No. 23-975

In the Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL., PETITIONERS

v.

EAGLE COUNTY, COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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The text of the National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. 4321 *et seq.*), and this Court's precedents establish several basic principles regarding the appropriate contours of an environmental impact statement. First, an agency must analyze the "reasonably foreseeable environmental effects of the proposed agency action." 42 U.S.C. 4332(2)(C)(i). Second, the term "'environmental effect' * * * include[s] a requirement of a reasonably close causal relationship" between the agency action and the particular environmental harm. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). An agency may therefore draw "manageable" lines concerning causation that look to "the underlying policies behind NEPA and Congress' intent, as

informed by the 'rule of reason.'" *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767 (2004) (citation omitted). Third, when an agency makes a determination under this framework about the scope of its environmental impact statement, a reviewing court "must assume" that the agency has "exercised [its] discretion appropriately" "[a]bsent a showing of arbitrary action." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976).

The non-federal respondents nonetheless contend that an agency must consider every environmental consequence that is reasonably foreseeable as a factual matter. That contention is incorrect. This Court's precedents make clear that NEPA permits agencies to limit their environmental analyses based on whether and to what extent the proposed federal action is the "legally relevant cause" of the effects. *Public Citizen*, 541 U.S. at 769. An agency may therefore make a reasonable, context-specific determination that—based on the scope of the proposed action and the provisions of the agency's governing statutes—a harm is too attenuated, speculative, contingent, or otherwise insufficiently material to warrant additional consideration, or any consideration at all, in an environmental impact statement.

At the same time, petitioners go too far to the extent they ask this Court to impose the same standard of proximate cause that applies in tort suits. The common law of torts is distinct from the statutory requirements in NEPA and serves different purposes. Agencies cannot woodenly apply tort standards—or the other categorical limits petitioners sometimes appear to advocate—where doing so would produce a result that contravenes NEPA's underlying policies and its rule of reason.

The Surface Transportation Board (Board) properly applied those principles in this case. The Board made a reasonable, context-specific determination that it did not need to provide additional analysis of the upstream and downstream effects of oil and gas development and refining in its environmental impact statement. Accordingly, the court of appeals erred in vacating that portion of the Board's decision. This Court should so hold and remand to the court of appeals. The Court should decline petitioners' request to reach beyond the question presented to consider aspects of the court of appeals' decision that were not challenged in the petition for a writ of certiorari.

A. NEPA Permits Agencies To Draw Manageable, Context-Specific Lines In Determining The Scope Of Their Environmental Impact Statements

NEPA's text requires a federal agency to produce a "detailed statement" examining the environmental effects of a proposal for a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). As the government explained in its opening brief (at 19-20), that procedural requirement is the primary means through which Congress vindicated its express intent to develop a "national environmental policy," under which all federal agencies work to "prevent or eliminate damage to the environment" and improve public health and welfare, while also enhancing understanding of the environment. 42 U.S.C. 4321, 4331 (emphasis omitted). But NEPA's core procedural requirement has important limits.

As all parties agree, an agency does not need to consider an asserted environmental consequence of a proposed federal action unless it is "reasonably foreseeable." See Pet. Br. 2; Envtl. Resp. Br. 10; Cnty. Resp.

Br. 22-23. Congress codified that requirement in its 2023 amendments to NEPA. 42 U.S.C. 4332(2)(C)(i) (specifying that an agency must examine the "reasonably foreseeable environmental effects of the proposed agency action"). And although the environmental impact statement in this case was completed before those 2023 amendments were enacted, the regulations of the Council on Environmental Quality (CEQ) have long provided that agencies should consider the "reasonably foreseeable" environmental effects of their proposed actions. 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978); 40 C.F.R. 1508.8(b) (2019); 40 C.F.R. 1508.1(g) and (aa) (2021); 40 C.F.R. 1508.1(g) (2023); 40 C.F.R. 1508.1(i) (2024).[1]

Moreover, this Court has held that the statutory term "environmental effects" embodies a further limitation on the scope of the environmental consequences an agency must analyze. In *Metropolitan Edison*, the Court explained that NEPA requires more than mere

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[1] In a divided decision, the D.C. Circuit recently concluded that CEQ does not have statutory authority to issue regulations implementing NEPA's procedural requirements that are binding on federal agencies and enforceable by the courts. *Marin Audubon Soc'y* v. *FAA*, No. 23-1067, 2024 WL 4745044 (Nov. 12, 2024). The government is currently assessing that ruling, which was issued without the benefit of party briefing, as the dissent explained in maintaining that the panel should not have decided the issue. CEQ began issuing NEPA regulations through notice and comment in 1978, see 43 Fed. Reg. at 55,978, and in the over four decades since, this Court has frequently cited and relied on CEQ's regulations, *e.g.*, *Public Citizen*, 541 U.S. at 770; *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989); *Andrus* v. *Sierra Club*, 442 U.S. 347, 356 (1979). Whatever the merits of the D.C. Circuit's recent decision, CEQ's regulations represent the considered judgment of the expert body established by NEPA concerning the appropriate implementation of NEPA's general requirements. And they also reflect the basic contours of agency practice under NEPA going back more than 45 years.

"but for" causation because the term "environmental effect" must "be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue." 460 U.S. at 774. Then, in *Public Citizen,* the Court explained that an agency action is not the "legally relevant cause" of an environmental harm the agency lacks the power to prevent. 541 U.S. at 769. And more generally, *Public Citizen* held that agencies are permitted to draw "manageable" lines to identify the consequences that have a sufficiently close causal connection to the proposed action to warrant consideration, informed by the "'rule of reason'" inherent in NEPA and the "statutory purposes" of an environmental impact statement. *Id.* at 767-768 (citation omitted). Those purposes are primarily (1) "'ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,'" and (2) providing relevant information to the public that serves as a "'springboard for public comment' in the agency decisionmaking process itself." *Id.* at 768 (citation omitted).

Under these principles, an agency may exclude or minimize consideration of environmental harms based on its determination that, in light of the scope of the proposed federal action and the nature of the agency's organic statutes, the harms are too attenuated, speculative, contingent, or otherwise insufficiently material to be "useful[]" to the agency's decisionmaking process. *Public Citizen*, 541 U.S. at 767-768; see Gov't Br. 21-22, 27-28. Courts may not set aside such a determination unless it is arbitrary or capricious. *Kleppe*, 427 U.S. at 412.

B. The Non-Federal Respondents Err In Asserting That Reasonable Foreseeability Is The Only Limit On The Scope Of An Environmental Impact Statement

The non-federal respondents agree (*e.g.*, Envtl. Resp. Br. 44) with the basic principle that an agency need not consider "effects that are too attenuated, speculative, contingent, or otherwise insufficiently material to the environmental review that NEPA requires." But they err in suggesting that those considerations are fully accounted for by the reasonable foreseeability requirement. This Court has repeatedly recognized that reasonable foreseeability is not the only limit on an agency's NEPA obligations because those obligations are triggered only by a "reasonably close causal relationship" between the proposed agency action and the asserted effect, *Metropolitan Edison*, 460 U.S. at 774, and the extent of the analysis required of the agency is subject to the "rule of reason" inherent in NEPA, *Public Citizen*, 541 U.S. at 767-768.

1. "Reasonable foreseeability" is one key limit on the scope of a NEPA analysis. Current CEQ regulations, which were in place in 2023 when Congress codified the "reasonable foreseeability" requirement in NEPA, define "[r]easonably foreseeable" as "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." 85 Fed. Reg. 43,304, 43,376 (July 16, 2020) (40 C.F.R. 1508.1(aa) (2021)) (emphasis omitted); see 40 C.F.R. 1508.1(ii) (2024) (same). That definition, which accords with the plain meaning of the phrase, places the emphasis on what effects an agency should reasonably anticipate. It therefore permits agencies to exclude effects that are too contingent, removed, or uncertain to warrant consideration.

But this Court's precedents make clear that agencies may impose limits on their NEPA analyses beyond those captured by the term "reasonably foreseeable." *Metropolitan Edison* explained that the statutory term "'environmental effect'" further requires a "reasonably close causal relationship." 460 U.S. at 774. And in *Public Citizen*, the Court recognized that, even when an environmental harm is "reasonably foreseeable," 541 U.S. at 766 (citation omitted), NEPA's causation standard may not be met, *id.* at 767-768. That is because the causation standard looks not only to factual foreseeability, but also to the scope of the agency's action and the usefulness of particular environmental analysis, informed by the agency's statutory authority, and NEPA's "underlying policies" and "'rule of reason.'" *Id.* at 768.

While there is undoubtedly overlap between the requirements of reasonable foreseeability and the causation standards under NEPA, see Gov't Br. 23-24, the non-federal respondents wrongly assume that the overlap is complete. They therefore assert (*e.g.*, Envtl. Resp. Br. 1) that NEPA requires an agency to consider every environmental harm for which the agency's action is the but-for cause, so long as the harm is "sufficiently likely to occur and capable of being considered in sufficient detail." That test would impose a rigidly expansive obligation on federal agencies, depriving them of the ability to make a reasonable determination regarding whether and to what extent the analysis of a harm will be useful to the decisionmaking process. And the non-federal respondents' test would also be inconsistent with *Metropolitan Edison* and *Public Citizen*, which emphasized that agencies are permitted to draw a "manageable" line between environmental consequences that have a reasonably close causal relationship with the pro-

posed federal action and those that do not, based on NEPA's underlying policies and the rule of reason.

2. The non-federal respondents mistakenly suggest that Congress's 2023 NEPA amendments confirm that reasonable foreseeability is the only permissible limit on an agency's NEPA analysis. *Metropolitan Edison* and *Public Citizen* explained that the requirement of a "reasonably close causal relationship" is contained in the statutory term "'environmental effect.'" *Metropolitan Edison*, 460 U.S. at 774. That term remains in the statute after the 2023 amendments, and none of Congress's other changes suggest an intent to depart from the Court's prior construction.

Indeed, it would be more than passing strange to read the 2023 NEPA amendments to broaden the range of harms an agency must consider beyond what this Court's prior precedents established, because several of those amendments were aimed at lessening the burden on federal agencies. Thus, the amendments contain provisions for shortening both the length of environmental impact statements, 42 U.S.C. 4336a(e), and the time devoted to the environmental review process, 42 U.S.C. 4336a(g). It is hard to imagine, for example, how an agency could fit a detailed analysis of every reasonably foreseeable environmental harm that *might* flow from a major federal action into the 150 pages the amendments contemplate, 42 U.S.C. 4336a(e), when the environmental impact statement respondents found lacking here was almost 600 pages and had approximately 3000 pages of appendices.

3. The non-federal respondents also err in asserting (*e.g.*, Envtl. Resp. Br. 46) that allowing agencies to draw manageable lines leads to "unbounded and unpredictable results." An agency generally cannot disregard a

reasonably foreseeable environmental effect where there is a "reasonably close causal relationship" between the effect and the proposed agency action. That standard is flexible, not boundless. It permits an agency to exclude or minimize the analysis of effects where the agency reasonably finds that the requisite causal relationship is absent or diminished. And an agency may make that finding based on a range of context-specific factors, including the scope of the proposed action, the nature and reach of the agency's organic statutes, and whether the asserted harm is too attenuated, speculative, contingent, or otherwise insufficiently material to the particular agency decision. *Public Citizen*, 541 U.S. at 767. The fact that other governmental entities authorize, fund, or carry out the specific conduct that gives rise to the environmental issues may also inform an agency's determination that the requisite "reasonably close causal relationship" between its own actions and particular harms is missing or less robust. *Ibid.* (citation omitted); see Gov't Br. 17-18. But an agency may not exclude analysis of a reasonably foreseeable effect if those same considerations establish the agency action *is* the "legally relevant cause" of the effect and considering the effect is necessary to accomplish NEPA's "underlying policies" and is consistent with its "'rule of reason.'" *Public Citizen*, 541 U.S. at 768-769.

4. The non-federal respondents are also wrong to contend (*e.g.*, Envtl. Resp. Br. 46) that the government's position represents a "change[]" from "the longstanding, well-understood framework for environmental review under NEPA." As *Metropolitan Edison* and *Public Citizen* make clear, NEPA has always included room for agencies to draw "'manageable,'" context-specific lines based on the extent to which the analysis of envi-

ronmental harms will be "useful[]" to the decisionmaking process. *Public Citizen*, 541 U.S. at 767 (citation omitted).

Further, for over four decades, CEQ has emphasized that agencies should "focus[] on the major issues and real choices facing federal decisionmakers and exclud[e] less important matters from detailed study." 43 Fed. Reg. at 55,983. In promulgating the 1978 NEPA regulations, CEQ explained that such line drawing is crucial because "[t]he usefulness of the NEPA process to decisionmakers and the public ha[d] been jeopardized in recent years by the length and complexity of environmental impact statements." *Ibid.* And in promulgating regulatory amendments in 1986, CEQ reiterated that an agency's evaluation of "reasonably foreseeable significant adverse effects" should be informed by the "rule of reason." 51 Fed. Reg. 15,618, 15,621, 15,625-15,626 (Apr. 25, 1986). CEQ explained that the "'rule of reason' is basically a judicial device to ensure that common sense and reason are not lost," and that agencies are not forced to "'discuss remote and highly speculative consequences'" that will not be useful to the decisionmaking process. *Ibid.* (citation omitted).

Current CEQ regulations carry forward the longstanding position that agencies should draw manageable lines that focus an agency's resources and attention on the issues that are most significant to the decisionmaking process. The regulations call for agencies to undertake a "scoping" process at the outset of an environmental review during which they "identify[] the important issues and eliminat[e] from further study unimportant issues," 40 C.F.R. 1502.4(a), as well as issues that "have been covered by prior environmental review(s)," 40 C.F.R. 1502.4(d)(1). The regulations also

provide that "[e]nvironmental impact statements shall discuss effects in proportion to their significance," with "only brief discussion of other than important issues." 40 C.F.R. 1502.2(b); see 40 C.F.R. 1500.2, 1500.4, 1501.1(d).

In addition, this Court's precedents have long emphasized that judicial review of an agency's final decision under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*—including review of an agency's decisions regarding the scope and content of its accompanying environmental impact statement—is highly deferential and may be set aside only if arbitrary and capricious. In *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), for example, this Court recognized that "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* at 378.

C. Petitioners Err To The Extent They Endorse Bright-Line Rules That Find No Footing In NEPA's Text

Petitioners and the federal respondents are in accord on the basic principles governing the requirements of NEPA, all of which support the sufficiency of the Board's NEPA analysis that is before the Court in this case. See pp. 19-22, *infra.* Like the federal respondents, petitioners argue (Br. 21) that the review required by NEPA encompasses only the "reasonably foreseeable effects of" a proposed action. They further argue (Br. 17) that, in determining what qualifies as an "effect[]" of a project, NEPA does not apply a but-for standard of causation, and instead looks to whether the proposed agency action is the "legally relevant" cause of the environmental harm. Petitioners also emphasize that agencies must be permitted to draw "manageable"

lines that accomplish NEPA's "goal of 'ensur[ing] a fully informed and well considered [agency] decision'" without requiring analysis of matters that are insufficiently material. Br. 42 (citation omitted; first set of brackets in original). And, like federal respondents, petitioners observe that, in drawing those lines, agencies may look to the limits of their statutory "remit," Br. 26, and the "attenuated," Br. 33 (citation omitted), "speculative," and "contingent" nature of the alleged environmental harms, Br. 36.

At times, however, petitioners appear to go further, suggesting that an agency may apply bright-line rules to exclude analysis of reasonably foreseeable environmental effects for which the agency is the legally relevant cause, even though that analysis would be useful to the agency's decisionmaking and would aid the public in providing informed comments during the decisionmaking process. Neither NEPA's text nor this Court's precedents support imposition of those limits.

1. Petitioners suggest (*e.g.*, Br. 30-31) that agencies should apply the same proximate cause standard that applies in tort suits. But this Court has already rejected the contention that "any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an" environmental impact statement. *Metropolitan Edison*, 460 U.S. at 774 n.7. As the government explained in its opening brief (at 34-37), tort law and NEPA serve different purposes. Tort suits assign monetary liability for a harm that has already occurred; NEPA is designed to implement a national environmental policy by ensuring that agency decisionmaking is informed by the consideration of significant environmental effects that are likely to occur in the future. Even when a connection between an agency

action and an effect is not of a kind that might justify monetary liability in a tort suit, the causal connection may be close enough—given the scope of the proposed action and the nature and reach of the agency's governing statutes—that information about the harm will nonetheless make a material contribution to the agency's decisionmaking process. See *Metropolitan Edison*, 460 U.S. at 774 & n.7. Conversely, there may be circumstances in which tort law would impose liability but there is not a sufficiently "close causal relationship" for purposes of NEPA. *Ibid.*

Further, as the environmental respondents explain (Br. 38-40), tort law has evolved, and some of the principles that petitioners purport to draw from tort law are outdated or at least disputed. Requiring agencies to divert their attention to parsing tort principles for which they have no particular expertise would therefore be likely to lead to more confusion and uncertainty for the agencies in preparing their environmental impact statements, for project proponents seeking NEPA review, and for the courts charged with adjudicating any subsequent challenges. See Gov't Br. 36-37. These additional burdens would run counter to Congress's goal in the 2023 amendments of making the NEPA process more efficient.

This Court's decision in *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989), illustrates the delta between tort law and NEPA. In *Robertson*, the Forest Service prepared an environmental impact statement in connection with its issuance of a special use permit for a ski resort that would be built on federal land. *Id.* at 336. The effects the Forest Service analyzed included both the immediate effects on air quality and animal populations that would arise from construct-

ing and operating the resort, and the "adverse effects on air quality and the mule deer herd" in the surrounding area that were "primarily attributable to predicted off-site development" spurred by the new resort. *Id.* at 350. It is highly unlikely that the Forest Service (which, in any event, enjoys sovereign immunity) or even the new ski resort could have been held liable in a tort suit brought by a local resident harmed by the changes in air quality and mule deer population attributable to the new development. But the Court nonetheless cited the Forest Service's consideration of those secondary effects with approval, adding that their consideration ensured that local authorities were given "adequate notice of the expected consequences" of the proposed federal action and a chance to plan their response. *Ibid.*

Petitioners observe (Br. 24) that *Robertson* affirmed the Forest Service's decision to issue its environmental impact statement before the local authorities fully "developed" a mitigation plan that identified specific measures to address the changes in air quality and the mule deer population that would result from the new development. But the Court did not hold that the Forest Service was free to ignore the air quality and mule deer effects altogether, as a strict analogy to tort law might suggest. Instead, the Court recognized that the need to discuss "mitigation" "in sufficient detail to ensure that environmental consequences have been fairly evaluated" did not extend so far as to require the agency to delay the release of its environmental impact statement until it received a final mitigation plan from local authorities to address off-site effects that were outside of the agency's "jurisdiction." *Robertson*, 490 U.S. at 352. *Robertson* therefore demonstrates that agencies may draw manageable lines based on credible, available in-

formation, the scope of the project, and the agency's organic statutes, not the wooden application of tort law.

2. Petitioners similarly err in suggesting that the 2023 NEPA amendments codified tort law standards of proximate cause by adding the term "reasonably foreseeable." Br. 27-28 (citation and emphasis omitted). While "foreseeability" is typically an important component in a proximate cause analysis, it is not the sole component. This Court has explained that the proximate cause standard drawn from "'tort actions recognized at common law'" generally requires the application of "directness principles" of causation that typically limit damages liability to harms within the "'first step.'" *Bank of Am. Corp.* v. *City of Miami*, 581 U.S. 189, 203 (2017) (citations omitted). The 2023 NEPA amendments codify the reasonable foreseeability standard, but nothing in the amendments suggests that Congress also intended to incorporate tort law's "'first step'" or "directness principles." *Ibid.* (citations omitted). Nor does anything in the amendments suggest that Congress intended to depart from this Court's longstanding precedents interpreting the term "environmental effect" to incorporate the need for a reasonably close causal connection, but not to adopt the same causation standards as tort law. See *Metropolitan Edison*, 460 U.S. at 774 & n.7.

Moreover, imposing a strict "directness" or "first step" limit on NEPA's requirements would mark a substantial shift in the way the statute has traditionally been interpreted and applied. As *Robertson* illustrates, agencies have long considered both the direct effects of their actions (in *Robertson*, the harms to air quality and local animals caused by the construction of the ski resort itself), and secondary effects (*i.e.*, the harm to the

air quality and mule deer population caused by the new off-site development the ski resort would trigger) that are both caused by the action and reasonably foreseeable. Indeed, the first NEPA regulations provided that agencies should consider not just the "direct" environmental effects of the proposed agency action, but also reasonably foreseeable "indirect" effects. 40 C.F.R. 1508.8(a) and (b) (1979). And the regulations in place at the time of Congress's 2023 amendments to NEPA (and still in place now) similarly call for agencies to consider reasonably foreseeable direct, indirect, and cumulative effects of their actions. 40 C.F.R. 1508.1(g) (2022); 40 C.F.R. 1508.1(i).

3. For similar reasons, petitioners err to the extent they assert (Br. 40) that, under *Metropolitan Edison*, an agency may exclude the consideration of an environmental effect whenever it is mediated through "non-environmental effects" on third parties. See Pet. Br. 19-22. Petitioners appear to suggest (*ibid.*), for example, that an agency may disregard the environmental effects of new development spurred by a federal project because that development is itself "non-environmental." Again, in *Robertson*, the Court recognized the propriety of the agency's consideration of environmental effects caused by "predicted off-site development," rather than by the construction and operation of the ski resort itself. 490 U.S. at 350. And agencies often consider environmental effects mediated through third parties when they determine it is appropriate to do so based on the context, including the scope of the project and the nature of the agency's organic statutes. For example, before the Federal Highway Administration funds a highway project, it often considers the land use effects of the

new infrastructure, including reasonably foreseeable growth in nearby communities.[2]

Petitioners' proposed rule also rests on a misreading of *Metropolitan Edison*. In that case, the Court held that, in authorizing the reopening of a nuclear facility, the Nuclear Regulatory Commission did not need to consider the harms to the psychological health of nearby residents that were caused by their fears concerning the risk of a nuclear accident, because NEPA requires agencies to consider the public health consequences of changes in the natural and physical environment, not the health consequences of "risk *qua* risk." *Metropolitan Edison*, 460 U.S. at 779. *Metropolitan Edison*'s holding was therefore based on the Court's determination that NEPA is focused on "change[s] in the physical environment" and that the health harms flowing from fears or "risk" itself were "too remote from the physical environment to justify" requiring the agency to consider them. *Id.* at 774.

That holding cannot be extended to permit an agency to ignore reasonably foreseeable effects on the human environment solely on the ground that the federal project would spur development or some other third-party action that in turn results in those effects. As explained, see pp. 4-5, *supra*, agencies are free to consider the attenuated or contingent nature of a harm or its materiality to the agency's decision in drawing a manageable line based on NEPA's underlying policies and the rule of reason. But agencies must draw that line in context, and there is no categorical rule that could be applied to

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[2] See, *e.g.*, Fed. Highway Admin., U.S. Dep't of Transp., *Instructions for Reviewing Travel and Land Use Forecasting Analysis in NEPA Documents* (Feb. 21, 2018), https://www.environment.fhwa.dot.gov/nepa/Travel_LandUse/forecasting_reviewer_guidance.aspx.

every agency and project in determining whether a sufficiently close causal connection exists.

4. Petitioners likewise err to the extent they suggest (Br. 44) that agencies may ignore effects that fall outside their "subject-matter expertise." NEPA expressly contemplates that agencies will sometimes have to consider effects for which a different "Federal agency" "has jurisdiction by law *or special expertise*." 42 U.S.C. 4332(2)(C) (emphasis added); see 42 U.S.C. 4336a(a)(3) (permitting a lead agency to "designate any Federal, State, Tribal, or local agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal to serve as a cooperating agency"). The statutorily mandated solution is cooperation and consultation with other agencies, not disregarding the effects altogether. See Gov't Br. 31-33.

Metropolitan Edison does not suggest otherwise. Petitioners observe (Br. 44) that *Metropolitan Edison* stated that requiring agencies to consider the "psychological health damage caused by risk" would mean that agencies would have "to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions." 460 U.S. at 776. But the Court explained that this was a problem because spending resources to gain psychiatric knowledge might divert agencies' attention and leave them "unable adequately to pursue" NEPA's core purposes—the "protection of the physical environment and natural resources." *Ibid.* The concern was therefore about a diversion of resources from NEPA's central environmental focus; the Court was not endorsing a general rule excusing agencies from including any analysis of environmental effects outside their area of expertise.

5. Of course, none of this is to say that an agency must engage in a detailed analysis of every reasonably foreseeable environmental harm. The government agrees with petitioners that, as this Court has observed, agencies must be permitted to draw a "manageable" line "if NEPA's goal of 'insur[ing] a fully informed and well-considered decision' is to be accomplished." *Metropolitan Edison*, 460 U.S. at 776 (citation omitted; brackets in original). But an agency must draw its line with that goal in mind, focusing on the question of whether—in light of the nature of the project and the governing statutes—the analysis of particular harms is called for by NEPA's standard of a reasonably close causal relationship and its rule of reason. Agencies cannot simply rely on the rigid application of tort principles or bright-line and categorical rules regarding intervening effects or agency expertise.

D. The Surface Transportation Board Reasonably Declined To Perform Additional Analysis Of The Upstream And Downstream Effects Of Oil And Gas Development

The problems with an expansive gloss on NEPA are thrown into sharp relief by the environmental respondents' attempt (Br. 28-29) to defend the D.C. Circuit's decision in this case regarding the Surface Transportation Board's analysis of the upstream effects of oil and gas development in the Uinta Basin and the downstream effects of refining in the Gulf Coast.

1. In preparing its environmental impact statement in connection with its authorization of a proposed rail line connecting the Uinta Basin to existing railways, the Board engaged in detailed consideration of a wide range of potential environmental effects. See Gov't Br. 6-8. Among those effects were the potential environmental consequences of increases in oil and gas development in

the Uinta Basin that the new line might spur, and the potential increases in oil and gas refining. See, *e.g.*, J.A. 351-362, 365-474. The Board, for example, estimated the aggregate additional emissions of greenhouse gases that could occur from oil refining spurred by the new rail line. J.A. 423.

When the environmental respondents filed public comments asserting that the almost 50 pages of analysis that the draft environmental impact statement provided with respect to the upstream and downstream effects of oil and gas development were not sufficient, the Board offered a detailed response. J.A. 520-529. That response enumerated the various considerations that prompted the Board to conclude that additional analysis of the upstream and downstream effects of oil and gas development would not "inform" its decisionmaking. J.A. 521. The Board explained that the limited scope of its governing statutes, the specific nature of the proposed action, and the attenuated, contingent, and speculative nature of the effects all counseled against further analysis of the effects of oil and gas production in the Uinta Basin and the localized effects of refining of the oil in distant locations. See J.A. 520-529; see also J.A. 421, 477-482; Pet. App. 107a-109a.

In its final decision authorizing the new rail line, the Board reiterated its explanation for declining to engage in additional analysis of these effects. It observed that it "has no authority or jurisdiction over development of oil and gas in the Basin nor any authority to control or mitigate the impacts of any such development." Pet. App. 108a. And it stated that "[o]il and gas development that may occur following authorization of the [new railroad line] would entail many separate and independent projects that have not yet been proposed or planned and

that could occur on private, state, tribal, or federal land and could range in scale from a single vertical oil well to a large lease." *Ibid.* With respect to the effects of oil refining, the Board determined that "the actual volumes of crude oil that would move over the [new line] would depend on various independent variables and influences, including general domestic and global economic conditions, commodity pricing, the strategic and capital investment decisions of oil producers, and future market demand for crude oil from the Basin." *Id.* at 106a. The Board further observed that it has "no jurisdiction or control over the destinations or end uses of any products or commodities transported on the proposed rail line." J.A. 422.

Because the Board's explanation was reasonable and consistent with NEPA's text and underlying policies and the rule of reason, there was no basis for the court of appeals to find it arbitrary and capricious. Yet the environmental respondents insist (Br. 28-29) that the agency was obligated to perform the additional analysis they requested because the "effects were likely to occur," "[t]he Board had enough information to consider those effects," and it had "undisputed authority" to do so. That conception of an agency's NEPA obligations threatens to mire agencies in boundless NEPA review, forcing them to perform additional NEPA analysis any time a challenger points to some additional information the agency could have included in its environmental impact statement—no matter how tenuous the connection to the federal action or how unlikely it is that the additional information would be material to the agency and the public in the decisionmaking process. The Court should reject that understanding of NEPA and vacate this aspect of the D.C. Circuit's decision.

2. There are no substantial grounds for the Court to proceed further and consider aspects of the D.C. Circuit's decision that petitioners did not challenge in their certiorari petition. That petition focused exclusively on whether the court of appeals had misapplied *Public Citizen* by finding that the Board was required to consider the upstream and downstream effects of oil and gas development. See Pet. i. In their merits brief before this Court, however, petitioners assert (*e.g.*, Br. 30-31) that the court of appeals *also* erred in finding that the Board was required to consider certain downline effects, such as potential rail accidents, forest fires, and effects on local bodies of water. But whether or not the Board was required by NEPA to consider the downline risks of fires or rail accidents (including the possible effects of an oil spill resulting from an accident), it did so, in accordance with the Board's environmental regulations and practice. See, *e.g.*, 49 C.F.R. 1105.7(e); J.A. 199, 201, 220, 222.

In any event, the argument that the Board was not required to consider those downline effects was not raised before the court of appeals. The parties instead disputed whether the Board had committed certain errors during its analysis of those downline effects. See Pet. App. 40a-45a. The court therefore did not pass on the question of whether the Board was required to consider the effects in the first place. Because this Court is one "of review, not of first view," and because the issue is not properly before the Court in any event, the Court should decline to consider the issue. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).[3]

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[3] At times, petitioners also appear to challenge (Br. 43-47) the D.C. Circuit's determination that there were fact-specific errors in

CONCLUSION

The judgment of the court of appeals should be reversed in relevant part, and the case should be remanded to the court of appeals for further proceedings consistent with the Court's opinion.

Respectfully submitted.

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the Board's consideration of the downline effects. See Cnty. Resp. Br. 40-43 (responding to these arguments). Those issues were addressed by the Board in its briefing before the court of appeals. See Board C.A. Br. 39-52. Petitioners, however, did not seek review of those issues by this Court.