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 AND CENTER FOR BIOLOGICAL DIVERSITY, *ET AL.*,
Respondents

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

BRIEF OF *AMICI CURIAE* AMERICAN FOREST RESOURCE COUNCIL AND WESTERN ENERGY ALLIANCE IN SUPPORT OF PETITIONERS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Western Energy Alliance (the Alliance) and the American Forest Resource Council (AFRC) represent companies, communities, and stakeholders across the American West whose livelihoods depend on responsible development of the Nation's abundant natural resources.

Western Energy Alliance

For over fifty years, the Alliance has been a leader, advocate, and champion of independent oil and natural gas companies in the West. Alliance members and staff are dedicated to abundant, affordable energy, environmentally responsible development, and a high quality of life for all. Alliance members invest billions of dollars to lease, explore, operate, and develop oil and natural gas on thousands of oil and gas leases issued by the U.S. Department of the Interior, through the Bureau of Land Management (BLM), under the Mineral Leasing Act (MLA). 30 U.S.C. §§ 181, *et seq*. The Alliance advocates for access to federal lands for leasing, exploration, and production of America's oil and natural gas resources; and rational, efficient, and effective permitting processes.

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[1] Per Supreme Court Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici *curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Judicial application of the National Environmental Policy Act (NEPA) to the federal onshore oil and gas program significantly affects Alliance members. The Alliance defends BLM decisions authorizing oil and gas land-use planning, leasing, and development in cases before lower federal courts and in the U.S. Courts of Appeals for the D.C. and Ninth Circuits. In the past eight years, the Alliance has litigated the judicial standards imposed on the BLM's NEPA analyses of greenhouse gas emissions and global climate change.

American Forest Resource Council

AFRC is an Oregon-based nonprofit and regional trade association that advocates for sustained-yield timber harvests on public timberlands and enhancing forest health and resistance to fire, insects, and disease throughout the West. It represents over fifty forest-product businesses and forest landowners in Oregon, Washington, California, Nevada, Idaho, and Montana. It also promotes active management to have productive public forests, protection of the value and integrity of adjoining private forests, and support for the economic and social foundations of local communities. And AFRC works to improve federal and state laws, regulations, policies, and decisions on access to and management of public forest lands and protection of all forest lands.

AFRC members depend on reliable supplies of timber and other forest products from National Forests and BLM lands. Active forest management, including logging, thinning, and prescribed fire, is

essential to reducing wildfire risks, improving forest health, protecting watersheds and wildlife habitat, and ensuring a steady supply of renewable building materials. AFRC's members are committed to collaborative and science-based stewardship of public lands with local communities and other stakeholders.

Interests of *Amici Curiae*

Although they focus on different natural resources in the West, the Alliance and AFRC share an interest in the proper implementation of NEPA. For decades, anti-development (or, "anti-use") interests have wielded NEPA as a weapon to cut down responsible resource-management activities that are in the public interest. *Amici curiae* have taken part in countless administrative processes and legal challenges on the scope of NEPA reviews for projects ranging from individual oil and gas wells and timber sales to region-wide plans and programs.

Repeatedly, anti-development litigants abuse NEPA. They demand exhaustive analyses of every remote alternative and impact—not to improve agency decision-making, but to stop development. As a result, NEPA reviews now routinely span thousands of pages and require five years or more to complete, only to be challenged in court anyway.

Even the most diligent agencies suffer flyspecking for supposed flaws and omissions. All the while, the litigation paralyzes needed infrastructure, energy development, forest-health projects, and resulting economic productivity.

The consequences for the Alliance, AFRC, and the Nation have been severe. While technologically recoverable oil and gas resources on federal lands are estimated at 194 trillion cubic feet of natural gas and 35 billion barrels of crude oil, actual production from these vast reserves is a small fraction of its potential due to leasing and permitting delays. Similarly, timber harvests from National Forest lands are down 80 percent from peak levels,[2] even as our forests have grown dangerously overcrowded and wildfire risks have soared.[3] Rural communities across the West have suffered the resulting job losses, mill closures, and revenue declines.

The misuse of NEPA to target these authorized—congressionally ***prioritized***—activities is not only devastating to local economies, but also flatly inconsistent with the statute's text and purpose. NEPA is not an environmental-protection statute that prohibits actions with adverse effects. It is a procedural tool for agency deliberation and public participation. When NEPA is contorted into an all-encompassing inquiry requiring exhaustive guesswork about potential effects an agency cannot meaningfully consider or control, it serves only to delay critical economic and resource-management activity, not to serve the public interest.

This case presents an opportunity for the Court

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[2] Katie Hoover, Cong. Research Serv., Federal Land Ownership: Acquisition and Disposal Authorities (R45688) (2019).

[3] Fiscal Year 2022 Budget Justification; Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests (2022).

to enforce critical limits on NEPA's scope and prevent further weaponization of the statute. The lower court's holding that the Surface Transportation Board must analyze downstream greenhouse gas emissions from any "reasonably foreseeable" fossil-fuel consumption induced by its action, regardless of whether the agency has authority to control that consumption, is wrong. If the Court lets it stand, then the ruling will further bog down federal decision-making and harm the public interest.

Also, this case shows yet another effort to transform NEPA into a *de facto* national-energy and climate "policy" overseen by federal courts. But Congress has made clear in the MLA, Federal Land Policy and Management Act (FLPMA), National Forest Management Act (NFMA), Multiple Use Sustained-Yield Act, and other statutes that responsible development of natural resources ***is*** the public interest. NEPA is not a weapon to cut down that interest. *Amici curiae* respectfully ask the Court to restore NEPA to its essential but modest purpose.

SUMMARY OF THE ARGUMENT

In this case, a few anti-development interests, a federal regulator (in the minority), and then the lower court decided that they knew more about what is in the "public interest" than Congress knows, and they used NEPA as a sword to cut down a rail-line construction project that would serve the public interest. But Congress decided that building rail lines

is in the public interest. NEPA serves only an ancillary role in making sure the federal regulators pause to consider environmental consequences that might flow from construction of a rail line.

Amici curiae do not construct rail lines, but they advocate for other projects—oil and gas development and active forest management—that Congress says are ***in*** the public interest. Yet anti-development groups have for years now similarly wielded NEPA as a sword to cut down those projects.

NEPA is a procedural statute; it makes federal agencies pause before approving projects so the agencies can "address"—not prevent, but ***address***—the "reasonably foreseeable" environmental effects of their approvals. That is all NEPA does. As this case shows, unelected regulators and lower federal courts have misplaced NEPA's role in decision-making, elevating their own substantive "environmental" aims over the public interest. The pernicious application of NEPA asks whether federal regulators must in a substantive sense *prevent* possible downstream impacts of their actions that are nevertheless outside their statutory authorities to control. This Court has said that the regulators cannot do that. But regulators and lower courts have ignored this Court's precedent. The systemic disregard of NEPA's *limits* hurts oil and gas development and active forest management. This Court should reverse the trend and reinforce NEPA's limits.

ARGUMENT

I. Resource development serves the public interest.

Federal land-management in the West reflects a balance between Congress's power over the federal lands and its desire to foster economic development and resource use. The federal government has long sought to facilitate settlement and use of its vast Western holdings through land grants, homesteading incentives, rights-of-way, and other policies. Meanwhile, Congress incrementally reserved some lands and resources in federal ownership to provide for their stewardship and use. The resulting system of "multiple use" management—formally adopted across most federal lands in the mid-20th century—reflects this essential balance among interests. *See* 16 U.S.C. §§ 528–31. For this brief, it is worth explaining the statutory frameworks guiding onshore oil and gas development and active forest management on federal lands.

Oil and Gas Development

Under the MLA, Congress requires the U.S. Department of the Interior to hold competitive oil and gas lease sales "at least quarterly" to promote responsible development of this nation's energy resources, which the Department does through its BLM. 30 U.S.C. § 181. The BLM *must* conduct these quarterly lease sales for lands that are eligible and available for leasing. 30 U.S.C. § 181; 43 C.F.R. § 3120.1-2(a).

At the same time, the BLM manages public lands under FLPMA, 43 U.S.C. §§ 1701–1787. FLPMA requires the BLM to manage public lands under the principles of "multiple use" and "sustained yield" to meet the needs of present and future generations. 43 U.S.C. § 1701(a)(7), (8), (12); 43 U.S.C. § 1732(a)–(b); 43 C.F.R. § 1610.5-3. FLPMA also identifies "mineral exploration and production" as one of the "principal or major uses" of public lands, 43 U.S.C. § 1702(*l*), and declares that it is the Nation's policy that BLM manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals, [and other commodities] from the public lands." 43 U.S.C. § 1701(a)(12).

So where does NEPA come into play? The BLM employs a three-stage decision-making process (planning, leasing, and development) for oil and gas uses of federal lands, and the federal courts have held that NEPA applies to all three stages. In other words, federal agencies conduct NEPA analyses at least ***three times*** before any oil or gas is produced from a federal lease.

In the *first* stage, the BLM broadly assesses the presence of minerals and other resources on public lands through land-use planning, which includes determining what lands are open or closed to potential oil and gas development; and for "open" areas, what conservation stipulations should apply to future leases offered on those lands (*e.g.*, offering parcels with timing restrictions on surface activities to protect migrating wildlife). 43 C.F.R. § 1601.0-5(n).

The final product of the first stage is a resource-management plan (RMP), which is supported by an environmental impact statement (EIS) prepared following NEPA. 43 C.F.R. § 1601.0-6. An EIS assesses the potential environmental impacts of oil and gas development under different *planning* alternatives based on "reasonably foreseeable" development scenarios. With respect to oil and gas resources, RMPs say which lands will remain open (or closed) to oil and gas leasing and development. 43 C.F.R. § 1601.0-5(n). And they state the stipulations and mitigation measures that may be attached to leases or made conditions of approval for subsequent permits for exploration or development projects. *Id.* Once the BLM issues an RMP, later more-specific decisions implementing specific projects must conform to the plan. 43 C.F.R. § 1601.5-3(a).

In the *second* stage, the BLM conducts a new round of NEPA analysis to decide which parcels to offer in its quarterly oil and gas lease sales. 30 U.S.C. § 226(b)(1)(A). Sometimes, the BLM may prepare one or more environmental assessments that "tier" to an EIS prepared in the planning stage. *See* 40 C.F.R. §§ 1501.5, 1501.11. And sometimes, the BLM may rely on earlier environmental documents when preparing a lease sale. *See* 43 C.F.R. §§ 46.120(c), 46.300(a)(2). But other times, the BLM must conduct a full EIS at the leasing stage too.

The *third* stage of NEPA analysis occurs after the BLM has issued a lease, when an oil and gas operator submits an application for a permit to drill and the BLM determines whether, and under what

conditions, it will approve the development proposed for the lease it has issued. 30 U.S.C. § 226(g); 43 C.F.R. §§ 3162.3-1, 3171.5. The BLM reviews the application, completes *more* environmental review, and decides whether to approve the permit and impose any limiting conditions on its approval. 43 C.F.R. § 3171.13.

The lower courts have generally required NEPA review at each of the three stages, with the BLM's obligations intended to be relative to the particular activity being authorized and the availability of information, because "[i]t is more logical and efficient to ask certain questions when the truth of their premises is unveiled." *N. Slope Borough v. Andrus*, 642 F.2d 589, 606 (D.C. Cir. 1980); *accord N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006) (oil and gas projects "generally entail separate stages of leasing, exploration and development. At . . . the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize.").

But while the lower courts have given NEPA a pervasive presence in the federal onshore oil and gas program, Congress has consistently declared that development of the federal mineral estate ***is*** in public interest. Since at least the middle of the 19th century, "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States." 30 U.S.C. § 22.

This open-access policy reflected Congress's intent "to reward and encourage the discovery of minerals that are valuable in an economic sense." *United States v. Coleman*, 390 U.S. 599, 602 (1968). And while the BLM can manage federal leasing, it—like the Surface Transportation Board here—does not have legal authority to regulate air emissions and set climate policy that might (or might not) result from the agency's actions. *See Wyoming v. Dep't of the Interior*, 493 F. Supp. 3d 1046, 1065–66 (D. Wyo. 2020), *vacated on other grounds*, No. 20-8072, 2024 WL 3791170, at *2 (10th Cir. Aug. 13, 2024).

The MLA extended this principle to fuel minerals such as oil, gas, and coal. The congressional intent was to "***to promote*** the orderly development of the oil and gas deposits in . . . lands of the United States through private enterprise." Senate Subcomm. of the Comm. on Interior and Insular Affairs, The Investigation of Oil and Gas Lease Practices, 84th Cong., 2nd Sess. 2 (1957) (emphasis added).

Active Forest Management

FLPMA and the NFMA, which provide organic authority and comprehensive planning frameworks for BLM and Forest Service lands, likewise set resource development as a priority in multiple-use stewardship. As it does with mineral development, FLPMA specifies that "'principal or major uses' includes . . . ***timber production***." 43 U.S.C. § 1702(*l*) (emphasis added). The NFMA, in turn, requires the Forest Service to afford "coordination of outdoor recreation, range, timber, watershed, wildlife and

fish, and wilderness" in developing land and RMPs. 16 U.S.C. § 1604(e)(1). It further directs the agency to "determine forest management systems, harvesting levels, and procedures" based on all multiple-use values, not solely preservation. *Id.* § 1604(e)(2).

These statutes do not set a one-way ratchet in which federal lands increasingly disappear from resource development. Rather, they codify a balance between production and other concerns. True, FLPMA's multiple-use mandate directs BLM to consider "environmental" *values* while managing *uses*, but Congress more directly ordered the BLM to recognize the Nation's need for "***minerals***, food, ***timber***, and fiber." 43 U.S.C. § 1701(a)(8), (12).

Similarly, the NFMA requires the Forest Service to "insure consideration of the economic and environmental aspects of various systems of renewable resource management" in developing land management plans. 16 U.S.C. § 1604(g)(3)(A). The statutes contemplate informed agency decision-making, not myopic preservation that ignores the public interest.

As happens for oil and gas development, the Forest Service (generally) conducts NEPA analyses at multiple stages in forest management. The NFMA envisions a two-stage approach to forest planning: a *first* "programmatic level" and EIS, and a *second* assessment of potential environmental effects for individual, site-specific projects. *Inland Empire Pub. Lands Council v. Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996).

The lower courts have let anti-development groups file NEPA challenges at each planning stage, leading to average delays of roughly 4.2 years per project. In the last decade, there was a 56% increase in NEPA appeals over the prior decade, with the agency prevailing in 80% of cases. But even when the Forest Service wins, litigation can significantly delay science-based forest management intended to reduce wildfire risks, improve forest health and resilience, and protect communities.

Serial litigation has made it impossible for the Forest Service to increase the pace and scale of management, with the agency conducting an average of just 2.87 million acres of restoration work annually in recent years,[4] compared to the 20 million acres it has identified as needing restoration.

Public Interest: Energy and Forest Management

As relevant to this case, Congress has decided that *building* rail lines is in the public interest. 49 U.S.C. § 10901(c). Yet the lone dissenter at the Surface and Transportation Board and the lower court decided that they knew better than Congress about the public interest. Evidently, only they know that "***Decarbonization is national policy***" and *that* is the public interest, Pet.App.146a.

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[4] Forest Service, Fiscal Year 2022 Budget Justification, 2021; Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests (2022); Forest Service, Fiscal Year 2022 Budget Justification at 107 (2021).

Similarly, Congress has repeatedly emphasized for more than a century that onshore oil and gas production and active forest management *are* in the public interest. *E.g.*, 16 U.S.C. §§ 528–31; 16 U.S.C. §§ 472a, 1600–06, 1607–14; 43 U.S.C. §§ 1701–85. Congress did not codify NEPA—a procedural statute—to undermine the public interest in building rail lines, producing oil and gas from the Nation's mineral estate, or managing the forests.

Nor, as relevant to this case, *should* so-called "climate" concerns trump the public interest. To the contrary, FLPMA expressly directs the Secretary to "manage the public lands under principles of multiple use and sustained yield[.]" 43 U.S.C. § 1732(a). Conspicuously absent is any mandate to meet greenhouse gas targets, emissions budgets, or vague climate goals that Congress has not enacted. Even less present is any requirement that federal regulators *guess* about what might happen due to actions that they have no authority to regulate.

The NFMA similarly recognizes that forest management must balance environmental protection with resource production and management flexibility. It requires the Forest Service to prepare an EIS for each forest plan, but it denies any intent "to preclude silvicultural practices." 16 U.S.C. § 1604(m)(1).

The upshot is clear: Congress declared that responsible production of federal minerals and management of the forests is in the public interest. Congress further prescribed detailed statutes to further the interest. Environmental "values" are

relevant to agency decisions on where, when, and how the public interest is accomplished, and NEPA requires the federal regulators to pause and address those values. But Congress did not authorize anti-use groups, federal regulators, or the lower courts to set nationwide "climate" polices that elevate substantive "environmental" outcomes over the public interest.

II. NEPA requires processes, not outcomes.

Passed in 1970, NEPA "declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). But Congress's recognition of environmental values did not override its prior codifications of the public interest in resource *uses*; NEPA's opening provision describes a federal policy to "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist ***in productive*** harmony, and fulfill the social, ***economic***, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). This policy reflects a balance between environmental values and uses—not a singular focus on preservation or "anti-use."

To effectuate the policy, NEPA requires federal agencies to prepare "a detailed statement" (an EIS) on the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must address—that is, not prevent but ***address***—"reasonably foreseeable" environmental effects of the proposed agency action, and ***address*** alternatives to

the action, short-term versus long-term effects, and whether the effects will be irreversible. *Id.*

NEPA "does not mandate particular results, but simply prescribes the necessary process" for agencies to follow. *Robertson*, 490 U.S. at 350. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.* at 351. It does not require agencies to elevate environmental concerns, and it does not require agencies to adopt the least environmentally damaging action. *See generally Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1035 (9th Cir. 2019). Instead, NEPA ensures that an agency will consider detailed information concerning significant environmental impacts and make that information available to the wider public before going ahead. *Robertson*, 490 U.S. at 349.

In short, NEPA serves two goals: (1) to improve the quality of agencies' decision-making process, and (2) to inform the public about that decision-making process so that interested citizens may offer input. As this Court put it, "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action" through well-informed and transparent agency deliberation. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989).

Agencies and Courts Depart from the Statute

Despite Congress's modest goals, NEPA has evolved over into a burdensome and litigious

enterprise. On average, an EIS takes 4.5 years to complete, with some projects enduring delays of up to 17 years before receiving approval. Dan Bosch & Philip Rossetti, *Addressing Delays Associated with NEPA Compliance*, Am. Action Forum, July 10, 2018.[5] The costs often are in millions of dollars. *Id*. Taking infrastructure as an example, NEPA-related delays can add up to $4.2 million per year in costs for infrastructure projects. *Id*. And 148 infrastructure projects reviewed between 2010 and 2017 had an average ***delay of 7.6 years*** due to NEPA. These financial burdens and prolonged timelines pose severe challenges to the efficient and cost-effective implementation of essential projects.

But the risk of litigation hangs over every project like the Sword of Damocles. "[P]rocesses that have evolved to implement NEPA have often led to delay, confusion and litigation[.]" Kathleen McGinty testimony to Senate Energy and Natural Res. Comm., Subcomm. on Oversight (Oct. 19, 1995). The lower courts have allowed any group to file a NEPA lawsuit challenging even *the most exhaustive* analysis. These lawsuits are in the hundreds each year, stretching agency resources and chilling private investment. *See* WHITE HOUSE COUNCIL ON ENVTL. QUALITY, NEPA LITIGATION SURVEYS: 2001–2013.[6]

The Alliance and AFRC have suffered the

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[5] Philip Rossetti, *Addressing Delays Associated with NEPA Compliance*, American Action Forum (Mar. 20, 2017), https://www.americanactionforum.org/research/addressing-delays-associated-nepa-compliance/ (last visited Aug. 28, 2024).

[6] https://perma.cc/J7A4-GTM7 (last visited Aug. 15, 2024).

consequences of this broken process. Across vast swaths of the American West, domestic energy production, timber harvests and other congressionally authorized ***uses*** of federal lands have ground to a near halt. Oil and gas development from the federal estate has suffered.[7] Timber harvests from the National Forests have likewise fallen precipitously in recent decades.[8]

Win or lose, the mere pendency and even the boogeyman of NEPA litigation can delay critical projects by years or make them economically infeasible. Further, regardless of the underlying merit of the claims, the mere filing of a complaint adds months or years to even the most mundane agency action. Too often, the path of least resistance is simply not to act in the first place, *despite* the public's interest in natural resource use.

This situation is untenable and undermines multiple-use management of federal lands. Congress has declared that mineral production, timber production, and other resource uses are priority uses of federal lands—the agencies must promote these uses under their organic planning statutes. Anti-

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[7] *See U.S. Energy Info. Admin.*, *Cal. Field Prod. of Crude Oil*, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPCA1&f=A (last visited Aug. 28, 2024).

[8] *See* Oswalt, S.N., Smith, W.B., Miles, P.D., & Pugh, S.A. (2019). *Forest Resources of the United States, 2017: A Technical Document Supporting the Forest Service 2020 Update of the RPA Assessment*. at 44, Forest Service ("Removals of these timber products peaked in 1986 at 17 billion cubic feet. From this peak, removals for products declined 24.8 percent to 12.8 billion cubic feet in 2011.")

development groups, regulators, and the lower courts cannot wield NEPA as a veto over the public interest.

This Case

This case arises against that backdrop and implicates the proper scope of NEPA in an era of weaponized litigation. In demanding that the Surface Transportation Board quantify any greenhouse gas emissions traceable to guesses as to future upstream production and downstream uses of oil and gas spurred by its approval of a railroad, the lower court lost sight of NEPA's limited purpose. The lower court's unbounded conception of "indirect effects" stretches the causal chain beyond the breaking point and threatens to paralyze a broad swath of congressionally authorized infrastructure and resource management activities.

III. NEPA does not require agencies to guess about things they cannot control.

A. A "rule of reason" applies to NEPA analyses as a limiting principle.

This is not the first time the Court has grappled with NEPA's jurisdictional limits, although it has been a long time. In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Court rejected the notion that NEPA requires agencies to guess about future events that they lack authority to prevent.

That case involved a NEPA challenge to

Federal Motor Carrier Safety Administration (FMCSA) safety monitoring rules for Mexican trucks running in the United States. The plaintiff argued that FMCSA had to guess about the environmental impacts of cross-border truck traffic before publishing rules that would allow that, on the theory that the President's separate decision to lift a preexisting moratorium on such traffic was a "reasonably foreseeable" effect of FMCSA's action. *Id.* at 765.

This Court disagreed, emphasizing that "inherent in NEPA and its implementing regulations is a 'rule of reason'" that governs the scope of impacts an agency must consider. *Id.* at 767 (quoting *Marsh*, 490 U.S. at 373). That rule of reason incorporates "the 'familiar doctrine of proximate cause from tort law'" to figure out whether a particular effect bears a sufficiently close causal relationship to the agency action to warrant NEPA review. *Id.* (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). Under these background principles, "'but for' causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id.*; *see also Paroline v. United States*, 572 U.S. 434, 445 (2014) (reaffirming these limits).

The Court held that the increase in cross-border truck traffic was not proximately caused by FMCSA's safety rules. While the rules would "allow" such traffic to occur by establishing a registration and monitoring regime—that is, there was a "but for" relationship—that connection was insufficient to require further NEPA analysis because FMCSA had

"no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican trucks from operating in the United States." *Pub. Citizen*, 541 U.S. at 766. Put differently, any emissions generated by trucks crossing the border were attributable to "the President's action in lifting the moratorium," not to "FMCSA's issuance of safety regulations." *Id.* at 769. The agency had no obligation under NEPA to analyze the effects of truck activity it "simply lack[ed] the power to act on." *Id.* at 768.

The Court further emphasized the limited utility of requiring analyses of effects an agency cannot meaningfully address within its statutory authority. "Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking." *Id.* at 768. Demanding "an agency to consider environmental effects that will occur regardless of that agency's decisionmaking process" would not "fulfill NEPA's 'rule of reason' because the analysis would serve 'no purpose' in light of NEPA's regulatory scheme as a whole." *Id.* at 770. In short, an agency need not conduct a futile assessment of impacts beyond its power to control.

The lower court is aware of *Public Citizen* and should have applied it in this case to uphold the Surface Transportation Board's approval of the rail line. In *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016), for example, the lower court rejected a claim that the Federal Energy Regulatory Commission (FERC) had to analyze emissions from increased

natural gas exports as part of its approval of upgrades to a liquified-natural-gas terminal. While the terminal modifications would "substantially increase" the potential for this Nation to export liquified natural gas, FERC could not refuse to approve the upgrades on the grounds that they might lead to increased exports. *Id.* at 47. Only the Department of Energy (DOE) could authorize exports, and DOE had already done so under a separate statutory process. *Id.* FERC had no obligation to "duplicate the environmental review conducted by DOE," and NEPA did not pose a requirement to provide a duplicate review of the environmental impact of exporting natural gas. *Id.* That would go beyond the limiting principle.

Applying "reason" to limit the scope of NEPA has clear benefits. Proximate cause serves a critical gatekeeping function under NEPA by limiting the scope of effects an agency must analyze to those bearing a "reasonably close causal relationship" to the proposed action. *Pub. Citizen*, 541 U.S. at 767.

Where an agency lacks jurisdiction to control third-party conduct, it need not engage in a futile, speculative assessment of the effects of that conduct merely because they may be a "but for" consequence of the agency's decision. And where an impact assessment would be of only marginal utility to the agency's decision-making process, NEPA does not demand that the agency conduct it anyway.

B. The lower court's decision contravenes the limiting principle of "reason."

The decision below ignores the precedential aspects of the *Public Citizen* decision and opinion. Here, the lower court held that a NEPA analysis must encompass in detail ***any*** downstream GHG emissions "reasonably foreseeable" allowed—in a "but for" sense—by an agency action regardless of whether the agency can do anything about those emissions. This near-limitless view of "indirect effects" not only ignores *Public Citizen* and proximate-cause principles, but also threatens to inject (or continue allowing the perpetuation of) standardless speculation into a broad swath of agency decision-making in defiance of this Court and Congress's Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which *requires* federal regulators to act reasonably, *see FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (§ 706(A)(2) "requires that agency action be reasonable and reasonably explained").

At best, the lower court misread *Public Citizen*. The lower court erroneously concluded that the Board had to quantify downstream greenhouse gas emissions as a "reasonably foreseeable" indirect effect of its rail authorization, without considering whether the Board has any statutory authority to regulate those emissions, and never mind whether there was any realistic way to figure out how, ***if***, when, and where those emissions would occur. Prudence and reality took a back seat to the lower court's desired substantive "environmental" outcome, which was to prevent construction of the rail line.

Further, the court improperly looked past *Public Citizen*'s grounding in proximate-cause principles, suggesting that this Court's analysis was limited to narrow circumstances involving presidential discretion and foreign affairs. These analytical missteps led the lower court to stretch NEPA beyond all reasonable limits.

"But For" or Proximate Causation?

Elaborating further, the lower court at best fundamentally misapprehended *Public Citizen*'s holding and analytical framework. In *Public Citizen*, this Court did not say the mere foreseeability that some trucks would enter the Nation from Mexico that would not be able to enter "but for" the agency's action would nevertheless trigger the agency's duty to analyze those trucks' emissions. Rather, the Court emphasized repeatedly that proximate cause—not just "but for" cause—is essential to prompt an agency obligation under NEPA. 541 U.S. at 767 ("[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations."). Where an agency cannot prudentially control or mitigate an environmental impact, that impact "cannot be considered an effect of the agency action in any meaningful sense," even if it is foreseeable in an attenuated "but for" sense. *Id*.

Properly understood, *Public Citizen* compels the conclusion that the Surface Transportation Board need not quantify—to ***guess*** about—potential upstream oil and gas-development and downstream-refining emissions here even if, in some sense, those

emissions might not occur "but for" the Board's action approving construction of the rail line. The Board has no authority to regulate them, much less hold up projects so that it could *guess* what those emissions might be. To its credit, the Board agreed and approved construction of the rail line, which was in the public interest. The lower court erred in setting aside that action.

But like FMCSA in *Public Citizen*, the Board "has no ability to prevent" oil and gas drilling in the Uinta Basin, the operation of pipelines or refineries, or the downstream use of fossil fuels shipped over the railway—wherever in the world those fuels might end up. *Id*. at 770. Those matters lie within the regulatory ambit of the BLM, the Pipeline and Hazardous Materials Safety Administration, the Environmental Protection Agency, the State of Utah, and myriad other entities that are not the Board. The Board's "limited statutory authority" begins and ends with licensing the construction and operation of rail lines as "required by the present or future public convenience and necessity." 49 U.S.C. § 10901(c). That's all.

Implementing *Public Citizen* by Regulation

Admittedly, the lower courts generally, federal regulators, and even Congress have struggled with NEPA, including *Public Citizen*. The Council on Environmental Quality (CEQ) attempted to codify *Public Citizen*, but then in 2022 removed the phrase "reasonably close causal connection" from its NEPA regulations, 87 Fed. Reg. 23,453, 23,465 (Apr. 20,

2022), and Congress recently codified the requirement that agencies examine "reasonably foreseeable environmental effects," whatever that means, 42 U.S.C. § 4332(2)(C)(i); *see* 2023 Act § 321(a)(3)(B), 137 Stat. 38. However, these changes do not diminish the importance of proximate cause as a limiting principle for agencies' NEPA obligations.

To its credit, CEQ's explanation for its regulatory revision did not explicitly say that agencies must analyze effects that have only an attenuated, "but for" connection to agency actions. *See* 87 Fed. Reg. at 23,465. Instead, CEQ indicated that the "rule of reason" dictated the need for a close causal relationship between an agency action and its alleged effects. *Id*. Similarly, while Congress amended NEPA to specify that agencies must examine "reasonably foreseeable environmental effects," in practice, the agencies and lower courts are up-in-the-air when it comes to *limiting* the regulators' NEPA obligations, so they are afraid to approve and let go forward important projects on federal lands.

NEPA does not demand such angst. This Court has perhaps most succinctly stated it as: an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976). And an agency has no power to act "unless and until Congress confers power upon it." *La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). So the

Surface Transportation Board cannot delve—and it *could not have* delved—into hypotheticals by guessing about future upstream oil and gas development and future downstream refining worldwide, wherever the oil from the Uinta Basin *might* go and despite the lower court's judgment. *See id.*

The lower court's approach injects standardless conjecture into every NEPA analysis. Applying the lower court's reasoning, ***every*** agency action becomes a reckoning on climate policy. That would be, in fact it is, disastrous in practice.

Example: NEPA Stops Oil and Gas Development

This is not idle speculation. By requiring the Board to quantify downstream emissions from any oil and gas production, no matter how attenuated from the agency's action, the lower court would open the door to similarly expansive NEPA challenges across a broad swath of federal decision-making.

Recall that anti-development groups get at least ***three bites of the apple*** when wielding NEPA as a weapon to prevent or shut down oil and gas development and similarly have multiple chances to challenge forest-management projects. *Supra* at Argument § I. The lower court's expansive, invasive approach to NEPA in this case would enable completely unreasonable regulatory actions and lower-court decisions that prevent realization of the public interest in the form of oil and gas development and active forest management.

Taking oil and gas development as an example: development of nearly every federal oil and gas lease offered for sale by the BLM since 2015, in seven states, is currently stymied by NEPA litigation in the D.C. Circuit's and Ninth Circuit's lower courts. The agency and producers are regularly whipsawed by lower-court decisions that order more NEPA ***guesses***—depending on the judges' preferences—on climate impacts, including from transportation of oil and gas to market and eventual downstream combustion.

A group of legal challenges brought in the U.S. District Court for the District of Columbia illustrate the detrimental delays that result when courts do not confine an agency's NEPA-review responsibilities to the impacts that are within the agency's statutory authority.

In 2016, anti-development groups challenged eleven BLM oil and gas lease sales in Wyoming, Colorado, and Utah. In 2019, the court granted in part the claims as to the *Wyoming* federal oil and gas lease sales, concluding that the BLM violated NEPA by: failing to (1) quantify guesses of greenhouse gas emissions; (2) pinpoint downstream uses' greenhouse gas emissions, and (3) consider cumulative impacts of quantified greenhouse gas emissions compared to regional and national emissions. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). The court remanded the BLM's decisions and enjoined the agency from approving any development on the ***Wyoming-only*** leases until the agency conducted the curative NEPA analysis.

The agency did so, but the anti-development groups at once amended their complaint to challenge the supplemental analysis. The court then also found deficiencies and remanded the Wyoming leasing decisions a third analysis and again restricted development—all while leaving the BLM and the leaseholders of later issued lease sales guessing as to what the governing NEPA standard would be, and whether ***any*** of the leases across several States would survive to see development. *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020).

Meanwhile, the anti-development groups brought even more complaints challenging the BLM's analyses of other oil and gas lease sales from 2017 through 2020—covering millions of acres of federal minerals in five Western states. *WildEarth Guardians v. Haaland*, 1:20-cv-00056 (D.D.C. 2020); *WildEarth Guardians v. Haaland*, 1:21-cv-00175 (D.D.C. 2021). In 2021, the BLM and the plaintiffs settled the claims, shutting oil and gas interests out of those discussions. Without regard to the limits on the BLM's authority, the agency agreed to conduct more NEPA analyses—guesses about attenuated issues—on greenhouse gases and climate impacts for the thousands of the leases challenged in the various cases, further tying up those thousands of leases covering millions of acres across several States. *See, e.g.*, *WildEarth Guardians v. Haaland*, 1:16-cv-01724, Doc. 227-1 (D.D.C. Mar. 4, 2022).

As part of the new supplemental analysis, the BLM analyzed *other* federal oil and gas lease sales that were not subject to the anti-development groups'

complaints. In total, the agency addressed ***seventy-five*** different federal oil and gas lease sales covering seven states. *See* Supp. E.A. for Greenhouse Gas Emissions Related to Oil and Gas Leasing in Seven States from February 2015 to December 2020, DOI-BLM-WO-3100-2023-0001-EA.[9]

While the BLM released a draft supplemental analysis for public review and comment in late 2022—years and years after issuing the leases, which at the time were *also* supported by exhaustive NEPA analyses— the agency ***to this day*** has not finalized it or issued a Record of Decision. As a result, the BLM has taken the position that leaseholders cannot develop valid leases issued as long ago as 2015.

The lengthy delays affect not only the challenged federal leases, but also—because of the nature of oil and gas development—the development of adjacent private, state, and federal oil and gas interests. The business impacts of these delays are significant. In aggregate, the face value of these sold leases is approximately $471 million, with millions more invested in due diligence review and capital allocation for exploration and development, and billions in lost revenue from not being able to develop these stranded assets.

In sum, by wielding NEPA as a weapon in a way that Congress never intended, the anti-development groups, the regulators and the lower courts—like the lone dissenter at the Surface

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[9] https://eplanning.blm.gov/eplanning-ui/project/2022218/510 (last visited Aug. 8, 2024).

Transportation Board who decided that he alone knew that "***Decarbonization is national policy***," Pet.App.146a (emphasis in original)—get exactly what they want: indefinite delays of oil and gas production (and, similarly, forest management) on federal lands, notwithstanding the public interest.

The most recent report analyzing the federal circuit courts' decisions on NEPA challenges says that five out of the six cases in which the circuit courts found a NEPA violation involved ***oil and gas or mineral interests***. The sixth case involved a federal energy company's (Tennessee Valley Authority's) decision to remove ***timber*** for a transmission project. *See* NEPA Annual Report 2022.[10] The oil and gas and timber industries suffer unfairly.

This Court should put NEPA back into its proper role. *Public Citizen*'s anchoring in proximate cause—in being *reasonable*—is no mere suggestion; it is an indispensable safeguard against untenable speculation and uncheckable regulatory actions. Where, as here, an agency has no statutory authority to prevent downstream impacts, it need not quantify those impacts in an EIS.

The Board took a hard look at the effects of approving construction of the Uinta Basin Railway. In NEPA, Congress demanded no more.

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[10] https://naep.memberclicks.net/assets/annual-report/NEPA_Annual_Report_2022.pdf (last visited Aug. 28, 2024)

CONCLUSION

It is the role of elected legislators, not federal regulators or the courts, to define and implement a national climate and energy policy. Those dissatisfied with current priorities can advocate for change through Congress, but they cannot wield NEPA as a sword to strike down the public interest.

For the foregoing reasons, the judgment of the lower court should be reversed.

Respectfully submitted,

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