

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 Circuit**

**BRIEF OF *AMICI CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION AND
THE COMPETITIVE ENTERPRISE INSTITUTE
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

Table of Authorities..... ii

Interest of *Amici Curiae*..... 1

Summary of Argument.....2

Argument.....5

I. NEPA Is Not The Magna Carta.....5

II. NEPA Has Morphed Into a Compliance Regime
Congress Did Not Intend.....7

III. NEPA Only Requires Study of Effects Caused
By The Specific Proposed Action Within The
Agency’s Regulatory Power11

A. Under *Public Citizen*, Agencies Need Not Study
Effects Beyond Their Jurisdiction 11

B. Congress Statutorily Cabined the Scope of
NEPA Review to Effects Directly Flowing From
The Proposed Action Under Review 14

C. The Decision Below Mistakenly Expanded
NEPA’s Sweep and Overrode Congress’s
Legislative Choices19

IV. The Emperor Has No Clothes: CEQ Has No
Legislative Rulemaking Authority23

Conclusion27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>350 Mont. v. Haaland</i> , 29 F.4th 1158 (9th Cir. 2022)	13, 14
<i>Airport Impact Relief, Inc. v. Wykle</i> , 192 F.3d 197 (1st Cir. 1999)	23
<i>Alaska v. Carter</i> , 462 F. Supp. 1155 (D. Alaska 1978).....	26
<i>Alaska Survival v. Surface Transp. Bd.</i> , 705 F.3d 1073 (9th Cir. 2013).....	20, 21
<i>Balt. Gas & Elec. Co. v. NRDC</i> , 462 U.S. 87 (1983).....	6
<i>Barnes v. Dep’t of Transp.</i> , 655 F.3d 1124 (9th Cir. 2011).....	10
<i>Basel Action Network v. Mar. Admin.</i> , 370 F. Supp. 2d 57 (D.D.C. 2005).....	17
<i>Cape May Greene, Inc. v. Warren</i> , 698 F.2d 179 (3d Cir. 1983)	18
<i>Citizens against Burlington, Inc. v. Busey</i> , 938 F.2d 190 (D.C. Cir. 1991)	3, 5, 18
<i>City of Shoreacres v. Waterworth</i> , 420 F.3d 440 (5th Cir. 2005).....	13

<i>Conservation Cong. v. Finley</i> , 774 F.3d 611 (9th Cir. 2014).....	5
<i>Cronin v. U.S. Dep’t of Agric.</i> , 919 F.2d 439 (7th Cir. 1990).....	8
<i>Ctr. for Biological Diversity v. FERC</i> , 67 F.4th 1176 (D.C. Cir. 2023)	6
<i>Ctr. for Biological Diversity, Manasota-88, Inc. v. U.S. Army Corps of Eng’rs</i> , 941 F.3d 1288 (11th Cir. 2019). 12, 14, 17, 21, 24	
<i>Dep’t of Transp. v. Public Citizen</i> , 41 U.S. 752 (2004).....	2, 5, 6, 12, 14, 18
<i>Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.</i> , 729 F. App’x 287 (5th Cir. 2018).....	6, 7
<i>Ensco Offshore Co. v. Salazar</i> , 781 F. Supp. 2d 332 (E.D. La. 2011)	19
<i>FDA v. All. for Hippocratic Med.</i> , 602 U.S. 367 (2024).....	7
<i>FEC v. Cruz</i> , 596 U.S. 289 (2022).....	24
<i>Food & Water Watch v. U.S. Dep’t of Agric.</i> , 1 F.4th 1112 (D.C. Cir. 2021)	23, 25, 26
<i>Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.</i> , 252 F.3d 246 (3d Cir. 2001)	19

<i>Greene Cty. Planning Bd. v. Fed. Power Com.,</i> 455 F.2d 412 (2d Cir. 1972)	25
<i>Greenpeace USA v. Stone,</i> 748 F. Supp. 749 (D. Haw. 1990).....	17
<i>Gross v. FBL Financial Services, Inc.,</i> 557 U.S. 167 (2009)	15
<i>Hardt v. Reliance Standard Life Ins. Co.,</i> 560 U.S. 242 (2010)	15
<i>Hiram Clarke Civic Club v. Lynn,</i> 476 F.2d 421 (5th Cir.1973).....	25
<i>Int’l Bhd. of Teamsters v. Dep’t of Transp.,</i> 724 F.3d 206 (D.C. Cir. 2013)	13
<i>Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.,</i> 566 U.S. 560 (2012)	15
<i>Lemon v. Geren,</i> 514 F.3d 1312 (D.C. Cir. 2008)	5
<i>Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Com.,</i> 869 F.2d 719 (3d Cir. 1989)	27
<i>Loper Bright Enterprises v. Raimondo,</i> 144 S. Ct. 2244 (2024).....	23
<i>Metropolitan Edison Co. v. People Against Nuclear Energy,</i> 460 U.S. 766 (1983)	11, 12

<i>Morrison v. Nat’l Austl. Bank Ltd.</i> , 561 U.S. 247 (2010).....	18
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	21, 22
<i>NAACP v. FPC</i> , 425 U.S. 662 (1976).....	18, 21
<i>Nat’l Helium Corp. v. Morton</i> , 455 F.2d 650 (10th Cir.1971).....	25
<i>Nat’l Wildlife Fed’n v. Sec’y of the U.S. Dep’t of Transp.</i> , 960 F.3d 872 (6th Cir. 2020).....	21
<i>Nestle USA, Inc. v. Doe</i> , 593 U.S. 628 (2021).....	18
<i>Nevada v. DOE</i> , 457 F.3d 78 (D.C. Cir. 2006).....	26
<i>New Prime Inc. v. Oliveira</i> , 586 U.S. 105 (2019).....	15
<i>NRDC v. EPA</i> , 859 F.2d 156 (D.C. Cir. 1988).....	14, 18
<i>NRDC v. Nuclear Reg. Comm’n</i> , 647 F.2d 1345 (D.C. Cir. 1981).....	17
<i>N.Y. Cent. Sec. Corp. v. United States</i> , 287 U.S. 12 (1932).....	21

<i>Protect Our Parks, Inc. v. Buttigieg</i> , 39 F.4th 389 (7th Cir. 2022)	5, 14, 17
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989)	5
<i>Ry. Labor Executives' Assn's v. Nat'l Mediation Bd.</i> , 29 F.3d 655 (D.C. Cir. 1994)	24
<i>Seattle Audubon Soc. v. Moseley</i> , 80 F.3d 1401 (9th Cir. 1996)	18, 19
<i>Shapiro v. United States</i> , 335 U.S. 1 (1948)	12
<i>Sierra Club v. Bosworth</i> , 510 F.3d 1016 (9th Cir. 2007)	10
<i>Sierra Club v. Clinton</i> , 746 F. Supp. 2d 1025 (D. Minn. 2010)	17
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017)	5, 13
<i>Sierra Club v. FERC</i> , 827 F.3d 59 (D.C. Cir. 2016)	5
<i>Sierra Club v. FERC</i> , 827 F.3d 36 (D.C. Cir. 2016)	12, 13, 17
<i>Sierra Club v. U.S. Army Corps of Eng'rs</i> , 803 F.3d 31 (D.C. Cir. 2015)	6

<i>Town of Barnstable v. FAA</i> , 740 F.3d 681 (D.C. Cir. 2014)	13
<i>Vt. Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978)	8
<i>Wash. Env't Council v. Bellon</i> , 732 F.3d 1131 (9th Cir. 2013)	14
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022)	24
<i>Winter v. NRDC, Inc.</i> , 555 U.S. 7 (2008)	5
<i>Wyoming v. DOI</i> , 493 F. Supp. 3d 1046 (D. Wyo. 2020)	19
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	26

Statutes

Fiscal Responsibility Act of 2023, Pub. L. 118-5, § 321, 137 Stat. 10, 38 (2023)	21
National Environmental Policy Act of 1969, Pub. L. 91-190, §§ 102(C)(i)– (ii), 83 Stat. 852, 853 (1970)	16
16 U.S.C. § 824a(a)	18
42 U.S.C. § 4331(a)	18

42 U.S.C. § 4331(b)(2)	18
42 U.S.C. § 4332(C)	5, 18
42 U.S.C. § 4332(C)(i) (2023)	16
42 U.S.C. § 4332(C)(ii) (2023)	16
42 U.S.C. § 4333	18, 27
42 U.S.C. § 4342	25
42 U.S.C. § 4344	24
43 U.S.C. § 1332(3).....	18
49 U.S.C. § 10101(4).....	20
49 U.S.C. § 10101(7).....	20
49 U.S.C. § 10101(11).....	20
49 U.S.C. § 10501(a)(1)	19
49 U.S.C. § 10502	19
49 U.S.C. § 10502(a).....	21
49 U.S.C. § 10901	19
49 U.S.C. § 10901(a).....	21
49 U.S.C. § 10901(b).....	21
49 U.S.C. § 10901(c)	21

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43 Fed. Reg. 55,978 (Nov. 29, 1978)	26
85 Fed. Reg. 43,304 (July 16, 2020).....	23
89 Fed. Reg. 35,442 (May 1, 2024).....	15

Rules

Sup. Ct. R. 37.3.....	1
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Should the National Environmental Policy Act Be Extended to Major Federal Decisions Significantly Affecting the Environment of Sovereign Foreign States and the Global Commons,
1 Vill. Envtl. L.J. 431 (1990)..... 17, 18
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BRIEF OF *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.3, *amici curiae* respectfully submit this brief in support of Petitioners.¹

INTEREST OF *AMICI CURIAE*

Amicus curiae Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, AFPF appears as *amicus curiae* before federal and state courts.

Amicus curiae Competitive Enterprise Institute (“CEI”) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since 1984, CEI has carried out its mission through policy analysis, commentary, and litigation.

This case raises a familiar problem. Too often, federal agencies overstep their authority by substituting their policy preferences for those mandated by Congress in the law. This problem can

¹ *Amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

be exacerbated when a judicial panel erroneously imports atextual policy considerations into a statute, here, the National Environmental Policy Act (“NEPA”). Neither agencies nor Article III courts should be in the business of substituting their policy preferences for those of Congress, as set forth in the text of statutes.

SUMMARY OF ARGUMENT

This case is not about what constitutes sound energy, infrastructure, environmental, or social policy. The question presented has nothing to do with those issues, which must be addressed through substantive authorizing statutes, subject to constitutional limits. Instead, this case is about whether NEPA, as enacted by Congress and construed by this Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), requires agencies to study questions beyond their regulatory authority and outside their expertise. The answer is no.

Congress wrote NEPA as a purely procedural statute that does not dictate outcomes. It merely obligates agencies to study the proximate environmental effects of proposed actions within their jurisdiction and report the results. But over the past 50 years some lower courts have transmogrified NEPA into a substantive, outcome-oriented environmental statute that allows project opponents to block projects that do not align with their policy preferences. This decades-long accretion has layered onto the statute an expansive and elaborate body of compliance requirements going far beyond what the text requires and has led to the creation of, in essence, a NEPA industrial complex.

The decision below—which held the Surface Transportation Board (“STB”) had “responsibility under NEPA to identify and describe” upstream effects “it lacks authority to prevent, control, or mitigate,” Pet. App. 36a—highlights the scope of the problem. It is the jurisprudential equivalent of requiring a law student to obtain a medical degree as a condition precedent to practicing law. That cannot be right. And it makes zero sense.

This extratextual gloss on NEPA cannot be allowed to stand. “Just as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede.” *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) (Thomas, J.). And the time has come to closely examine the operative statutory text. *Amicus* respectfully submits it is well worth the effort. A thorough statutory investigation may reveal that a large body of NEPA precedent has no textual foundation, instead resting on nothing more than statutory quicksand and judicial policy preferences.

A root cause of the problem is that courts have long assumed the Council on Environmental Quality (“CEQ”) has broad authority to issue NEPA regulations that bind other agencies and are entitled to judicial deference. CEQ, in turn, has created an elaborate body of NEPA interpretations that venture far beyond NEPA’s statutory requirements. This has, in turn, led to judicial interpretations of CEQ regulations straying yet further from NEPA’s text.

The problem is that CEQ does not have, and never has had, *any* authority to issue binding NEPA regulations. Instead, its charge is to serve a purely

advisory function and make policy recommendations. Indeed, shortly after NEPA's passage, Congress enacted major substantive authorizing statutes, such as the Clean Air Act of 1970 and the Clean Water Act of 1972, which empowered the Environmental Protection Agency, underscoring CEQ's modest, advisory role. An Executive Order issued *years after* NEPA's enactment cannot retroactively revise NEPA to grant CEQ sweeping "legislative" rulemaking powers that Congress withheld from it. The atextual judicial gloss on NEPA—based, in part, on a misguided reliance on CEQ's legislative project—likewise cannot change or add to the actual words Congress enacted into law.

As relevant here, nothing in NEPA requires agencies to study indirect or cumulative effects outside of the scope of the specific proposed agency action under review. Instead, agencies must only study effects that are proximately caused by specific decisions within their regulatory authority. Each individual agency must also comply with their organic statute, which sets forth the factors Congress intended the agency to consider in assessing the proposed action. This limits the scope of NEPA to matters within each agency's statutory authority as it considers each individual project. In sum, NEPA reviews must be tethered to effects proximately caused by the specific agency decision that are within the scope of the agency's jurisdiction, guided by the agency's mission as set forth by Congress.

For the foregoing reasons, this Court should reverse the decision below.

ARGUMENT

I. NEPA Is Not The Magna Carta.

As a threshold matter, it is important to understand that “NEPA is not a green Magna Carta[.]” *Busey*, 938 F.2d at 194. The statute merely obligates agencies to create reports under certain circumstances. See 42 U.S.C. § 4332(C). “NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Pub. Citizen*, 541 U.S. at 756–57 (citations omitted); see *Winter v. NRDC, Inc.*, 555 U.S. 7, 23 (2008). It is thus “not a substantive” statute, *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389, 397 (7th Cir. 2022), and “does not provide substantive” requirements, *Conservation Cong. v. Finley*, 774 F.3d 611, 615 (9th Cir. 2014).

“As a procedural statute, NEPA does not mandate any particular outcome.” *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016). Instead, it “*is all about the journey.*” *Sierra Club v. FERC*, 867 F.3d 1357, 1380 (D.C. Cir. 2017) (hereinafter “*Sabal Trail*”) (Brown, J., concurring in part, dissenting in part). “Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). “Preparation of an environmental impact statement will never force an agency to change the course of action it proposes.” *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (cleaned up). “Congress in enacting NEPA . . . did not require agencies to elevate

environmental concerns over other appropriate considerations.” *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97–98 (1983) (citations omitted). If it complies with the statute’s procedural requirements, an agency is free to proceed with the proposed action regardless of the nature, intensity, or scope of potential environmental impacts.

An agency’s analytical obligations are tempered by a “rule of reason.” *Pub. Citizen*, 541 U.S. at 767; see *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1182 (D.C. Cir. 2023) (“When reviewing an agency’s compliance with NEPA, the rule of reason applies, and we consistently decline to flyspeck an agency’s environmental analysis.” (cleaned up)). For example, if fewer than twenty miles of a 600-mile project is on federal land, NEPA only requires study of the portion of the project under federal control. See *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 54 (D.C. Cir. 2015) (Brown, J., concurring in the judgment).

In sum, “NEPA imposes no duty for federal agencies (or anyone else) to use the reports to protect the environment.” Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It* 3 (Oct. 16, 2018).² “NEPA cannot prevent informed[]” agency decisions regardless of the consequences that may flow from those decisions. *Ecosystem Inv., Partners v. Crosby*

² <https://rtp.fedsoc.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf>.

Dredging, L.L.C., 729 F. App'x 287, 295 (5th Cir. 2018). And Congress never intended for it to be used as a tool to block projects some may disagree with.

II. NEPA Has Morphed Into a Compliance Regime Congress Did Not Intend.

But in the past decades, project opponents have weaponized NEPA as a tool to block projects at odds with their policy views.³ And “a half century of NEPA implementation has transformed this seemingly innocuous agency reporting duty into the most costly, burdensome and ineffective environmental law in the history of the United States.” Rutzick, *supra*, 3.

Regulatory and judicial policymaking has spawned a sprawling NEPA industrial complex. “NEPA compliance’ now consumes as much as one billion dollars of direct federal expenditures every year, or more . . . , and demands the full-time work effort of hundreds or thousands of federal employees and contractors . . . in every agency of the government.” *Id.* NEPA also imposes massive costs on States, localities, and private citizens seeking federal funds or permits. *See id.* And as Judge Posner has observed, “a full-fledged” EIS “is very costly and time-consuming to prepare and has been the kiss of death to many a

³ In an appropriate case, this Court should revisit the extent to which such groups are allowed under Article III to bring NEPA challenges. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 405 (2024) (Thomas, J., concurring); Rutzick, *supra*, 4 n.9.

federal project[.]”⁴ *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990). *Cf. Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (“Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative[.]”).

The statute “is notorious for special interest abuse” and “can be used by anyone interested in frustrating or delaying a major government action.” Frank B. Cross, *The Judiciary and Public Choice*, 50 *Hastings L.J.* 355, 375 (1999). Project opponents “place[] a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects the monkey wrencher opposes.” Bradley C. Karkkainen, *Whither NEPA?*, 12 *N.Y.U. Env’tl. L.J.* 333, 339 (2004); *see* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 *Cal. L. Rev.* 929, 972 (1993) (describing “sandbagging” to interfere with projects).

Project opponents frequently use NEPA litigation as a tactic to block projects through delay. Indeed, a recent report found that “[b]etween 2013 and 2022, circuit courts heard approximately 39 NEPA appeals cases per year, a 56% increase over the rate from 2001 to 2015.” Nikki Chiappa et al., *Understanding NEPA*

⁴ “NEPA impact statements were once less than ten pages[.]” James W. Coleman, Fixing the Environmental Policy Act, U.S. House of Representatives House Committee on Natural Resources, 4 (April 25, 2018), <https://www.congress.gov/115/meeting/house/108215/witnesses/HHRG-115-II00-TTF-ColemanJ-20180425.PDF>.

Litigation 3 (2024).⁵ “On average, 4.2 years elapsed between publication of an environmental impact statement or environmental assessment and conclusion of the corresponding legal challenge at the appellate level.” *Id.*

“NEPA and the threat of litigation [also] impose a sizable burden on agencies[.]” *Id.* at 5. “The U.S. Forest Service, the agency that shoulders the greatest NEPA burden, provides a prime example. By its own admission, excessive environmental reviews have prevented the Forest Service from effectively managing forests, at one point consuming almost 40% of the agency’s budget.” *Id.* at 4 (citing USDA Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management* (2002)).⁶ The excessive burdens the threat of NEPA litigation impose on Forest Service resources endangers humans and property, hampering the Forest Service. See Eric Edwards and Sara Sutherland, *Does Environmental Review Worsen the Wildfire Crisis?* (June 2022).⁷

Experience has shown that pointless paperwork requirements flowing from judicial expansion of

⁵ https://thebreakthrough.imgix.net/Understanding-NEPA-Litigation_v4.pdf.

⁶ <https://www.fs.usda.gov/projects-policies/documents/Process-Predicament.pdf>.

⁷ <https://www.perc.org/wp-content/uploads/2022/06/PERC-PolicyBrief-NEPA-Web.pdf>.

NEPA have real-world consequences.⁸ *Cf. Barnes v. Dep't of Transp.*, 655 F.3d 1124, 1143 (9th Cir. 2011) (Ikuta, J., dissenting) (“[T]he majority sides with delay and air pollution by imposing pointless [NEPA] paperwork on the agency before the necessary project can go forward.”). “In 1999, for instance, delays in the NEPA process for the prescribed burning of the Six Rivers National Forest resulted in the wildfire that the prescribed burning was meant to prevent from occurring.” Brian Potter et al., *How to Stop Environmental Review from Harming the Environment* (2022).⁹ *Cf. Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) (Kleinfeld, J., concurring) (questioning whether common-sense fire-protection measures require years of study under NEPA). A similar event occurred in 2003. *See* Statement of Abigail Kimbell, USDA Forest Service, Before the U.S. House of Representatives Committee on Resources (April 23, 2005).¹⁰

This Court should also be cognizant of the real-world harms that flow from *Sabal Trail* and its progeny. Consider the decision below. “The railway project into the Uinta Basin would empower the individuals that the Utah AFL-CIO represents within the labor industry to secure meaningful employment[.]” Utah AFL-CIO Cert. Amicus Br. 1. “A long-awaited project in a region that has experienced

⁸ “In recent decades NEPA has imposed tens of billions of dollars of unnecessary cost on the American economy with no proven corresponding environmental benefit.” Rutzick, *supra*, 23.

⁹ <https://ifp.org/environmental-review/>.

¹⁰ https://www.fs.usda.gov/sites/default/files/legacy_files/media/types/testimony/042305.pdf.

cycles of prosperity and decline for far too many years, this eighty-eight-mile short-line railroad would finally provide Vernal, Utah and Roosevelt, Utah some stability in their economies.” *Id.* at 5–6. Indeed, the “[p]roject holds the potential to employ thousands of . . . hard-working, skilled professional trade workers, and would contribute to rebuilding the middle class.” *Id.* at 13. The “railroad would [also] dramatically improve the economy and the lives of the Ute Indian Tribe and others who live in the Uintah Basin.” Ute Indian Tribe Cert. Amicus Br. 2–3. Project opponents blocked that opportunity for thousands of people (and their families) to live the American Dream and achieve prosperity. “Blocking the Project stifle[d] economic, environmental, and safety improvements in the region and hurt[] area residents.” Utah Cert. Amicus Br. 3. That was wrong. And it was contrary to both the statute and this Court’s precedent.

III. NEPA Only Requires Study of Effects Caused By the Specific Proposed Action Within The Agency’s Regulatory Power.

All of the above-described unnecessary delays and litigation would unfortunately have to be tolerated by this Court if they resulted from a proper textual understanding of the statute that Congress wrote. But they do not. Instead, this Court should mow the jurisprudential weeds and return NEPA to its statutory roots.

A. Under *Public Citizen*, Agencies Need Not Study Effects Beyond Their Jurisdiction.

In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), this Court

construed the terms “‘environmental effect’ and ‘environmental impact’ in § 102” of NEPA “to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue,” *id.* at 774. In *Public Citizen*, this Court reaffirmed that “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause” analogous “to the ‘familiar doctrine of proximate cause from tort law.’” 541 U.S. at 767 (citing *Metro. Edison Co.*, 460 U.S. at 774). “[A] ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect[.]” *Id.* In other words, “NEPA does not cover all ‘effects’ that are ‘caused by’ a change in the physical environment in the sense of ‘but for’ causation.” *Ctr. for Biological Diversity, Manasota-88, Inc. v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1295 (11th Cir. 2019) (quoting *Metro. Edison Co.*, 460 U.S. at 774).

Under *Public Citizen*, “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant cause’ of the effect.”¹¹ 541 U.S. at 770; see *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (hereinafter

¹¹ The Fiscal Responsibility Act retains this Court’s construction of “environmental effect.” See Fiscal Responsibility Act of 2023 (“FRA”), Pub. L. 118-5, § 321, 137 Stat. 10, 38 (2023) (codified at 42 U.S.C. §§ 4332(C)(i)–(ii) (2023)); see also *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (“In adopting the language used in the earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.” (cleaned up)).

“*Freeport*”). Cf. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005) (“[I]t is doubtful that an environmental effect may be considered as proximately caused by the action of a particular federal regulator if that effect is directly caused by the action of another government entity over which the regulator has no control.”). This means that “when the occurrence of an indirect environmental effect is contingent upon” the actions of “a separate agency, the agency under review is not required to address those indirect effects in its NEPA analysis.” *Sabal Trail*, 867 F.3d at 1380 (Brown, J., concurring in part, dissenting in part). Jurisdictional limitations on an agency’s authority break the causal chain for purposes of NEPA. Put another way, “[a]n effect the agency is powerless to prevent does not fall within NEPA’s ambit.” *Id.* at 1381 (Brown, J., concurring in part, dissenting in part).

Agencies therefore are not required to consider effects outside of their jurisdiction.¹² See *Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) (“Because the FAA simply lacks the power to act on whatever information might be contained in the [EIS], NEPA does not apply[.]”). And an agency’s “analysis should not include effects that the agency ‘has no ability to prevent . . . due to its limited statutory authority over the relevant actions.’” *350 Mont. v.*

¹² Nor does NEPA require agencies to consider alternatives outside of their jurisdiction and regulatory power. See *Int’l Bhd. of Teamsters v. Dep’t of Transp.*, 724 F.3d 206, 217 (D.C. Cir. 2013) (NEPA does not require an agency to consider alternatives it “lacks authority to impose”).

Haaland, 29 F.4th 1158, 1188 (9th Cir. 2022) (Nelson, J., dissenting) (quoting *Pub. Citizen*, 541 U.S. at 770).

Nor should NEPA analyses extend to effects that are remote in time, geographically remote, or the product of a lengthy causal chain, and those that would occur regardless of the proposed agency action.¹³ *Cf. Protect Our Parks*, 39 F.4th at 399 (“NEPA requires agencies to consider only environmental harms that are both factually and proximately caused by a relevant federal action.”). Without these guardrails, agencies could be empowered to act as “de facto environmental-policy czar[s].” *Ctr. for Biological Diversity, Manasota-88*, 941 F.3d at 1299. *Cf. NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (“EPA may not . . . under the guise of carrying out its responsibilities under NEPA transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities[.]”).

B. Congress Statutorily Cabined the Scope of NEPA Review to Effects Directly Flowing From The Proposed Action Under Review.

First principles of statutory interpretation underscore this basic point. “[I]t’s a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.”

¹³ For example, it is near impossible to draw a causal connection between any individual project and global phenomena. *See Wash. Env’t Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013); *see also 350 Mont.*, 29 F.4th at 1186 (Nelson, J., dissenting).

New Prime Inc. v. Oliveira, 586 U.S. 105, 113 (2019) (cleaned up). “As in all such cases, . . . [this Court] begin[s] by analyzing the statutory language, ‘assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.’” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted)).

“Effects” is an undefined term in the statute. “When a term goes undefined in a statute,” this Court “give[s] the term its ordinary meaning.” *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (citation omitted). As dictionaries have long made clear, an “effect” is “something produced by an agent or cause”; the word “may be chosen to designate only those factors in a complex situation that may be definitely attributed to a known and immediate cause.”¹⁴ *Effect*, Webster’s Seventh New Collegiate Dictionary 264 (1972); *see Effect*, Black’s Law Dictionary 461 (5th ed. 1979) (“Effect, n. That which is produced by an agent or cause; result; outcome; consequence.”); *Effect*, Black’s Law Dictionary 605 (4th ed. 1951) (defining “[e]ffect” to mean “[r]esult.”). This has not changed. *See Effect*, Black’s Law Dictionary (12th ed. 2024) (“Something produced by an agent or cause; a result, outcome, or consequence.”).

¹⁴ CEQ recently reimagined the entire concept of “effects” in a way that is at odds with, and appears to reject, the statute’s text. *See* 89 Fed. Reg. 35,442, 35,575 (May 1, 2024) (codified at 40 C.F.R. § 1508.1(i)) (defining “[e]ffects” or “impacts”).

Other statutory language further supports this construction of “effects.” As relevant here, NEPA requires agencies to include in the required report discussion of “the environmental impact of *the proposed action*” and “any adverse environmental effects which *cannot* be avoided should *the proposal* be implemented[.]” National Environmental Policy Act of 1969, Pub. L. 91-190, §§ 102(C)(i)–(ii), 83 Stat. 852, 853 (1970) (codified at 42 U.S.C. §§ 4332(C)(i)–(ii)) (emphasis added).¹⁵ This makes pellucid that the scope of an agency’s NEPA study must be limited to the specific “proposed action” at issue and only study the “environmental effects” of that “proposal” and not extend to speculation about the independent actions of third parties, other federal and state agencies, or foreign bodies. The only “adverse environmental effects” that must be included in the report are those that “cannot be avoided”—and are certain to occur— as a result of, and directly and unavoidably caused by, the specific proposal the agency is reviewing.

As a definitional matter, this excludes effects that can only occur as a result of another agency’s decision, as well as the independent actions of third parties that are outside the scope of the specific proposal before the agency. NEPA’s text thus makes clear that as a matter of first principles agencies are not required to

¹⁵ In 2023, these provisions of NEPA were amended by the FRA. Those amendments do not retroactively apply to the 2021 Board Order. *See* Eagle County BIO 4 n.1. The FRA further clarified that the scope of NEPA analysis must be limited to the specific proposal under agency review. *See* 42 U.S.C. §§ 4332(C)(i)–(ii) (2023).

study indirect or cumulative effects. Those concepts are not present in the statutory language.

Possible upstream and downstream effects not directly attributable to the specific agency decision under NEPA review should not factor into the analysis. The independent decisions by *other* responsible state and federal agencies (and for that matter foreign governments) with regulatory authority over upstream and downstream activities, and the independent actions of third parties outside the sphere of proposal under review, break the causal chain. *See, e.g., Freeport*, 827 F.3d at 47. Under NEPA, “an agency is on the hook only for the decisions that it has the authority to make,” *Protect Our Parks*, 39 F.4th at 400, and should thus “draw the line at the reaches of its own jurisdiction.” *Ctr. for Biological Diversity, Manasota-88*, 941 F.3d at 1295.

Nor does NEPA alter the limits of an agency’s substantive statutory authority set by Congress.¹⁶ *See*

¹⁶ NEPA should also not be given extraterritorial reach. *Cf. NRDC v. Nuclear Reg. Comm’n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 761 (D. Haw. 1990); *Basel Action Network v. Mar. Admin.*, 370 F. Supp. 2d 57, 71 (D.D.C. 2005); *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1046 (D. Minn. 2010) (“the activities in Canada here are beyond the review of NEPA”). Indeed, “NEPA expressly restricts the extraterritorial environmental role that Congress intended agencies of the federal government to perform[.]” Scott C. Whitney, *Should the National Environmental Policy Act Be Extended to Major Federal Decisions Significantly Affecting the Environment of Sovereign Foreign States and the Global*

42 U.S.C. §§ 4332(C), 4333. NEPA “does not expand the jurisdiction of an agency beyond that set forth in its organic statute,” *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983), and “does not expand an agency’s substantive powers.” *NRDC v. EPA*, 859 F.2d at 169. It simply does not require an agency to evaluate issues over which it has no control. *Pub. Citizen*, 541 U.S. at 766–69. To the contrary, the scope of an agency’s NEPA analysis should be shaped and limited by the agency’s organic statute setting out the metes and bounds of its jurisdiction and the specific factors Congress intended for it to consider. After all, “an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives.”¹⁷ *Busey*, 938 F.2d at 196. *Cf. Seattle*

Commons, 1 Vill. Envtl. L.J. 431, 445 (1990). Its focus is instead on “present and future generations of Americans.” 42 U.S.C. § 4331(a); *see id.* § 4331(b)(2) (“all Americans”). NEPA was not intended to require study of global issues. *See Whitney*, 1 Vill. Envtl. L.J. at 471; *see also Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 634 (2021).

¹⁷ Many agencies’ organic statutes are sharply tilted toward prosperity, abundance, and economic growth—as opposed to degrowth—by promoting development critical to Americans’ ability to affordably heat and cool their homes, travel to visit family, have a reliable food supply, and pursue their livelihoods. *See, e.g.*, 16 U.S.C. § 824a(a); 43 U.S.C. § 1332(3); *see NAACP v. FPC*, 425 U.S. 662, 669–70 (1976) (“[T]he principal purpose of th[e] Power and Gas] Acts was to encourage the orderly

Audubon Soc. v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996) (agency need not consider options “inconsistent with its basic policy objectives”).

C. The Decision Below Mistakenly Expanded NEPA’s Sweep and Overrode Congress’s Legislative Choices.

Here, “the proposed action” was authorization by the STB to construct and operate a small rail line. *See* Pet. App. 74a–75a. “In 2020, the Seven County Infrastructure Coalition (Coalition) filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authorization to construct and operate an approximately 85-mile rail line” in rural Utah. Pet. App. 74a–75a. After over a year and a half of extensive study, consistent with its mission and organic statute, the STB issued an Order granting the Coalition’s exemption petition subject to certain conditions. *See* Pet. App. 122a.

The STB has “exclusive jurisdiction over transportation by railroad.” *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 250 n.1 (3d Cir. 2001) (citing 49 U.S.C. § 10501(a)(1)). The agency “is charged with the

development of plentiful supplies of electricity and natural gas at reasonable prices.”); *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 339 (E.D. La. 2011) (noting “OCSLA’s overriding policy of expeditious development”); *Wyoming v. DOI*, 493 F. Supp. 3d 1046, 1062 (D. Wyo. 2020) (“The purpose of the [MLA] is to promote the orderly development of oil and gas deposits . . . through private enterprise[.]” (cleaned up)).

economic regulation of various modes of surface transportation, primarily freight rail.” About, Surface Transportation Board, <https://www.stb.gov/about-stb/> (emphasis added). It is not an environmental regulator and has no role in setting environmental standards for locomotives.¹⁸

Congress has made its railroad transportation policy preferences clear. For instance, “ensure the development and continuation of a sound rail transportation system,” 49 U.S.C. § 10101(4); “reduce regulatory barriers to entry into and exit from the industry,” *id.* § 10101(7); and “encourage fair wages and safe and suitable working conditions in the railroad industry,” *id.* § 10101(11). That is what Congress has tasked the STB with doing.

Against this backdrop, the STB’s organic statute provides “the STB ‘shall’ grant an exemption from a provision of the statute if (1) application of that provision is not necessary to carry out the transportation policy and (2) the transaction is of limited scope or the application of the full statutory procedures is not needed to protect shippers from abuse of market power.”¹⁹ *Alaska Survival v. Surface*

¹⁸ Congress appears to have instead tasked EPA with doing so. See EPA, Regulations for Emissions from Locomotives, <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-emissions-locomotives>.

¹⁹ “Section 10901 sets forth a more detailed procedure for authorizing construction and operation of rail lines, which requires a determination that the activities are consistent with

Transp. Bd., 705 F.3d 1073, 1082 (9th Cir. 2013) (quoting 49 U.S.C. § 10502(a)). Those are the only permissible reasons why the STB may deny an exemption. *Cf. Nat'l Wildlife Fed'n v. Sec'y of the U.S. Dep't of Transp.*, 960 F.3d 872, 880 (6th Cir. 2020) (“Nor do the enumerated criteria allow the agency to make free-form environmental decisions.”).

The STB thus lacked power to deny an exemption based on upstream (or downstream) effects outside of its jurisdiction.²⁰ *See Ctr. for Biological Diversity, Manasota-88*, 941 F.3d at 1299 (“Because the statute authorizes the Corps to deny a permit only if the discharge itself will have an unacceptable environmental impact, the regulations cannot empower the Corps to deny permits for any other reason—including downstream . . . effects”). Indeed, it would be arbitrary and capricious for the STB to deny an exemption based on factors Congress did not intend for it to consider, such as policy considerations outside of its jurisdiction. *See Motor Vehicle Mfrs.*

the public convenience and necessity.” *Alaska Survival*, 705 F.3d at 1082 (quoting 49 U.S.C. § 10901(a)–(c)). That standard does not authorize the STB to deny authorization based on considerations outside of its charge. *See N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (“[T]he term ‘public interest’ as thus used” in the Transportation Act of 1920 “has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities[.]”); *see also NAACP v. FPC*, 425 U.S. at 669 (“[T]he use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare.”).

²⁰ The decision below found otherwise. *See* Pet. App. 37a. That was error. *See supra* n.19.

Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Thus, the STB was required to discuss in its EIS the environmental impact of the rail line and any adverse environmental effects that would necessarily occur as a direct result of the rail line. That is all. The STB did this—and more—describing the proposed action's effects on water resources, special status species, wayside noise, land use and recreation, socioeconomics, tribal concerns, vehicle safety and delay, rail operations safety, big game, fish and wildlife, vegetation, geology and soils, hazard waste sites, construction noise, vibration, energy, paleontological resources, visual resources, air quality, and greenhouse gas emissions.²¹ See *Unita Basis Railway Final Environmental Impact Statement* (“Final EIS”), STB Docket No. FD 36284, Vol. I, at S-8–S-12 (Aug. 6, 2021) (JA 121–34). The Final EIS and supporting materials comprised three volumes, totaling 3,650 pages.²²

Still, the decision below found that this was not good enough for government work. It instead held that the STB had “responsibility under NEPA to identify and describe” upstream effects “it lacks authority to

²¹ The Final EIS found that “emissions during construction and operation would represent a small percentage of statewide greenhouse gas emissions in Utah.” Final EIS S-12 (JA 132).

²² The Final EIS and supporting materials are available at <http://www.uintabasinrailwayeis.com/DocumentsAndLinks.aspx>.

prevent, control, or mitigate[.]” Pet. App. 36a. That was error and should not be permitted.

Here, the STB has *no* authority to regulate upstream and downstream effects that may (or may not) occur as a result of the independent actions of third parties outside its regulatory jurisdiction and decisions made by other state and federal regulatory bodies. And therefore it had no obligation to study or speculate about whatever effects may flow from independent decisions other agencies may make. The reason why is that the STB lacked the authority to act on this information and would not be the legal cause of any such effects. *Cf. Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 207 (1st Cir. 1999).

IV. The Emperor Has No Clothes: CEQ Has No Legislative Rulemaking Authority.

This Court should likewise reject any suggestion that CEQ’s views about the proper scope of environmental studies agencies must conduct under NEPA are entitled to deference or are binding on other agencies.²³ *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). CEQ is a creature of statute, which possesses only those powers Congress chooses to confer upon it. “An agency, after all, literally has no

²³ In the past, CEQ has erroneously suggested that its so-called NEPA regulations are entitled to *Chevron* deference. *See* 85 Fed. Reg. 43,304, 43,307 (July 16, 2020). That argument was wrong then and, in any event, is now foreclosed by *Loper Bright*. This Court “has never addressed the question of CEQ’s regulatory authority.” *Food & Water Watch v. U.S. Dep’t of Agric.*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring).

power to act—including under its regulations—unless and until Congress authorizes it to do so by statute. An agency’s regulation cannot operate independently of the statute that authorized it.” *FEC v. Cruz*, 596 U.S. 289, 301 (2022). And CEQ bears the burden to establish statutory authorization for its actions.

CEQ cannot change or expand NEPA’s text to add NEPA “compliance” obligations beyond what Congress thought appropriate. *See Ctr. for Biological Diversity, Manasota-88*, 941 F.3d at 1299 (“[R]egulations cannot contradict their animating statutes or manufacture additional agency power.”). “[E]nabling legislation is generally not an open book to which the agency may add pages and change the plot line” as it sees fit. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (cleaned up). Congress need not prohibit an agency action or negate a claimed power; “[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution[.]” *Ry. Labor Executives’ Assn’s v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Indeed, Congress did not assign CEQ *any* authority to issue regulations that bind other agencies. Instead, the scope of its statutorily authorized duties is much more limited. *See* 42 U.S.C. § 4344 (duties and functions of CEQ). CEQ, “created in Title II of NEPA, was intended to act primarily in an advisory capacity.” Scott C. Whitney, *The Role of the President’s Council on Environmental Quality in the 1990s and Beyond*, 6 J. Envtl. L. & Lit. 81, 88 (1991). Its charge is to “to formulate and *recommend* national policies to promote the improvement of the

quality of the environment.” 42 U.S.C. § 4342 (emphasis added). “It is part of the Executive Office of the President, created for the purpose of advising the President on environmental matters.”²⁴ *Food & Water Watch*, 1 F.4th at 1119 (Randolph, J., concurring). And its “duties and functions are confined” to gathering information, conducting studies, and advising the President. Whitney, 6 J. Env’tl. L. & Lit. at 89 (discussing 42 U.S.C. § 4342).

“The Council’s function is in no way regulatory[.]” *Nat’l Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir.1971). Under the statute, CEQ “has no authority to prescribe regulations governing compliance with NEPA[.]” *Greene Cty. Planning Bd. v. Fed. Power Com.*, 455 F.2d 412, 421 (2d Cir. 1972); accord *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421, 424 (5th Cir.1973) (“CEQ does not have the authority to prescribe regulations governing compliance with NEPA”); see *Food & Water Watch*, 1 F.4th at 1119

²⁴ As Judge Randolph has observed:

If CEQ’s regulations are binding, several concerns would need to be addressed. What, if any, mechanism is there for judicial review of CEQ’s regulations? Do CEQ’s regulations bind executive and independent agencies alike? Can the President override the requirement (and safeguard) of notice-and-comment rulemaking? And can other executive offices assert this authority as well? “[W]here there is so much smoke, there must be a fair amount of fire, and we would do well to analyze the causes[.]”

Food & Water Watch, 1 F.4th at 1119 (concurring) (quoting Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 432 (1960)).

(Randolph, J., concurring) (“No statute grants CEQ the authority to issue binding regulations.”).

CEQ was first given the task of promulgating NEPA “regulations” in 1977 not by any amendment to the statute, but rather by President Carter’s Executive Order 11,991. *See Food & Water Watch*, 1 F.4th at 1119 (Randolph, J., concurring); *see also Nevada v. DOE*, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (noting CEQ “was empowered to issue regulations only by executive order”). *Cf. Alaska v. Carter*, 462 F. Supp. 1155, 1162 n.16 (D. Alaska 1978) (“Although CEQ was created by NEPA, it derives its authority to issue guidelines on EIS preparation not from the statute but from Exec. Order No. 11,514.”). In 1978, pursuant to this Executive Order, CEQ issued so-called “regulations” that purported to implement NEPA’s provisions and that it claimed were binding on other agencies. *See* 43 Fed. Reg. 55,978, 55,978 (Nov. 29, 1978). In so doing, CEQ mistakenly conflated Congress’s Article I legislative power with the President’s powers under Article II. *See id.*

That was error. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952). To be sure, the President has a duty to ensure that the laws are faithfully executed. In furtherance of that duty, he has the power to control individual agencies’ NEPA implementation through his appointment and removal authority under Article II, and he is free to direct his appointees to adopt NEPA policies, to the extent those policies are otherwise lawful. He may also use CEQ to design those NEPA policies and hold his agencies accountable for failing to follow his directions issued through CEQ. However, he may not do so in a way that conflicts with the statute, and

courts may not give binding effect to CEQ rules when they conflict with the statute.

Because Congress did not assign CEQ substantive rulemaking authority, CEQ's interpretation of NEPA cannot set a "floor" that binds courts or the general public. Instead, CEQ's interpretation of NEPA is simply a direction from the President to agencies. *See Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Com.*, 869 F.2d 719, 743 (3d Cir. 1989) (Becker, J.) ("CEQ guidelines are not binding on an agency to the extent that the agency has not expressly adopted them."). This means that each agency must comply with NEPA in a manner that is both consistent with NEPA's statutory text and appropriately tailored to each agency's mission and circumscribed by the statutes that agency administers. In other words, NEPA was never meant to be a one-size-fits-all statute. *See Whitney*, 6 J. Envtl. L. & Lit. at 101. As NEPA's statutory structure makes clear, Congress tasked individual agencies—*not* CEQ—with implementing NEPA in a manner that best fits within each agency's individual mission and organic statutes, subject to limits on each agency's jurisdiction and mission. *See* 42 U.S.C. § 4333.

CONCLUSION

This Court should reverse the decision below.

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