

No. 23-975

IN THE
Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, *et al.*,
Petitioners,
v.
EAGLE COUNTY, COLORADO, *et al.*,
Respondents.

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

**BRIEF OF THE ASSOCIATION OF
AMERICAN RAILROADS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The Association of American Railroads (“ARR”) is an incorporated, nonprofit industry association whose membership includes freight railroads that operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR also represents passenger railroads that operate intercity passenger trains and provide commuter rail service.

Combined, the nation’s railroads operate nearly 140,000 miles of right-of-way, the construction and maintenance of which frequently require federal permits or approval. This, in turn, necessitates an analysis of the impacts of a project under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* This case directly affects the extent to which upstream and downstream impacts, specifically emissions from commodities transported by AAR’s members and which are not causally related to a rail project must be considered by the Surface Transportation Board (“STB” or “the Board”) or any other federal agency.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The movement of freight by rail involves a broad spectrum of commodities including agricultural & food products, grain, chemicals, coal, construction, pulp & paper, crude oil, consumer products, and motor vehicles and parts. Railroads, as common carriers subject to the statutory obligation to provide “transportation or service on reasonable request,” cannot refuse to transport a particular commodity simply because that commodity may have climate impacts or is otherwise disfavored by certain parties.

Attempting to trace emissions “related” to that statutorily mandated service in the context of evaluating a wide spectrum of rail projects, large and small, which themselves have no causal connection to such emissions, introduces a chain of analyses and assessments that are inconsistent with NEPA’s objectives. The D.C. Circuit’s holding, if allowed to stand, would result in a never-ending, speculative analysis of upstream and downstream impacts from a vast universe of possible commodities stretching far beyond a federal agency’s authority and control.

ARGUMENT

The Seven County Infrastructure coalition seeks to build an 88-mile common carrier rail line in Utah linking the Uinta Basin to the North American rail network. The STB conducted a thorough environmental review of the relevant factors related to that line and approved the project. The STB’s order approving the project complies with NEPA because its analysis was tailored to those effects with a reasonably close causal relationship to the Board’s action.

Nonetheless, respondent has alleged that the STB was obligated to consider and analyze the upstream and downstream impacts of the primary commodity anticipated to be hauled on the new line—in this case, waxy crude oil. Agreeing, the D.C. Circuit remanded the case, holding that “[t]he Board cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments.” *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1180 (D.C. Cir. 2023). The court faulted the Board for failing to consider “downline” effects resulting from increased crude oil refining on Gulf Coast communities and effects of projected increases in spills and accidents from additional oil trains travelling along existing rail lines, in addition to “upline” impacts on vegetation and special status species due to increased drilling. *Id.* at 1168.

The D.C. Circuit’s decision flies in the face of this Court’s precedent. When taken to its logical conclusion, the holding would expand the scope of analysis required to prepare even the most basic NEPA documents related to railroad industry infrastructure projects. And as applied to rail projects, the D.C. Circuit’s analysis places NEPA on a collision course with the rail carriers’ common carrier obligations. By rejecting the D.C. Circuit’s flawed analysis and reaffirming prior Supreme Court precedent limiting the scope of review under NEPA, the Court can prevent needless delays to rail projects that serve this nation’s critical transportation infrastructure needs.

I. STB's obligation to consider indirect impacts under NEPA is limited in scope.

An agency's NEPA obligations are limited by the scope of the agency's regulatory authority. This Court has held that NEPA requires a causal connection between the proposed action and an effect that must be evaluated. Certain effects will necessarily fall outside of NEPA's scope because "the causal chain is too attenuated." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

In addition, this Court held that NEPA requires a "reasonably close causal relationship" between an agency action and its environmental effects. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 754 (2004). Specifically, "[w]here an agency has no ability to prevent" an environmental effect "due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. In such cases, the agency has no obligation under NEPA to consider those environmental impacts.

A. *Public Citizen* requires a causal connection that is lacking here.

The STB's obligation to consider indirect impacts under NEPA extends only to effects that are "reasonably foreseeable," and for which the agency's action has a "reasonably close causal relationship." *Public Citizen*, 541 U.S. at 767. But "that does not mean that the [Board] had to examine everything for which the Project[] could conceivably be a but-for cause." *Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016). There must be a causal connection between the action and the effects.

The STB does not control the nation's energy demands nor does it have a role in the permitting or other regulations governing Gulf Coast refineries or upstream oil recovery. Moreover, even if the STB had the authority to prevent the project from going forward by declining to authorize it would not be dispositive of causation. What matters is that there will be separate regulatory decisions – for example, the permitting of a refinery by state and federal regulators – that “break the NEPA causal chain and absolves the [Board] of responsibility to include in its NEPA analysis considerations that it ‘could not act on’ and for which it cannot be the ‘legally relevant cause.’” *Sierra Club*, 827 F.3d at 47-48 (citing *Public Citizen*, 541 U.S. at 769).

The importance of the causation requirement becomes obvious when considering the range of agency actions subject to NEPA review and the scope of agencies' regulatory authority. The D.C. Circuit's opinion would expand an agency's NEPA obligations to the upstream and downstream impacts of a project, and, for a railroad project, to consideration of the commodities likely to be hauled. Railroads are integrated into the economy as a whole and haul a huge mix of commodities, with ever-changing routes and volumes. As applied to review of railroad projects, the DC Circuit's approach would require STB to undertake an expensive, expansive, and ultimately irrelevant NEPA review process.

There is no causation between the upstream and downstream emissions and involvement of the rail industry transporting those commodities. For example, an intermodal railyard expansion can create additional freight capacity and lessen supply chain bottlenecks. In addition, that railyard may, because of this increased capacity, permit additional freight – such as

more automobiles or electronics – to be transported via rail rather than via truck or barge. But people do not buy and use more cars or electronics than they otherwise would simply because those goods are transported via rail instead of other modes. Those emissions would occur regardless of how the commodity was transported within United States’ supply chain. Using this Court’s language, the causal link is simply too attenuated.

In the present case, there are many ways to transport crude waxy oil, including via pipeline and truck. There is no reason to conclude that a Board decision to prevent the project from moving forward would result in that fuel source remaining in the ground.

B. The STB has limited authority over this project.

The Board has federal authority to approve the construction and operation of rail lines in the United States. By statutory design, the Board shall approve construction of new rail line unless it finds that the proposal would be “inconsistent with the public convenience and necessity.” 49 U.S.C. § 10901(c).² While “public convenience and necessity” are not defined by statute, traditionally the agency has looked at (a) the public demand for the service, (b) financial viability of the applicant to undertake the project, and (c) whether the proposal will unduly harm existing services. *See Tongue River R.R.—Const. & Oper.—Western Alignment*, STB FD No. 30186 (Sub-No. 3) (STB served Oct. 9, 2007). The Board also affords substantial importance to shipper interests. *Id.* This

² The Board has adopted rules setting forth the process for and requirements of a full application to construct a rail line section 10901. *See* 49 CFR §§ 1150.-1150.10 (Subpart A).

permissive licensing policy reflects Congress' strong statutory presumption in favor of new rail line construction. See *Alaska R.R.—Constr. & Operation Exemption—Rail Line Extension to Port MacKenzie, Alaska*, FD 35095 (STB served Nov. 21, 2011), aff'd sub nom. *Alaska Survival v. STB*, 705 F.3d 1073 (9th Cir. 2013); *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003).³

The Board may also approve certain construction transactions through its exemption process, as it did here. 49 U.S.C. §10502.⁴ The exemption provision signals the Congressional intent of the Staggers Act, the statute which substantially deregulated the railroad industry in 1980.⁵ While exemptions for rail line construction generally require less detail than a full application under Subpart A, the Board's environmental

³ See also Bipartisan Infrastructure Law, Section 11301 (135 Stat. 525-30, Nov. 15, 2021) (amending NEPA to require that major infrastructure projects complete environmental reviews within two years and contain an "adequate level of detail to inform decisions necessary for the role of the participating agencies and cooperating agencies").

⁴ Congress required that "the Board, *to the maximum extent consistent with this part*, shall exempt ... a transaction" when the Board finds that application of section 10901 "(1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power." *Id.*

⁵ See H.R. Rep. No. 96-1430, 96 Cong. 2d. Sess. at 105 (1980) (the "policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.").

review of a project is not limited or otherwise altered. *See* 49 C.F.R. §§ 1150.31-1150.36.

Inherent in STB approval of rail projects is the understanding that a railroad may transport different types of cargo over an approved line, and that aspects of such transportation – particularly safety and environmental concerns – are regulated by other agencies and are outside of the STB’s jurisdiction. Decisions about where, how, or whether each commodity is manufactured, produced, packaged, or ultimately used (including any resulting environmental impacts), falls under the purview of other agencies, not the STB (which is charged with ensuring that common carriers honor any reasonable request to move such cargo from point A to point B).

NEPA does not expand an agency’s Congressionally granted authority; instead, NEPA is bounded by the reviewing agency’s existing authority. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 28, 43 (1983) (holding that the requirements of NEPA are limited by the statutory authority delegated to agencies). *See also Int’l Brh. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 217 (D.C. Cir. 2013) (“an agency lacks authority to impose the [NEPA] alternatives proposed by the Teamsters and those alternatives would go beyond the scope” of the federal action). The STB’s authority does not extend to regulating the vast number of commodities that can be transported via rail, nor the manner in which such commodities are transported. Likewise, the Board does not have authority to deny authorization of a new rail line simply because of the emissions or other environmental impacts associated with the freight the line may transport.

II. The D.C. Circuit’s overbroad interpretation of what is reasonably foreseeable under NEPA is unworkable as applied to common carriers such as railroads.

Railroads have little choice over the commodities they must move. As common carriers, railroads are subject to the statutory obligation to provide “transportation or service on reasonable request,” and cannot refuse to transport a particular commodity simply because that commodity may have upstream or downstream impacts. *See* 49 U.S.C. § 11101(a). Nor should railroads be obligated to mitigate for potential upstream or downstream impacts of the commodities that they transport. In the case of intermodal containers, the transporting railroad may not even know what products are inside the shipping container.

Because common carriers have an obligation to transport a potentially unlimited universe of goods upon reasonable request, attempting to measure indirect impacts would be impossible. If the D.C. Circuit’s decision is upheld, these projects would be subject to a seemingly limitless and highly speculative NEPA analysis resulting in unnecessary delays for critical transportation infrastructure projects. But as this Court has made clear, NEPA does not require a far-reaching analysis into potential up and downstream impacts over which the reviewing agency has no control nor authority to regulate.

Here, the D.C. Circuit focused on the acknowledged fact that the primary commodity expected to be transported by the Uinta Basin rail line would be a fossil fuel (waxy crude oil). However, there cannot be one set of rules for a proposed project where the primary commodities expected to be transported are fossil fuels and another for all other proposed rail

projects. Under a railroad's common carrier obligation, any rail line may transport fossil fuels. But any rail line may also transport chemicals, grain, automobiles, and international shipping containers carrying any number of consumer products. Further, the nature and quantity of the goods shipped can, and likely will, change over time.

The D.C. Circuit's holding creates unnecessary uncertainty, significant litigation risk, provides little, if any, environmental benefit, and is contrary to NEPA (a procedural statute), which should not involve dictating "winners" and "losers."

Requiring an agency, here the STB, to consider lifecycle emissions related to the production, usage, and disposal of commodities and goods shipped by rail – and which are outside the control of both the Board and the railroads – will do little more than create wholly unreliable and speculative data that needlessly delay critical infrastructure projects, implicate burdensome mitigation requirements that should not be borne by railroads, and ultimately would not benefit the analysis of the underlying project or alternative means of accomplishing the project's or NEPA's goals. "NEPA's purpose is not to generate paperwork – even excellent paperwork" but rather to "provide input as necessary to the agency making the relevant decisions." *Public Citizen*, 541 U.S. at 768-69 (2004).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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