citizen*, 541 U.S. at 767. The D.C. Circuit has lost sight of those limits, as this case dramatically illustrates. STB studied all that NEPA requires and then some in a 3,600-page EIS, but environmental objectors and the D.C. Circuit demanded still more, including an exhaustive review of matters as remote as the impact of additional oil refining (that the new railway theoretically could spur) on air quality on the Gulf Coast. Invoking its *Sabal Trail* decision, the D.C. Circuit effectively punished STB for going beyond what NEPA requires, holding that STB's efforts to trace increased crude production to Gulf Coast refineries obligated it to study environmental effects thousands of miles removed from the project at issue. There is simply no role under NEPA's text and this Court's precedents for stymying development projects based on environmental effects that are so wildly remote in geography and time. This Court should reaffirm that NEPA embodies a demanding form of proximate cause, not mere but-for causation, and reverse.

This Court has been clear. "NEPA requires" studying an environmental effect only when there is "'a reasonably close causal relationship'"—i.e.,

"proximate cause"—"between the environmental effect and the alleged cause," and only when the agency "has … statutory authority over" the "effect," and thus the "ability to prevent" it. *Public Citizen*, 541 U.S. at 767, 770 (quoting *Metro. Edison*, 460 U.S. at 774). While the D.C. Circuit cited this Court's precedents, it required STB's NEPA analysis to transgress the limits of proximate cause and STB's purview, while giving STB no leeway to make reasonable judgments about dim and distant effects.

That was legal error. This Court's repeated emphasis on proximate cause and "reasonably close causal relationship[s]" between a project and its environmental effects, *Metro. Edison*, 460 U.S. at 774, rules out the need to consider effects that are far removed in geography and time or that are separated by multiple intervening causes that themselves are non-environmental and highly uncertain. It strains credulity to contend that laying 88 miles of track in rural Utah is proximately related to climate change or environmental harm in Gulf Coast communities. So too for potential downline train accidents: It beggars belief that the legally relevant (i.e., proximate) cause of an accident several States away could somehow be the Uinta Basin Railway—and not, for instance, the engineer of the relevant train, the train manufacturer, or the operator of the relevant track. Even if the project could be said to be the but-for cause, a tort plaintiff suing the agency or the Uinta Basin Railway for a train accident a thousand miles away (let alone for climate change) would be laughed out of court. The result should be no different just because plaintiffs challenge an EIS under NEPA. "'[F]or want of a nail, a kingdom was lost' is a commentary on fate, not the

statement of a major cause of action against a blacksmith." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment).

The decision below also defies NEPA's "practical 'rule of reason.'" *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 97 S.Ct. 4, 6 (1976) (decision of Marshall, J.). NEPA requires agencies to consider proposals "significantly affecting the quality of the human environment," 42 U.S.C. §4332(2)(C), not track down every remote or minimal impact. As one moves from the direct effects of the project to increasingly remote effects and mere risks, the agency has discretion to ignore them or give them more cursory treatment, and the rule of reason prevents a court from forcing an agency to consider "information" that the agency deems of little "value" to the "decisionmaking process." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989). For example, whatever the proper solution to global climate change, the issue must be addressed globally (or at least nationally by EPA), not by blocking an 88-mile rail line bringing much-needed economic stability and development to a remote corner of Utah. In practical terms, "no rule of reason worthy of that title," *Public Citizen*, 541 U.S. at 767, would "oblige" an agency responsible for approving rail projects "to expend considerable resources developing … expertise" on issues "not otherwise relevant to [its] congressionally assigned functions," *Metro. Edison*, 460 U.S. at 776; *see also Public Citizen*, 541 U.S. at 769.

The decision below is a poster child for converting a sensible procedural check into a morass that

operates as a substantive roadblock to development. The clearest way to put an end to this excess is for this Court to reverse and make clear that the EIS here is sufficient. 88 miles of track should not require 3,600 pages of EIS, let alone a remand for further study of wildly remote matters. This Court should reverse.

ARGUMENT

I. Text And Precedent Answer The Question Presented In The Negative.

A. This Court Has Made Clear That Proximate Cause and a Rule of Reason Sensibly Limit the Scope of NEPA Review.

1. This Court decided *Metropolitan Edison* in 1983, four years after a high-profile accident at the Three Mile Island nuclear power plant prompted mass evacuations and a national reckoning about the safety of nuclear power. Immediately following the accident, the Nuclear Regulatory Commission ("NRC") ordered the power company to shutter the plant indefinitely. 460 U.S. at 769. When the power company sought permission to resume operations, the Atomic Energy Act required NRC to act as "necessary or desirable … to protect health or to minimize danger to life or property." 42 U.S.C. §2201(b). NEPA also required the Commission to prepare an EIS. In *Metropolitan Edison*, this Court addressed what environmental impacts NRC needed to consider under NEPA before authorizing Three Mile Island operations to resume.

The Court began with statutory text. Under the version then in effect, NEPA required agencies to study "the environmental impact of the proposed action" and "any adverse environmental effects which

cannot be avoided should the proposal be implemented." 42 U.S.C. §4332(2)(C)(i)-(ii) (1975). As then-Justice Rehnquist explained, this language did not mean that NEPA required the Commission to consider every possible adverse effect of restarting Three Mile Island. 460 U.S. at 774. Rather, "the terms 'environmental effect' and 'environmental impact'" must "be read to include a requirement of a reasonably close causal relationship" akin to "proximate cause" "between" the agency action "and the effect at issue." *Id.*; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (explaining the settled principle that federal statutes often should be "construed … to incorporate a requirement of proximate causation").

With that statutory construction in hand, the Court unanimously concluded that things like the "release of low-level radiation, increased fog in the Harrisburg area (caused by operation of the plant's cooling towers), and the release of warm water into the Susquehanna River" were properly on the table for NEPA purposes. *Metro. Edison*, 460 U.S. at 775. These effects, after all, were "proximately related" to the plant resuming operations. *Id.* at 774.

On the flip side, the Commission's EIS did not need to account for "the potential psychological health effects" of reopening the plant on members of the surrounding community, let alone the impact on far-flung relatives living hundreds or thousands of miles away. *Id.* at 771, 774, 777-78. In reaching that conclusion, the Court did not deny that locals were still reeling from the recent brush with disaster, or that reopening the plant "may well cause" residents to

suffer "psychological health problems … and accompanying physical disorders" that derive from "'tension and fear.'" *Id.* at 774. But NEPA is concerned with effects of agency action on "the physical environment"—i.e., "'the air, land and water'"—and such harms were "simply too remote from the physical environment to justify requiring the NRC to evaluate the psychological health damage … that may be caused by renewed operation of [the plant]." *Id.* at 773, 774 (emphasis omitted).

Furthermore, the resumption of operations was not the proximate cause of the health effects respondents raised; those effects instead would "flow directly from *the risk* of [a nuclear] accident." *Id.* at 775 (emphasis added; alteration in original) (quoting *Metro. Edison* Br. for Resps. 23). "But a *risk* of an accident is not an effect on the physical environment" either. *Id.* "A risk is, by definition, unrealized in the physical world." *Id.* at 767. What matters under NEPA—and what defines the scope of review—is the relationship between *the project* at issue and changes in the physical environment *caused by it*. "NEPA does not require agencies to evaluate the effects of risk, *qua* risk," of a project moving forward, as opposed to the reasonably foreseeable effects of the project itself. *Id.* at 779.

Finally, the Court warned against allowing NEPA to be converted into a vehicle for environmental policy disputes. "The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Id.* at 777.

Metropolitan Edison all but resolves this case. If NEPA did not require consideration of allegedly direct

health consequences of the ripped-from-the-headlines risk of another nuclear meltdown before restarting Three Mile Island, then it is hard to demand that STB's EIS here consider the risk of accidents on existing tracks hundreds of miles away, let alone the remote and theoretical risk that the Uinta Basin Railway could cause future harm to communities near Gulf Coast refineries. But if any doubt remained post-*Metropolitan Edison*, *Public Citizen* settled it.

2. The question in *Public Citizen* was whether, when deciding what safety regulations should govern Mexican trucks operating in the United States, the Federal Motor Carrier Safety Administration needed to consider the Mexican trucks' contribution to domestic air pollution. 541 U.S. at 756. Unlike *Metropolitan Edison*, the question was not risk—e.g., the risk that Mexican trucks would have environmentally damaging accidents in the United States or impact traffic patterns in ways that affected distant communities—but the certainty that Mexican trucks would cause additional air pollution. After all, the regulations were the last thing standing in the way of President Bush's directive to allow Mexican trucks to operate in the United States. *Id.* at 765-66.

Nevertheless, even though the agency action was plainly the but-for cause of that increased pollution, the Court concluded that it landed outside NEPA's required scope. *Id.* at 770. The Court clarified that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id.* at 767. Rather, NEPA requires agencies to consider only those effects *proximately caused* by the proposed action. *Id.* Given

the President's order, the agency could not simply decline to issue regulations, and so—while the agency action allowing the Mexican trucks into the country was plainly a but-for cause of increased pollution—"the President," "*not*" any "action" by the agency, was "the legally relevant cause." *Id.* at 760-61, 769; *see also id.* at 767 (noting that "proximate cause analysis turns on," among other things, "considerations of the 'legal responsibility' of actors" (quoting W. Page Keeton et al., *Prosser and Keeton on Law of Torts* 275 (5th ed. 1984))).

The Court likewise invoked NEPA's "rule of reason," which ensures that agencies need not engage in endless environmental reviews that would frustrate the agency's primary mission or "serve no purpose in light of NEPA's regulatory scheme as a whole." *Id.* Respondents there argued that while the President's decision required the agency to allow the trucks into the country, the agency still needed to consider pollution, on the theory that it might matter on the margins when selecting among the menu of possible safety regulations. This Court disagreed, holding that "no rule of reason worthy of that title would require an agency" against its will to study environmental effects falling outside its "ability to prevent." *Id.* at 767, 770.

3. *Metropolitan Edison* and *Public Citizen* suffice to resolve this case in petitioners' favor, but they are far from the only decisions of this Court holding that only proximate environmental effects count, and an agency's NEPA analysis need not consider remote environmental effects, non-environmental effects, pure risk, or matters beyond the agency's remit.

In *Robertson v. Methow Valley Citizens Council*, for instance, the Forest Service authorized the development of a major new ski resort in a "sparsely populated area" of the Cascade Mountains. 490 U.S. at 337. The resort quickly got bogged down in litigation. Environmental groups challenged the adequacy of the EIS, which recognized that off-site development on private land "could … degrad[e] … existing air quality" but did not delve deeply into the air-quality issue. *Id.* at 339-40, 344-45. They further argued the EIS needed to conduct a "worst case" analysis of impacts to the local mule-deer population and that the Forest Service's conclusion that those effects were "uncertain[]" did not suffice. *Id.* at 343, 347. This Court rejected both arguments with a nod to NEPA's "rule of reason." Because the county, not the Forest Service, had primary jurisdiction over air quality, "[t]he off-site effects on air quality and on the mule deer herd" would "be subject to regulation by other governmental bodies" with primary "jurisdiction" over the effects and "authority to mitigate them." *Id.* at 350, 352. "[I]t would be incongruous to conclude that the Forest Service" was responsible to develop related mitigation measures. *Id.* at 352-53.[2]

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[2] Unfortunately, that conclusion was not enough to save the resort: Despite heralding the region as "the best potential destination ski resort in the United States," Aspen Ski Corporation ultimately "bec[a]me weary of the seemingly never-ending lawsuits" and sold the property to another developer, who itself "ran out of cash" after "spen[ding] roughly $12 million on land and legal fees." Ryan Flynn, *Early Winters Resort, WA: A Ski Hill That Never Was*, SnowBrains (Jan. 8, 2024),

The Court reached a similar conclusion for similar reasons in *Vermont Yankee*. There, the Court brushed back the suggestion that an EIS must "ferret out every possible" way to mitigate environmental effects, particularly when those effects fall into the domain of "state public utility commissions or similar bodies." 435 U.S. at 550-51, 558. And in *Baltimore Gas and Electric*, this Court blessed NRC's use of generic rules to evaluate the environmental effects of nuclear power generation generally, rather than via a power-plant-specific analysis. As the Court there put it, "Congress did not enact NEPA … so that an agency would contemplate the environmental impact of an action as an abstract exercise"; agencies "ha[ve] discretion" under NEPA to "cho[ose]" to "evaluate … environmental impact[s]" "generically," rather than specifically, to "further[]" "[a]dministrative efficiency and consistency of decision." 462 U.S. at 100-01.

* * *

The lessons of this Court's NEPA cases are clear, yet they all seemed lost on the D.C. Circuit in its decision below. NEPA requires agencies to study only environmental effects proximately caused by the proposed agency action. NEPA does not require agencies to study remote environmental effects, non-environmental effects, risks, or factors outside the agency's control. Nor does an agency have to consider every effect that may (or may not) flow from conduct or events that a proposed project may (or may not)

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https://bit.ly/4fAPp9W. That result underscores the risk that NEPA litigation allows environmental opponents of agency-approved projects to lose the NEPA battle while still winning the war of attrition.

spur, just because the agency could ensure that those potential future consequences never arise by denying a permit and cutting off the proposed action altogether. *Metropolitan Edison* and *Public Citizen* both say so directly and confirm that the D.C. Circuit erred in requiring STB to consider far-downstream consequences as part of its NEPA review.

That proximate-cause limit tethered to the project itself is buttressed by NEPA's rule of reason, which puts sensible limits on what an agency must study. In *Public Citizen*, even though pollution from Mexican trucks was a certain, direct environmental effect of the Federal Motor Carrier Safety Administration promulgating its safety regulations, the agency did not need to study pollution from increased truck traffic, because the agency "ha[d] no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." 541 U.S. at 759. Likewise in *Robertson*, even if air pollution from off-site development was a certain, direct environmental effect of licensing the ski resort, the Forest Service would not need to study it, because it would fall within the County's authority. Once again, those cases confirm that the D.C. Circuit erred in holding that STB must conduct a full-scale NEPA review of issues far outside its limited remit, but well within the purview of other agencies' authority—especially when those other agencies can address such issues more comprehensively, rather than making a relatively modest infrastructure project the scapegoat for everything from upstream mining to downstream accident risks and climate change.

B. The BUILDER Act Buttresses the Limitations on NEPA Review That This Court's Cases Recognize and Enforce.

This Court has long "applied the standard requirement of proximate cause to actions under federal statutes" even though "the text did not expressly provide for it." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 708 (2011) (Roberts, C.J., dissenting). As of 2023, NEPA's text *does* provide for it. While not directly applicable to this pre-Act project, Congress codified in the BUILDER Act what this Court has long held, making clear that the scope of NEPA review turns on foreseeability and reasonableness—i.e., proximate cause—and that NEPA does not alter statutory provisions delimiting an agency's authority or mission.

As amended by the BUILDER Act, NEPA now provides as follows:

> (2) [A]ll agencies of the Federal Government shall—
>
> > (C) … except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> >
> > > (i) ~~the~~ reasonably foreseeable environmental ~~impact~~ effects of the proposed agency action~~,~~;

> (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented~~,~~; [and]
>
> (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal[.]

42 U.S.C. §4332 (2023) (additions underlined; deletions stricken).

These clarifying changes underscore that Congress has embraced this Court's decisions, which keep NEPA as a manageable procedural check, rather than a substantive roadblock to infrastructure development. The BUILDER Act makes explicit what this Court already held was implicit by textually adopting the language of proximate cause. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 445 (2014) (proximate cause is "often explicated in terms of foreseeability"). That strongly reinforces this Court's decisions. After all, if Congress can "carry forward" this Court's statutory precedents merely by "perpetuating the [same] wording" (i.e., doing nothing in response to this Court's statutory decisions), then Congress' affirmative choice to adopt new language embracing prior statutory precedents of this Court supplies a strong signal that those precedents were

correct. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

The BUILDER Act likewise embraces the rule of reason recognized in *Public Citizen*. The Act's title underscores Congress' intent for NEPA review to be narrow and efficient, rather than unwieldy and anti-development. *See id.* at 221 (noting that statutory titles provide a "permissible indicator[] of meaning"). Similarly, the Act continues to limit NEPA to projects "significantly affecting the quality of the human environment," 42 U.S.C. §4332(2)(C), and it now expressly absolves agencies of considering alternatives that are not "reasonable," *id.* §4332(2)(C)(iii) (2023), and presumptively limits the EIS process to no more than "2 years" and an EIS itself to "150 pages," *id.* §4336a(e)(1), (g)(1). What is more, it makes explicit that when Congress assigns an agency to administer a decidedly pro-development statute—as it has done with STB and rail construction, *see* p.10, *supra*—NEPA does not stand in the way; the agency need only weigh alternatives that "meet the purpose and need of the proposal" and evaluate the cost of doing nothing. *Id.* §4332(2)(C)(iii) (2023).

At bottom, the BUILDER Act not only endorses this Court's focus on proximate cause and underscores that limits on an agency's regulatory mission and its subject-matter portfolio are baked into the rule of reason, but illustrates the folly in the D.C. Circuit's boil-the-ocean mandate here.

II. The Decision Below Flouts NEPA And This Court's Cases Applying It.

This Court's NEPA precedents and Congress' recent and emphatic reaffirmation of them confirm that NEPA envisions a procedural cross-check, not a substantive roadblock. And NEPA's procedural cross-check is not designed to be unduly onerous or to resemble a Sisyphean task, where there is always one additional and increasingly remote effect or risk that must be considered. To the contrary, NEPA strikes a sensible balance where an agency need only consider proximate environmental effects and judgments about what to consider are protected from endless second-guessing by a rule of reason. Striking this balance ensures that NEPA will continue to facilitate "fully informed and well-considered decision[s]" while remaining "bounded by some notion of feasibility." *Vt. Yankee*, 435 U.S. at 551, 558. It likewise ensures that "[t]he political process, and not NEPA, provides the appropriate forum in which to air policy disagreements" with a project that meets all the substantive criteria for agency approval. *Metro. Edison*, 460 U.S. at 777.

The decision below upsets that balance and threatens to block vital infrastructure development under the guise of just a little more process. The impact (if any) of 88 new miles of track in an isolated corner of Utah on train accidents hundreds of miles away or the air quality of refining communities on the Gulf Coast or on climate change is the very definition of remote, not proximate, cause. And despite the D.C. Circuit's view that NEPA demands a never-ending process, it was eminently reasonable for an agency

responsible for administering an explicitly pro-development statute to decline to consider de minimis environmental impacts that are little more than the inevitable consequences of development and that should be regulated (if at all) as part of a comprehensive scheme administered by a different agency. To state the obvious, the solution to the global issue of climate change does not lie in blocking 88 miles of track or keeping the Uinta Basin isolated from the national economy.

A. The Decision Below Demanded Consideration of Non-Proximate and Non-Environmental Effects.

1. If a train collision occurs in the middle of Colorado and winds up in court, there are plenty of potential tort defendants: the hapless train engineer, the careless builder of the malfunctioning train, the manufacturer of the unsafe track, the negligent dispatcher who was on duty, or perhaps even the reckless safety regulator who ignored advice to lower the relevant speed limit. Only the most creative of plaintiffs' lawyers—and least successful, given the well-established limits of proximate cause—would think to sue the operator of an 88-mile rail line that begins and ends in rural Utah or the regulator who approved it on the theory that it increased downline accident risk by less than a percentage point.

That would be true *a fortiori* for consequences on the ground (or in the air above it) from increased waxy crude refining on the Gulf Coast—and doubly so of effects of such refining on the Earth's atmosphere, as changes or increases in refining are strictly regulated by other agencies. Not even Helen Palsgraf could have

dreamed of a judicial opinion finding 88 miles of track wholly in rural Utah to be the proximate cause of future air pollution on the Gulf Coast and its ramifications for Gulf refining communities—to say nothing of one linking the railway to monsoons in the South Pacific.

While well-established principles of proximate cause would stop such fanciful lawsuits at the starting gate, the D.C. Circuit put STB on the hook for studying similarly remote effects of approving 88 miles of rail line in rural Utah. The D.C. Circuit justified that burden not by expressly finding air pollution on the Gulf Coast or downline accidents to be proximately caused by the project, but by emphasizing that STB has the authority to deny the permit necessary for the project if it "finds that such activities are inconsistent with the public convenience and necessity." *See* Pet.App.36a-37a; 49 U.S.C. §10901(c).

That analytical leap hopelessly conflates but-for and proximate cause. An agency can avoid any number of remote impacts and risks of harmful activity by denying a required permit, because the very nature of a permit makes it a necessary but-for cause of the permitted activity. But this Court has repeatedly rejected the notion that NEPA embodies such a "'but-for' causation" standard. *Public Citizen*, 541 U.S. at 767. In its place, and in order to protect the "manageable" and balanced approach that Congress intended, *see Metro. Edison*, 460 U.S. at 776, NEPA requires agencies to study only proximate environmental effects. In light of "the congressional concerns that led to the enactment of NEPA," "[s]ome effects" of a proposed project "that are 'caused by' a

change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [NEPA] because the causal chain is too attenuated." *Id.* at 774. Stated more succinctly, proximate cause is the touchstone for an EIS—and where proximate cause ends, so ends the scope of what NEPA requires.

Moreover, as this Court has emphasized, the focus of the proximate-cause inquiry is on *the project itself*, not on subsequent activities a project may someday enable. *See id.* at 771-79; pp.20-21, *supra.* NEPA requires "a detailed statement" of "the environmental impact *of the proposed action*" and "alternatives *to the proposed action*." 42 U.S.C. §4332(2)(C) (2019) (emphases added).[3] Thus, "to decide what kind of an [EIS] need be prepared, it is necessary first to describe accurately the … 'action' being taken." *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 322 (1975); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 395-402 (1976). And the same is true for the proximate-cause inquiry. "To determine whether [NEPA] requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by *the major federal action at issue*." *Metro. Edison*, 460 U.S. at 773 (emphasis added). What matters, in other words, is the relationship between *the project* and changes in the physical environment *caused by it*.

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[3] The language under the BUILDER Act is substantially similar. *See* 42 U.S.C. §4332(2)(C) (2023) (requiring "a detailed statement" of, *inter alia*, "reasonably foreseeable environmental effects of the proposed agency action" and "alternatives to the proposed agency action").

Under that rubric, changes in the physical environment that have a reasonably close causal relationship to a proposed project must be considered as part of an agency's NEPA review. But changes in the physical environment that are remote from a proposed project in space and time need not be considered as part of an agency's NEPA review, because those effects are, by definition, *not* proximately caused *by the project*. Likewise, environmental effects that flow from subsequent actions that the project may (or may not) ultimately enable need not be considered under NEPA, as such uncertain potentialities likewise lie well beyond the scope of proximate environmental effects.

That sensible proximate-cause limit focused on the project itself is reinforced by NEPA's direction to consider alternatives. *See* 42 U.S.C. §4332(2)(C)(iii). It makes perfect sense for an agency to consider three alternative rail routes to connect the Uinta Basin with the national rail system, as well as a no-action alternative. *See* pp.11-13, *supra*. If one route endangers important habitat or threatens a pristine river, then the EIS helpfully directs the agency to an alternative. But it is completely infeasible to consider every alternative for the cargo that could be carried on distant rail lines, the development the rail line could precipitate in the Uinta Basin, or the permutations for the mix and quantity of crude refined on the Gulf Coast. And NEPA directs agencies to consider all alternatives in the same manner, not to go to the ends of the Earth vis-à-vis the principal proposal and give only cursory consideration to the alternatives. Thus, the only conclusion consistent with NEPA's text and the imperative to keep NEPA analysis within

reasonable bounds is to consider only a manageable range of proximate environmental effects of all alternatives. Any other conclusion would leave agencies (and courts) with impossible burdens and without "a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Public Citizen*, 541 U.S. at 767 (quoting *Metro. Edison*, 460 U.S. at 774 n.7).

2. The D.C. Circuit lost sight of these important principles here. The court of appeals perceived three failings in the EIS: failing to adequately consider (1) "the effects of increased crude oil refining on Gulf Coast communities in Louisiana and Texas"; (2) "downline effects of projected increases in spills and accidents from additional oil trains traveling the existing Union Pacific rail line"; and (3) the "upline impacts on vegetation or special status species" that might be found near potential well sites if the new railway spurs independent development. Pet.App.12a-13a; *see also* Pet.App.30a-37a, 40a-47a.

Just quoting those supposedly "omitted" impacts confirms that the D.C. Circuit went well beyond proximate environmental effects of adding 88 miles of rail in rural Utah. First, any impact on Gulf Coast communities in Louisiana and Texas is wildly remote in multiple dimensions. There are multiple States, and more than a thousand miles, between the 88 miles of track in Utah and the Gulf Coast.

And there is arguably an even greater gap between the project and any material increase in crude oil refining in those remote areas. Even crediting the D.C. Circuit's apparent assumption that all crude shipped on a common-carrier rail line will

end up at a specific destination in the Gulf Coast, whether there will even be an increase in crude oil refining on the Gulf Coast depends on the amount of waxy crude shipped on the new line and how that compares to the status quo ante with truck transportation, *see* CADCJA230, "the ability and willingness" of the refineries in those areas to receive and process waxy crude oil, JA477, and (among many other things) the actions of myriad local, state, and federal regulators who already directly oversee the refineries' operations. Figuring out "the climate effects of the combustion of the fuel intended to be extracted" thus depends on guessing which part (or parts) of the Gulf Coast might receive and refine the oil; speculating whether and to what degree waxy crude from the Uinta Basin will augment existing refining activity, rather than just displace refining crude from elsewhere (and, if so, what kind of crude is displaced); estimating the relative impacts of refining one form of crude versus another; and then inferring that the environmental protections already in place (due to action by EPA and state regulators, not STB) would fail to protect the surrounding community from any marginal increase in refining output. All of those are "middle links" that render "the effects of increased crude oil refining on Gulf Coast communities in Louisiana and Texas" far too remote from a new railway line in rural Utah and far too speculative to justify NEPA review of those highly contingent potentialities. *Metro. Edison*, 460 U.S. at 775.

The "downline" effects of STB's decision are, if anything, even more contingent and remote. As part of its NEPA review, STB used models to predict how many trains would be added to other rail lines. Based

on that prediction, STB estimated that the additional train cars would result in less than one—0.89, to be exact—additional train accident each year. Pet.App.40a-41a. And even that number oversells the point. Where such an accident would occur; whether it would be serious or minor; whether it would involve cars that were empty or full; and whether it would cause any damage to the physical environment hundreds or thousands of miles removed from the Uinta Basin are all matters of complete guesswork. As noted, any plaintiff trying to sue the operators of the 88 miles of rural Utah track (or STB) for a train accident in Colorado, Louisiana, or anywhere in between would be laughed out of court. The most that could be said is that STB approval of the 88 miles at issue here was a but-for cause of the future accident. To argue that the accident was a proximate environmental effect drains those words of meaning and defies this Court's precedents.

The same is true of the potential that, *if* the railway spurs new development in the Uinta Basin, that new development *may* have effects on the surrounding environs. *See* Pet.App.31a. Initially, that risk depends on the assumption that the new rail line will carry substantial amounts of waxy crude—by no means a certainty, as evidenced by the fact that the Center for Biological Diversity previously contended that market demand for oil could never sustain the railway. *See* Pet.App.197a-198a. And the assumptions spin out from there. The D.C. Circuit's own description of STB's supposed omissions underscores that it has gone well beyond proximate environmental effects of the project itself. The D.C. Circuit demanded consideration of "as yet unknown

and unplanned independent projects that would occur on as yet unidentified private, state, tribal, or federal land," "undertaken 'by as yet unknown entities and licensed or permitted by other federal agencies, state and local governments, or the Ute Tribe, depending on the location of the development,'" at a level that is "simply unknown and unknowable." Pet.App.31a (quoting CADC.Gov.Br.35-36). The court should have stopped well before the fourth "unknown." None of those unknowns is a proximate consequence *of the project*, as opposed to a potential consequence of independent development that the project may (or may not) spur and that could pose some harm to the environment, despite whatever environmental analysis is required if, and when, any concrete future projects materialize.

To be sure, an agency must make some educated assumptions about environmental effects that are certain but hard to quantify, to "ensure[] that [those] important effects will not be overlooked or underestimated," and to "provide[] a springboard for public comment." *Robertson*, 490 U.S. at 349. In *Metropolitan Edison*, for example, NRC needed to make educated assumptions about the "release of low-level radiation, increased fog in the [surrounding] area (caused by operation of the plant's cooling towers), and the release of warm water into [a nearby] River." 460 U.S. at 775. But those were all actual effects of the project itself. Environmental consequences that may (or may not) arise if a project spurs other conduct (i.e., other non-environmental consequences) are not proximate effects of a project. The project may be their but-for cause—but if one thing is clear in this context,

it is that but-for cause is not enough. The D.C. Circuit ignored that critical limitation here.[4]

Indeed, the decision below ended up light-years away from any recognizable notion of proximate cause. According to the court, the "foreseeable environmental effects of the project" include "the climate effects of the combustion of the fuel intended to be extracted" at new oil wells *that do not yet exist*, but that may (or may not) be constructed if the project is approved and it increases demand for waxy crude from the Uinta Basin. Pet.App.66a. It would be a stretch to argue that 88 miles of rail is the proximate cause of the extraction of any fuel, given the myriad factors that go into energy extraction (market demands, emergence of new technology, business expansion and contraction, just to name a few). It would take proximate causation well past its breaking point to try to connect the new rail with "the combustion" of said fuel. Yet the D.C. Circuit went further still, asserting that the new rail is the proximate cause of *the climate effects* of such combustion. That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013).

3. The problems with the D.C. Circuit's decision run deeper still. NEPA requires consideration only of

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[4] The regulations in effect at the relevant time here defined "effects" to include both direct and indirect effects, with the latter encompassing effects "later in time or farther removed in distance" than the former. 40 C.F.R. §1508.8(a)-(b) (2019). But "effects" still must be effects *of the project itself*—and even the indirect effects must "still [be] reasonably foreseeable," *id.* §1508.8(b), i.e., proximately related to the agency action and project at issue. To the extent the courts of appeals have interpreted the phrase "reasonably foreseeable" more broadly, they have misapplied this Court's decisions.

proximate effects of proposed projects *on the physical environment*, i.e., "the air, land and water." *Metro. Edison*, 460 U.S. at 772-73 (emphasis removed). "If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." *Id.* at 778. Put simply, what matters is a project's proximate *environmental* effects; non-environmental effects, even if proximate, need not be considered. The decision below cannot be squared with that fundamental limitation on NEPA review.

Take the risk of downline train accidents. Even assuming that a new, 88-mile railway in rural Utah might be the but-for cause of additional traffic on rail lines hundreds of miles distant, which in turn might eventually contribute to an accident that would not have occurred if the Uinta Basin remained cut off from the national rail system, it does not follow that the accident would have any meaningful impact on the "air, land and water." If the train cars were unloaded or carrying innocuous cargo, there would be a safety risk for the Federal Railway Administration to consider substantively—but not an environmental risk for STB to review under the auspices of NEPA. "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." *Id.* at 772.

At most, then, the D.C. Circuit could only have required STB to reconsider (the vanishingly narrow and remote universe of) downline accidents *actually affecting the physical environment*. But even limiting the remand to train accidents actually impacting the physical environment does not solve the problem; it just highlights that the decision below forces STB to

evaluate "risk, *qua* risk." *See id.* at 779. NEPA requires STB "to prepare an EIS evaluating" harms that are "proximately related to a change in the physical environment." *Id.* at 774. But the only reasonably foreseeable effect of connecting the Uinta Basin with the broader national rail system is that there likely will be a very small number of new accidents. That is not an *environmental* effect at all.

* * *

All told, this Court's NEPA precedents make clear that the metes and bounds of what an agency must analyze under NEPA should be cabined by what is necessary for the statute to fulfill its important, but limited, mission: "to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment." *Metro. Edison*, 460 U.S. at 772. That makes this case straightforward. To the extent the proposed project has actual environmental effects that are reasonably foreseeable consequences of the project itself, those effects must be analyzed (and, as explained, they were and then some). But to the extent the project has non-environmental effects—ranging from spurring new development in the Uinta Basin, to (an infinitesimally small number of) increased rail accidents downline, to a change in the quantity or mix of refining activities on the Gulf Coast—the risk of some environmental harm from those activities need not be considered under NEPA. Thus, in concrete terms, since approving the track could cross a critical habitat, contribute to air pollution in the Uinta Basin, or change the topography in a way that causes run-off to enter a mountain lake, STB properly studied these

adverse effects of the project, relying as necessary on input from other agencies, reasonable forecasting, and educated assumptions. But it just as properly declined to go further to consider risks beyond the effect of the proposed action "on the physical environment." *See id.*

No one—save, perhaps, project opponents who benefit from delay—would be served by a system "requir[ing] detailed discussion of … effects [that] cannot be readily ascertained" in a way that is "[in]compatible with the time-frame of the needs to which the underlying proposal is addressed." *Vt. Yankee*, 435 U.S. at 551. And even if agencies did turn over every speculative rock (although there is always the possibility of studying the next-most remote and speculative risk), the resulting EISs would skew decisionmaking by overemphasizing "small, often irrelevant, losses from the proposed new projects," and allowing them to distract from "the gains [in] environmental innovation." Richard A. Epstein, *The Many Sins of NEPA*, 6 Tex. A&M L. Rev. 1, 3 (2018).

In short, "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' is to be accomplished." *Metro. Edison*, 460 U.S. at 776 (alteration in original) (quoting *Vt. Yankee*, 435 U.S. at 558). The decision below defies that imperative.

B. The Decision Below Flouts NEPA's Rule of Reason.

As the preceding section explains, the lack of proximate cause and actual environmental effects from the project suffice to explain why STB did not *need* to consider the three "omissions" identified by the

D.C Circuit. But STB actually *did* exercise its discretion to consider some of these issues in its EIS. For example, STB used models to predict how many trains would be added to other rail lines, as well as "national data for train accident rates" to predict marginal risks from the additional trains. Pet.App.40a. The Board likewise employed maps of wildfire potential to conclude that the risk of downline fires was miniscule. Pet.App.42a-43a. The D.C. Circuit's real gripe was not that these effects went unstudied, but rather that the court felt that STB should have gone further in its studies. That is a rule of bottomless process, not a rule of reason—and it defies this Court's precedents. *See, e.g.*, *Baltimore Gas*, 462 U.S. at 103 ("A reviewing court should not magnify a single line item beyond its significance as only part of a larger Table.").

Indeed, when it came to the environmental effects on communities on the Gulf Coast, the D.C. Circuit went even further and effectively punished STB for going beyond what NEPA requires. Given that any environmental effect on Gulf Coast communities is remote and speculative, STB could have simply dismissed any such effect as hopelessly remote. *Cf. Metro. Edison*, 460 U.S. at 774 (rejecting any need to consider psychological effects on far-flung relatives of local residents). But STB nonetheless went beyond the call of legal duty to try to trace potential increases in waxy crude production to refineries on the Gulf Coast, while disclaiming any ability to identify particular refineries. Applying the no-good-deed-goes-unpunished rule of *Sabal Trail*, the D.C. Circuit held that by tracing the waxy crude to Gulf Coast refineries, STB obligated itself to go further and study

environmental effects on Gulf Coast communities and the refineries contribution to climate change. Pet.App.34a-35a.

That approach gets matters almost exactly backwards and defies this Court's direction to apply a "practical rule of reason" to agency determinations and go no further in studying increasingly remote environmental effects. Once an EIS analyzes a project's proximate environmental effects, there is no valid basis for a court to demand more. The agency can choose to go further, if time and resources allow. But the agency should not be faulted, let alone reversed, for going beyond what is legally required. And if the agency concludes that investing additional bandwidth into studying a distant or speculative environmental effect is unlikely to be helpful, then a court has no "meaningful standard[]" with which to second-guess the agency's judgment. *United States v. Texas*, 599 U.S. 670, 679-80 (2023). "To require otherwise would render agency decisionmaking intractable." *Marsh*, 490 U.S. at 373.

An agency can deem further study unhelpful for any number of reasons. As in *Public Citizen*, an agency might deem further study unhelpful when the agency lacks the legal "ability to prevent" the studied effect. 541 U.S. at 770. Or, as in *Metropolitan Edison*, an agency might deem further study unhelpful when the agency lacks subject-matter expertise to evaluate the effect: "Time and resources are simply too limited … to believe that Congress intended to" "oblige[]" agencies "to expend considerable resources developing … expertise that is not otherwise relevant to their congressionally assigned functions." 460 U.S.

at 776; *see also West Virginia v. EPA*, 597 U.S. 697, 729 (2022) ("'When [an] agency has no comparative expertise' in making certain policy judgments … 'Congress presumably would not' task it with doing so." (alteration in original) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019))). Or, as in *Robertson*, an agency might deem further study unhelpful when another regulator has primary responsibility for remediating the studied effect in a more comprehensive fashion. *See* 490 U.S. at 340; p.24, *supra*.

These sensible principles laid down by this Court explain why STB was well within its prerogative to decline further study of downline accidents, Gulf Coast communities, or "the climate effects of the combustion of the fuel intended to be extracted" at yet-to-be-built oil wells that may be constructed as a result of the new rail. Pet.App.66a. At the end of the day, STB is not in a position to regulate rail traffic, track safety, refinery practices, or climate change. *Cf.* James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 Utah L. Rev. 119, 143 (2018) ("In practice, in unpredictably changing energy markets, it is nearly impossible to predict the upstream and downstream impact of a new pipeline project."). More to the point, regulation of those issues should focus on ensuring the optimal rules for all track safety and all refinery emissions, not obsessing about the marginal contributions of 88 miles of new track in remote, rural Utah.

To be sure, NEPA calls for inter-agency consultation. But that consultation should be brought

to bear only on the problems that the proponent agency is supposed to study under NEPA. There is a vast difference between consulting with the Forest Service to determine the effects of a proposed rail route that passes through a National Forest, *see, e.g.*, Pet.App.182a, and asking EPA to assess how 88 miles of additional track in Utah will contribute to climate change based on refining activities on the Gulf Coast. NEPA may require the former, but the rule of reason protects an agency that declines to do the latter.

The same logic applies for STB's reasonable decision to study potential ecological harms *from the railway*, but not potential harms from new construction that the new line may precipitate. The extent to which one infrastructure project will spur subsequent development is hard enough to predict for experts in real estate or urban planning—and STB is neither of those things. And that is doubly true given that, as *even the D.C. Circuit admitted*, there is presently no way to know with any reasonable degree of certainty where exactly in the 12,000-square-mile Uinta Basin this new development will end up or how extensive it will be (if it ends up being built at all). *See* Pet.App.31a-34a. To the extent some new development materializes, there will be time enough for the appropriate state or federal agencies to perform their respective statutory mandates to evaluate the environmental effects of a concrete proposal. There is no need to burden a different agency now with an entirely predictive and potentially unnecessary hypothetical EIS.

So too for train accidents. As noted, STB *did* look into the risks of increased accidents downline, but it

stopped its NEPA review of the potential risks of additional accidents the new railway could pose after concluding that the risks were de minimis. *See* pp.12-13, *supra*. That is an eminently reasonable approach. Rail traffic safety is not a purely (or even predominantly) environmental issue. While train accidents, like tanker-truck accidents, have the potential to cause environmental problems, the principal regulatory goal is to minimize all accidents on the rails, whether cars are full or empty, or whether they carry passengers, wheat, or waxy crude. And, more to the point, there is a federal agency with expertise, authority, and responsibility for rail safety, and it is not STB, but the Federal Railroad Administration ("FRA"), whose Administrator must have "professional experience in railroad safety, hazardous materials safety, or other transportation safety." 49 U.S.C. §103(d); *see* p.10, *supra*. If respondents think FRA is falling down in its management of the national rail system, that is a problem whether or not there are 88 miles of additional track in rural Utah, and they should challenge the relevant FRA agency action. What they should not be allowed to do is tie the Uinta Basin Railway up in court indefinitely by bringing a NEPA claim against STB concerning a de minimis risk.

That is especially true given STB's role in administering a statute that puts a thumb on the scale in favor of rail construction. STB is the successor agency to the Interstate Commerce Commission. Its members must have expertise in transportation and business, not oil refining, ecology, or even train safety. Its fundamental duty under 49 U.S.C. §10901 is "authoriz[ing]" rail line "activities … []consistent with

the public convenience and necessity." *Id.* §10901(c). Needless to say, any project that contributes to interstate commerce could also be said to contribute to climate change or increased traffic on the national railway system. While agencies can certainly study the environmental risks from such increased commercial activity, the rule of reason places reasonable limits on how much study is necessary and prevents NEPA from working at cross-purposes with the basic pro-development mission of agencies like STB.

As the decision below illustrates, however, the D.C. Circuit has replaced this Court's rule of reason with a mandate to consider everything under the Sun. If an agency *can* block a project on the ground that it "would be too harmful to the environment," then (says the D.C. Circuit) the agency *must* consider any and all distant environmental effects the project may (or may not) engender—even if the agency has no role in regulating those effects, or the conditions that may mitigate or exacerbate them. *Sabal Trail*, 867 F.3d at 1373. So, here, the fact that STB *can* "deny" the permit required for the rail project "on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits" meant that it *must* consider "the climate effects of the combustion of the fuel intended to be extracted"—even though STB has zero authority to do anything about oil extraction, fuel combustion, or climate effects. Pet.App.36a-37a, 66a. That is not a rule of reason; it is the opposite.

This Court long ago cautioned that NEPA "should not be" turned into "a game" in which environmental groups and other opponents of progress "engage in

unjustified obstructionism" by raising a laundry list of far-flung effects that, in their view, "'ought to be' considered," no matter how long it takes and no matter whether the agency doing the considering has any power to do anything about the supposed problems the project poses. *Vt. Yankee*, 435 U.S. at 553-54. The Court doubled down on that view in *Metropolitan Edison*, emphasizing that policy disagreements should be aired in "[t]he political process, and not NEPA" litigation. 460 U.S. at 777. It bears emphasis that NEPA applies equally to legislative proposals and agency projects, 42 U.S.C. §4332(2)(C), and yet legislative proposals do not come encumbered with 3,600-page EISs. The explanation for that difference lies in the felt-need of agencies to paper the record in the context of projects that can be challenged in the D.C. Circuit. Congress recently made its views on the potential misuses and excesses of NEPA crystal clear. *See* Part I.B., *supra*. Yet, as the decision below makes all too clear, the home court of appeals for most of the federal alphabet soup agencies has not gotten the message. This Court should set the record straight, reverse the decision below, and unshackle agencies and infrastructure-development projects from NEPA-litigation purgatory.

III. The Court Should Confirm That STB's EIS Satisfies NEPA's Requirements.

This is hardly a case of an agency that greenlighted a project heedless of potential environmental impacts. The EIS here runs to 3,600 pages. It took years to prepare, and it reflects consultation with sister agencies with expertise in particular areas. But all that was not remotely good

enough for the D.C. Circuit, which demanded more speculation and more exhaustive consideration of environmental (and non-environmental) risks that are remote in both time and geography and that implicate issues far outside STB's narrowly focused mandate. Such an approach threatens a project that promises to bring significant economic development to the Uinta Basin by connecting that remote area with the national economy.

And the threat does not end there. Infrastructure development demands investment, and investors demand a degree of certainty and assurance that they will not become victims of a regulatory rope-a-dope. Opponents of development know full well that they do not need to win every legal battle to prevail in the war of attrition. The decision below is thus a threat not just to the promising project here, but to infrastructure development in general.

The best way for this Court to send a clear signal that such NEPA abuse will not be tolerated is to affirmatively hold that STB's EIS here passes NEPA muster. As the preceding discussion reveals, STB's EIS was comprehensive and thoroughgoing. It readily cleared NEPA's minimum requirements, since it studied all effects on the physical environment proximately caused by approving the railroad. It even went past proximate cause and discussed some remote effects and marginal risks like train accidents and down-rail fires. But that was gravy, not grounds for vacatur and additional study. Although the court of appeals may have preferred that discussion to be more thorough, that is not the test. There is no basis for reversing a favorable NEPA determination that

considers all of the proximate environmental effects of the proposed project, and the rule of reason protects agencies when they go further and consider some marginal risks without exhaustively examining them or running down every rabbit hole. Simply put, absent a failure to consider an effect that is both proximate and environmental, 3,600 pages of EIS ought to be more than enough.

In these circumstances, remanding the EIS to the agency would accomplish nothing but sowing additional confusion and delay. To give both petitioners and the people of the Uinta Basin the certainty that they deserve, the Court should reverse with language making clear that STB has no obligation to revisit its EIS on remand.

CONCLUSION

The Court should reverse the judgment below.

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August 28, 2024

STATUTORY APPENDIX

TABLE OF CONTENTS

42 U.S.C. § 4332(2)(C) (2019). Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall–

…

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided in section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]

42 U.S.C. § 4332(2)(C) (2023). Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall–

…

> **(C)** consistent with the provisions of this chapter and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) reasonably foreseeable environmental effects of the proposed agency action;

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

Prior to making any detailed statement, the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall

accompany the proposal through the existing agency review processes[.]

49 U.S.C. § 10901. Authorizing construction and operation of railroad lines

(a) A person may–

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if–

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

49 U.S.C. § 1301. Establishment of Board

(a) Establishment.–The Surface Transportation Board is an independent establishment of the United States Government.

(b) Membership.–(1) The Board shall consist of 5 members, to be appointed by the President, by and with the advice and consent of the Senate. Not more than 3 members may be appointed from the same political party.

(2) At all times–

(A) at least 3 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of transportation, transportation regulation, or economic regulation; and

(B) at least 2 members shall be individuals with professional or business experience (including agriculture) in the private sector.

(3) The term of each member of the Board shall be 5 years and shall begin when the term of the predecessor of that member ends. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, shall be appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified, but for a period not to exceed one year. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

(4) No individual may serve as a member of the Board for more than 2 terms. In the case of an individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, such individual may not be appointed for more than one additional term.

(5) A member of the Board may not have a pecuniary interest in, hold an official relation to, or own stock in or bonds of, a carrier providing

transportation by any mode and may not engage in another business, vocation, or employment.

(6) A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The Board may designate a member to act as Chairman during any period in which there is no Chairman designated by the President.

(c) Chairman.–(1) There shall be at the head of the Board a Chairman, who shall be designated by the President from among the members of the Board. The Chairman shall receive compensation at the rate prescribed for level III of the Executive Schedule under section 5314 of title 5.

(2) Subject to the general policies, decisions, findings, and determinations of the Board, the Chairman shall be responsible for administering the Board. The Chairman may delegate the powers granted under this paragraph to an officer, employee, or office of the Board. The Chairman shall–

(A) appoint and supervise, other than regular and full-time employees in the immediate offices of another member, the officers and employees of the Board, including attorneys to provide legal aid and service to the Board and its members, and to represent the Board in any case in court;

(B) appoint the heads of offices with the approval of the Board;

(C) distribute Board business among officers and employees and offices of the Board;

(D) prepare requests for appropriations for the Board and submit those requests to the President and Congress with the prior approval of the Board; and

(E) supervise the expenditure of funds allocated by the Board for major programs and purposes.