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

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 82 F.4th 1152. The decisions of the Surface Transportation Board (Pet. App. 74a-189a, 190a-230a) are available at 2021 WL 41926 and 2021 WL 5960905.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2023. A petition for rehearing en banc was

[1] The federal respondents supporting petitioners represented by the Solicitor General in this brief include the Surface Transportation Board. Although the Board did not participate at the certiorari stage (see Gov't Br. in Opp. 2 n.1), it was a party before the court of appeals and is therefore a respondent in this Court.

denied on December 4, 2023 (Pet. App. 72a-73a). The petition for a writ of certiorari was filed on March 4, 2024, and granted on June 24, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. Enacted in 1970, the National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. 4321 *et seq.*), establishes a set of "'action-forcing' procedures that require" agencies to "take a 'hard look' at environmental consequences" before undertaking major federal actions that will affect the environment. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted). Congress declared that the purpose of those procedural requirements is to encourage efforts 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; *accord Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. 4321); see 42 U.S.C. 4331 (describing tenets of the "national environmental policy") (emphasis omitted).

NEPA's core procedural provision requires agencies to prepare a "detailed statement" in connection with a proposal for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). As originally enacted, the statute required these environmental impact statements to include analysis of (among other things) the "environmental impact of the proposed action" and any unavoidable "adverse environmental effects" of the proposal. NEPA

§ 102(c)(i) and (ii), 83 Stat. 853. The original statute also established the Council on Environmental Quality (CEQ), a new entity charged with overseeing the national environmental policy the statute pronounced. 42 U.S.C. 4342.

In a set of 2023 amendments enacted after the agency decisions in this case, Congress clarified the appropriate scope of an environmental impact statement by specifying that the statement should analyze the "reasonably foreseeable environmental effects of the proposed agency action." 42 U.S.C. 4332(2)(C)(i); see Fiscal Responsibility Act of 2023 (2023 Act), Pub. L. No. 118-5, Div. C, Tit. III, § 321(a)(3)(B), 137 Stat. 38. Before that amendment, longstanding CEQ regulations had similarly specified 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) (1979)). In 2020, CEQ had revised the regulations to define "[r]easonably foreseeable" to mean "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). That definition remains in place today. See 40 C.F.R. 1508.1(aa).

2. a. The Surface Transportation Board (Board) is a federal agency that regulates rail carriers and railroads. Because the Board is the successor to the Interstate Commerce Commission, its authority is set out in the ICC Termination Act of 1995 (the Interstate Commerce Act), Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 10101 *et seq.*).

The Interstate Commerce Act grants the Board "exclusive" federal jurisdiction over "transportation by rail

carrier[s]" and "the construction, acquisition, operation, abandonment, or discontinuance" of railway lines and related facilities. 49 U.S.C. 10501(b)(2). The Act also charges the Board with enforcing the statute's "[c]ommon-carrier" obligation, which requires railroads to carry all commodities upon reasonable request—including hazardous and other environmentally-sensitive materials. See 49 U.S.C. 11101; *Riffin* v. *Surface Transp. Bd.*, 733 F.3d 340, 345-347 (D.C. Cir. 2013); accord *Akron, Canton & Youngstown R.R.* v. *ICC*, 611 F.2d 1162, 1166-1168 (6th Cir. 1979) (common-carrier railroad must carry nuclear waste), cert. denied, 449 U.S. 830 (1980).

b. An entity that wishes to construct or operate a new railroad line must generally seek a license from the Board. 49 U.S.C. 10901. One way to obtain a license is to file an application with the Board. See 49 U.S.C. 10901(c). This approach initiates a process that involves public notice and a proceeding to evaluate the application, and the Board is required to "issue a certificate authorizing" the construction "unless the Board finds that such activities are inconsistent with the public convenience and necessity." *Ibid.*; see 49 C.F.R. 1151.2.

Alternatively, as in this case, an applicant may request Board authorization through a more summary "exemption" process under 49 U.S.C. 10502. The Board may grant an exemption when it finds that a full proceeding under Section 10901 "is not necessary to carry out the rail transportation policy of [S]ection 10101" of the Interstate Commerce Act, and that either the "transaction or service is of limited scope" or full proceedings are "not needed to protect shippers from the abuse of market power." 49 U.S.C. 10502(a). Under the exemption process, the Board does not apply the "public

convenience and necessity" standard from Section 10901(c); instead the Board assesses the transportation merits of the construction or operation proposal based on statutorily enumerated policies for "regulating the railroad industry" set out in 49 U.S.C. 10101. See 49 U.S.C. 10502(a)(1). The Act provides that "the Board, to the maximum extent consistent with [the Act]," shall grant an exemption when it finds these criteria satisfied. 49 U.S.C. 10502(a). Under both the application and exemption processes, there is a presumption in favor of approving rail construction projects.

3. a. Petitioners seek to construct an 85-mile-long railway line in Utah connecting the Uinta Basin in northeastern Utah to the existing interstate freight rail network near Kyune, Utah. Pet. App. 190a-191a. Because the Basin is surrounded by high mountains and plateaus with elevations up to 13,000 feet above sea level, transportation options are limited. C.A. App. 259-260, 822. Freight must currently be transported by truck on two-lane highways. Pet. App. 7a. A new railway line would furnish an additional transportation option for moving goods into and out of the Basin. *Ibid.* And because waxy crude oil is the main commodity currently transported by trucks in the Uinta Basin, that would be the new line's primary freight. *Ibid.*

In May 2020, petitioners sought the Board's authorization for the railway line by invoking the Interstate Commerce Act's exemption process under Section 10502. Pet. App. 6a-7a. The Board conducted the exemption process in this case through bifurcated proceedings. *Id.* at 9a-11a. The Board issued a preliminary decision in January 2021 addressing the transportation merits of the proposed project before the Board's environmental analysis was complete, *id.* at 9a, and then is-

sued a final decision taking account of the completed environmental analysis later that same year, *id.* at 10a-11a.

b. The environmental analysis involved multiple stages. In October 2020, the Board issued a draft environmental impact statement in connection with the project. Pet. App. 10a. The Board then opened a public comment process that continued until February 12, 2021. During that process, the Board conducted six public meetings and received over 1900 comments. *Ibid.* In August 2021, the Board issued its final environmental impact statement. *Id.* at 76a.

The Board's final environmental impact statement spanned more than 600 pages. It was supported by more than 2200 pages of appendices containing technical analysis and other materials, as well as a separate 728-page document with the Board's responses to public comments—resulting in more than 3600 pages of analysis in total.[2]

The Board's final environmental impact statement identified and analyzed a series of "significant and adverse impacts that could occur as a result of the proposed rail line." J.A. 121. Those impacts included the disturbance of local "waters and wetlands" that would occur due to the line's construction, the "wayside noise" that would be created by the trains newly running through the area, J.A. 123-124, the alterations to land use and recreation, J.A. 124, and the effects on "[t]ribal [c]oncerns"—although the Board noted that the tribe whose land is in the Basin supported the project, J.A. 125-126; see Ute Indian Tribe of the Uintah and Ouray Reservation Amici Br. (filed Apr. 4, 2024). The environ-

[2] The full statement and appendices are available at http://www.uintabasinrailwayeis.com/DocumentsAndLinks.aspx.

mental impact statement also considered several "minor impacts" that "would not be significant" if certain mitigation measures were adopted. J.A. 126. Those impacts included "air quality and greenhouse gas[]" emissions in the area of construction and the effect of the new construction on local big game, fish, and wildlife. J.A. 132 (capitalization and emphasis omitted); see J.A. 126-134. In addition, the statement considered the "downline impacts" that the new railway line would create on existing lines by increasing the volume of traffic. J.A. 134. And the statement considered the cumulative impacts of the project, addressing the "relevant past, present, and reasonably foreseeable projects and actions that could have impacts that coincide in time and location with the potential impacts of the proposed rail line." J.A. 135; see J.A. 135-136.

Among the "cumulative impacts" the Board identified were the effects of increased oil production in the Uinta Basin spurred by the increased transportation capacity for oil furnished by the new railroad line. J.A. 135. Although the Board found that there were many unknowns and uncertainties in connection with the consequences of additional oil and gas development, the agency nonetheless estimated the amount of oil and gas that might be produced and the total amount of new oil wells and other infrastructure that might be constructed in the Basin if the railway was built, using "conservative" assumptions that "may overstate total future oil production in the Basin." J.A. 353; see J.A. 351-362. The Board also analyzed the environmental effects from that increased oil production on each relevant resource in the Basin to the extent it could without any information regarding specific projects and plans. See J.A. 365-474.

The Board specifically found that there were many uncertainties regarding the downstream effects of refining the oil that would be transported over the line. J.A. 420-423. The Board explained that it "generally cannot restrict the types of products and commodities that are transported on rail lines" and "that railroads have a common carrier obligation to carry all commodities, including hazardous materials, upon reasonable request under 49 U.S.C. § 11101." J.A. 421. The Board recognized, however, that much of the oil transported out of the Basin on the new line would likely go to refineries and end-users for combustion, which would produce emissions that contribute to "global warming and climate change." J.A. 420. The Board estimated the aggregate amount of greenhouse gas emissions from its estimation of the potential increase in combustion, using a set of assumptions that the Board described as "conservative" and that "may overstate" the potential emissions. J.A. 423. The Board found that its high-end estimate would represent approximately 0.8% of nationwide greenhouse gas emissions and 0.1% of global emissions. *Ibid.*

c. In an appendix to the final environmental impact statement responding to public comments on the draft statement, the Board addressed comments suggesting that it should have given more detailed consideration to the effects of upstream and downstream oil and gas development. J.A. 520-529. Some commenters had suggested that the Board "should have treated potential environmental impacts that could result from potential future, as yet unplanned, oil and gas development projects in the Basin as direct or indirect impacts of the proposed rail line, rather than treating [such] projects

as reasonably foreseeable future actions that could contribute to cumulative impacts." J.A. 520.

In responding to those comments, the Board explained that further analysis of the posited effects "would not inform the Board's decision on [petitioners' proposal] to construct and operate" the new railroad line. J.A. 521. The Board observed that a NEPA analysis has two purposes: (1) to ensure that, "in reaching its decision," the agency has available and may "carefully consider[] detailed information concerning significant environmental impacts," and (2) to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role" in the decision and its implementation. *Ibid.* (quoting *Public Citizen*, 541 U.S. at 768) (citation omitted).

The Board described several reasons that more detailed information about particular oil and gas development that might occur would not serve either of those purposes. J.A. 521-529. The Board observed that it "has jurisdiction over rail transportation by rail carriers," and that it had prepared the environmental impact statement in connection with its decision "under 49 U.S.C. § 10502" as to whether to grant petitioners' request "to construct and operate a new rail line" in the Uinta Basin. J.A. 522; see *ibid.* (citing 49 U.S.C. 10501). The decision before the Board was therefore "whether to authorize, deny, or authorize with conditions" petitioners' "proposal to construct and operate the proposed rail line." *Ibid.* "Oil and gas development [was] not part of" the proposed agency action before the Board and would be "subject to the approval processes of other federal, state, local, and tribal agencies." *Ibid.*

The Board also found that it "lack[ed] sufficient control over future oil and gas development projects to

make those projects part of the proposed action assessed in the [environmental impact statement]." J.A. 523. The Board acknowledged that "the availability of a rail transportation option would benefit the oil and gas industry" in the Basin, but it observed that the "industry is already well-established" and that the Board's authority to prevent or minimize oil and gas development is constrained because the Board "can only impose conditions that are consistent with its statutory authority over rail transportation by rail carriers under the Interstate Commerce Act." *Ibid.*

Further, the Board explained that the environmental consequences of future oil and gas development in the Uinta Basin were both "speculative" and attenuated. J.A. 525; see J.A. 527-529. The Board observed that many oil and gas development projects in the Basin had "not yet been proposed or planned." J.A. 528. It further observed that the extent of future oil and gas development would involve "many separate and independent projects" in the Basin that could vary in terms of the federal, state, tribal, or private character of the land, and the "scale" and nature of the projects themselves. *Ibid.* The Board also noted that "it would not be possible to determine which of these as yet unproposed, unplanned, and unsponsored projects would or would not proceed." J.A. 528-529. For all these reasons, the Board found that it was "not possible to" say that any such projects were "proximately caused by the proposed rail line." J.A. 529.

As to the downstream consequences of transporting oil over the proposed line, the Board observed that "crude oil produced in the Basin is currently transported to refiners in the Salt Lake City area" that have "limitations on the volume of crude oil" they can accept.

J.A. 528. The Board found that "it is possible that additional capacity could be added at those refineries in the future." *Ibid.* But the Board observed that refining might increase regardless of the Board's actions "depend[ing] on future market conditions." *Ibid.*

The Board's response to the comments did not discuss particular refineries in other locations, such as the Texas and Louisiana Gulf Coasts and Puget Sound, to which oil from the Basin might ultimately be shipped. But the environmental impact statement acknowledged the possibility of increased refining in those areas. J.A. 477-482. The Board determined in the statement that much of the oil would likely be transported to "markets in other regions of the United States," J.A. 477, and to the Gulf Coast and Puget Sound areas in particular, J.A. 478, but the Board observed that "[t]he final destinations of the trains would depend on the ability and willingness of refineries in other markets to receive rail cars carrying Uinta Basin crude oil and process the oil in their refineries." J.A. 477. Still, the Board prepared estimates of how much potential oil development in the Uinta Basin might increase transportation of oil to the Gulf Coast and Puget Sound. J.A. 481-482.

d. Ultimately, the Board's final decision authorized construction and operation of the proposed railroad line. Pet. App. 74a-123a. The Board's final decision reviewed the environmental effects described in the final environmental impact statement at length. See *id.* at 83a-117a.

In addressing the upstream and downstream consequences of oil and gas development, the Board reaffirmed its prior analysis. Pet. App. 105a-108a. The Board explained that it had "estimated aggregate emissions from potential future oil and gas development

based on the best available information regarding emissions from oil and gas production in the Basin." *Id.* at 106a. It further acknowledged that, "[t]o the extent that" crude oil transported on the line "would be combusted to produce energy, emissions from the combustion of the fuels would produce" greenhouse gasses, which could represent "up to approximately 0.8% of nationwide" emissions and 0.1% of global emissions. *Ibid.* But the Board found that "the actual volumes of crude oil that would move over the 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, * * * among other factors." *Ibid.*

The Board rejected the contention that it had given insufficient consideration to the upstream and downstream effects of oil production and refining. Pet. App. 107a. The Board reiterated 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." *Id.* at 108a. And it repeated 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.*

In the end, the Board recognized that the new railroad line was "likely to produce unavoidable environmental impacts," but it found that it could impose "extensive mitigation conditions" to "minimize those im-

pacts to the extent practicable." Pet. App. 118a-119a. It also determined that "construction and operation of" the new line would "have substantial transportation and economic benefits" that outweighed the environmental concerns. *Id.* at 119a.

4. Eagle County, Colorado and several environmental organizations (collectively, the "non-federal respondents") filed petitions for review of the Board's decision that were consolidated into a single proceeding before the court of appeals. See Pet. App. 9a, 13a. The court granted the petitions in part and denied them in part. *Id.* at 1a-71a.

As relevant here, the court of appeals held that the Board's environmental impact statement improperly excluded further analysis of the upstream environmental effects of increased oil production in the Basin and the localized downstream effects of ultimately processing some of that oil in refineries in Texas and Louisiana. Pet. App. 28a-37a. The court first rejected the argument that the Board's NEPA analysis was invalid because the Board classified the upstream and downstream consequences of oil and gas development as "cumulative" rather than "indirect" effects. *Id.* at 28a-29a. The court reasoned that "[e]ven if the Board erroneously characterized the impacts," the challengers had "identif[ied] no way in which this decision materially affected the Board's analysis under NEPA." *Ibid.* The Board had both "acknowledged the impact of increased oil extraction in the Basin and explained [that] '[t]he impacts and the analysis of those impacts would be the same no matter which label [it] used.'" *Id.* at 29a (quoting *id.* at 108a & n.15 (Final Exemption Decision)) (first set of brackets in original). The court therefore concluded that the purported misclassification of the ef-

fects could not "be said 'to undermine informed public comment and informed decisionmaking.'" *Id.* at 29a-30a (citation omitted).

The court of appeals agreed, however, with the non-federal respondents' argument that the Board had failed to justify the absence of further analysis of the alleged upstream and downstream consequences of oil and gas development in the environmental impact statement. Pet. App. 30a-37a. The court concluded that the Board's limited discussion of those harms could not be justified either on the ground that the upstream and downstream consequences were not "reasonably foreseeable," or on the ground that the Board lacked the statutory authority to prevent those consequences. *Id.* at 30a-31a (citation omitted).

As to reasonable foreseeability, the court of appeals held that the agency could not rely on its "'lack of information about the' location of future oil production sites" in the Basin and the "'destination and end use of the [oil]'" after it was transported over the proposed line and entered onto existing lines. Pet. App. 32a (citation omitted; brackets in original). The court stated that, while "great 'deference [is] owed to [the Board's] technical judgments,'" the Board had "fail[ed] to adequately explain why it could not employ 'some degree of forecasting' to identify the aforementioned upstream and downstream impacts." *Id.* at 35a (citation omitted; first and second set of brackets in original).

The court of appeals then rejected the contention that, under this Court's decision in *Public Citizen*, *supra*, the Board was not required to "identify and describe the environmental effects of increased oil drilling and refining" because of the Board's view that it "lack[ed] authority to prevent, control, or mitigate those develop-

ments." Pet. App. 36a. The court reasoned that the Board had the authority to prevent those effects because the Board has "exclusive jurisdiction over the construction and operation of the railway, including authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." *Ibid.* (citing 49 U.S.C. 10501(c), 10901(b)). The court also reasoned that the Board "is authorized to license railroad construction and operation based on the 'public convenience and necessity,' which encompasses reasonably foreseeable environmental harms." *Id.* at 37a (citation omitted). Based on that analysis, the court decided that "the Board's argument that it need not consider effects it cannot prevent" was "simply inapplicable." *Ibid.*

The court of appeals found a number of other flaws in the Board's NEPA analysis, including a failure to take a hard look at the increased risk of rail accidents downline of the 85 miles of new line, Pet. App. 40a-42a, the risk and impacts of wildfires downline caused by sparks from the operation of additional trains, *id.* at 42a-45a, and the railway's impacts on water resources downline on the Colorado River, *id.* at 46a-47a. The court rejected or declined to reach multiple other challenges under NEPA and the National Historic Preservation Act. *Id.* at 29a, 37a-39a, 47a-50a, 55a-57a. And the court found that there were flaws in the biological opinion that the Fish and Wildlife Service had provided in connection with the project under the Endangered Species Act, *id.* at 50a-55a, and in the Board's exemption decision under the Interstate Commerce Act, *id.* at 57a-69a. Petitioners did not seek review of those other issues.

Based on the errors the court of appeals found in the NEPA analysis and the biological opinion, the "fail[ure] to conduct a reasoned application" of the Interstate Commerce Act, and the Board's "fail[ure] to weigh the [railway's] uncertain financial viability and the full potential for environmental harm against the transportation benefits," the court vacated the Board's exemption order as arbitrary and capricious, and partially vacated the environmental impact statement and biological opinion. Pet. App. 70a; see *id.* at 70a-71a.

5. Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 72a-73a.

SUMMARY OF ARGUMENT

NEPA did not require the Board to undertake additional analysis of the upstream and downstream consequences of oil and gas development in determining whether to authorize the construction and operation of the proposed railroad line in this case. The court of appeals' contrary decision on that issue should be reversed.

A. "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 it is "well settled that NEPA itself does not mandate particular results." *Id.* at 350. Rather, the statute realizes its environmental policy goals—*i.e.*, "encourag[ing] productive and enjoyable harmony between man and his environment," "promot[ing] efforts which will prevent or eliminate damage to the environment," and "enrich[ing] the understanding of the ecological systems and natural resources important to the Nation," 42 U.S.C. 4321—through "a set of 'action-forcing' procedures that require" agencies to "take a 'hard look' at environmental consequences," *Robertson*,

490 U.S. at 350 (citation omitted). At the heart of NEPA's procedural mandates is the requirement that agencies must prepare a "detailed statement" analyzing "environmental effects" before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).

NEPA's core procedural mandate is subject to certain limits. Longstanding CEQ regulations, now codified in the statute, provide that an agency need only examine the "reasonably foreseeable" effects of a proposed action. See 2023 Act, § 321(a)(3)(B), 137 Stat. 38; 40 C.F.R. 1508.8(b) (1979). In addition, this Court has stressed that NEPA does not rely on a "but-for" standard of causation; rather, an agency is only required to examine the effects for which the agency's action is the "legally relevant cause." *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 769 (2004). That causal limit permits an agency to exclude from its analysis any effects the agency "has no ability to prevent * * * due to its limited statutory authority over the relevant actions." *Id.* at 770.

Moreover, even where an agency's statutory authority is not so strictly limited, the agency may take account of a variety of context-specific factors in determining whether and to what extent the proposed agency action is the "legally relevant cause" of a particular harm. *Public Citizen*, 541 U.S. at 769. Thus, an agency may reasonably determine that—based on the scope of the proposed action and the nature and reach of the agency's organic statutes—a harm is so attenuated, speculative, contingent, or otherwise insufficiently material to the agency's decisionmaking that the necessary causal connection is absent or diminished. *Id.* at 767. And the fact that other governmental entities authorize,

fund, or carry out the specific conduct that gives rise to the environmental issues may likewise 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). In these various circumstances, the agency may draw a "manageable line" that excludes any analysis of a harm if a "reasonably close causal relationship" is absent or that minimizes the analysis of a harm where the causal connection is less robust. *Ibid.* (citation omitted).

B. That does not mean that an agency may impose artificial restrictions on its NEPA analysis. An agency may not, for example, exclude consideration of an effect merely because the agency does not directly regulate it or because other agencies share regulatory authority in the relevant arena. Nor may an agency impose arbitrary bright-line limits based on rigid measures of geographic distance, the timing of an effect, or the number of other actors that may contribute to it. And agencies cannot apply the same tort-law standards of proximate cause given NEPA's different purposes and framework. Agencies must instead draw context-specific causal lines that accord with "the underlying policies behind NEPA and Congress' intent, as informed by the 'rule of reason.'" *Public Citizen*, 541 U.S. at 768.

C. In this case, the Board drew a reasonable line in declining to undertake more detailed analysis of the upstream and downstream effects of oil and gas development in its environmental impact statement supporting the authorization of a new railroad line from the Uinta Basin. The Board authorizes railroad construction and operation, not the development and use of the commodities that travel over those lines. Indeed, the Board is

required to enforce a common-carrier obligation that generally prohibits carriers from declining to provide transport based on the nature of the commodity. And other entities, including in some instances other federal agencies, have the authority to approve oil and gas development projects in the Uinta Basin and to regulate the localized effects of refining at the place where oil from the Basin might ultimately be transported.

Given this statutory framework, the Board explained that the scope of the proposed action was properly characterized as a decision to permit the construction of a new railroad line providing common carrier service, rather than a decision to approve new oil and gas development. The Board also cited many factors that established that the "environmental impacts that could potentially result from potential future oil and gas development projects" were speculative, contingent, and attenuated from the Board's proposed action. J.A. 529.

The Board therefore made a reasonable determination not to undertake additional or more detailed analysis of the upstream and downstream consequences of oil and gas development. J.A. 520-529. Because that determination was not arbitrary or capricious, the court of appeals erred in setting it aside, and the court's decision on this issue should be reversed.

ARGUMENT

THE SURFACE TRANSPORTATION BOARD REASONABLY LIMITED ITS CONSIDERATION OF THE UPSTREAM AND DOWNSTREAM EFFECTS OF PETITIONERS' PROPOSED RAIL LINE

NEPA embodies a "national commitment to protecting and promoting environmental quality," implemented primarily through a procedural requirement for agencies to analyze the significant environmental ef-

fects of their major actions. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). Agencies must adhere to NEPA's procedural command, but the statutory text, this Court's precedents, and CEQ's regulations all recognize that, in preparing its environmental impact statement, an agency has considerable latitude and may draw manageable, context-specific lines that take into account whether and to what extent harms have a reasonably close causal relationship to the agency's action and are sufficiently material to the agency's decisionmaking to further NEPA's purposes. The agency's factual findings and exercise of its expert judgment and discretion in determining the scope of its environmental impact statement may be set aside only if they are arbitrary and capricious. See, *e.g.*, *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 763 (2004); *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 375-376 (1989).

In determining the scope of their environmental analyses, agencies may not impose categorical or artificial limits that exclude information about environmental harms that have a reasonably close causal connection and would materially assist the agency in its decisionmaking or the public in providing meaningful input. But in this case, the Board did not rely on any such arbitrary limits. Rather, the Board relied on several context-specific factors to conclude that the upstream and downstream consequences of oil and gas development were too attenuated, speculative, contingent, and otherwise insufficiently material to the Board's decisionmaking to warrant additional consideration in the environmental impact statement. The Board's decision was not arbitrary and capricious, and the court of appeals erred in holding otherwise.

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

When Congress first enacted NEPA in 1970, it required agencies to prepare "detailed statement[s]" analyzing "the environmental impact of" a proposed major federal action, as well as (among other things) "any adverse environmental effects which c[ould not] be avoided should the proposal be implemented." §102(c)(i) and (ii); 83 Stat. 853 (42 U.S.C. 4332(2)(C)(i) and (ii) (1970)). Congress did not define the terms "environmental impact" or "environmental effect[]." *Ibid.* But this Court's precedents, longstanding practice, and recent NEPA amendments establish that agencies need only consider the reasonably foreseeable environmental consequences for which the agency action is a "legally relevant cause." *Public Citizen*, 541 U.S. at 769; see 42 U.S.C. 4332(2)(C) (requiring a "detailed statement by the responsible official on—(i) reasonably foreseeable environmental effects of the proposed agency action"). Moreover, an agency's determination regarding the scope of its environmental analysis is necessarily informed by NEPA's purposes and its "rule of reason," as well as the nature and scope of the agency's substantive authority. And the determination is reviewed under the APA's deferential "arbitrary and capricious" standard.

Under those principles, an agency may draw a manageable, context-specific line that differentiates between (1) the significant environmental harms for which the agency's action is the legally relevant cause and which will inform the agency's decisionmaking and the public's input, and (2) the potential harms that are more attenuated, speculative, contingent, or otherwise insufficiently material to the agency's decisionmaking, such

that their consideration is less likely to serve NEPA's purposes or satisfy its rule of reason. For harms in the latter category, the reasonably close causal connection may be missing entirely, such that the agency need not consider the harm at all, or the connection may be sufficiently removed that the agency may give the harm only limited consideration.

1. NEPA plainly requires that an effect be "reasonably foreseeable" in order to necessitate inclusion in an environmental impact statement. CEQ regulations have long provided that agencies should consider the "reasonably foreseeable" environmental effects of their proposed actions. 43 Fed. Reg. at 56,004; 40 C.F.R. 1508.8(b) (2019). In 2020, CEQ amended its regulations to clarify that "[r]easonably foreseeable" means "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). And in 2023, Congress codified this requirement by amending NEPA to specify that an agency must examine the "reasonably foreseeable environmental effects of the proposed agency action." 42 U.S.C. 4332(2)(C)(i); see 2023 Act §321(a)(3)(B), 137 Stat. 38.

NEPA also permits agencies to refrain from analyzing an effect for which the agency's action is not the "legally relevant cause." *Public Citizen*, 541 U.S. at 769. Thus, in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), the Court held that NEPA does not incorporate a standard of "'but for' causation." *Id.* at 774. Rather, 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." *Ibid.* The Court reiterated that principle in *Public Citizen*, holding that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." 541 U.S. at 767. And the Court explained that it is necessary to look at NEPA's "underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7).

There is considerable overlap among these principles. Reasonable foreseeability plays an important role in many statutory causation standards. See, *e.g.*, *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 703 (2011) (discussing the role of reasonable foreseeability for determining causation under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*). And Congress's recent amendments to NEPA confirm that agencies must look to whether a consequence is "reasonably foreseeable," 42 U.S.C. 4332(2)(C)(i), in drawing the "manageable line" that *Metropolitan Edison* and *Public Citizen* contemplate, *Public Citizen*, 541 U.S. at 767.[3] But the re-

[3] The overlap is also reflected in CEQ's 2022 amendments removing the term "reasonably close causal connection" from its NEPA regulations. CEQ had added that term, drawn from the Court's opinions in *Metropolitan Edison* and *Public Citizen*, for the first time in 2020 to clarify that agencies may look to the attenuated nature of an effect in determining the appropriate scope of their NEPA analyses. See 85 Fed. Reg. at 43,343-43,344. When CEQ subsequently removed that term from the regulations in 2022, it explained that it was not disregarding "an agency's ability to exclude effects too attenuated from its actions." 87 Fed. Reg. 23, 453, 23,465 (Apr. 20, 2022). Rather, CEQ indicated that the requirement of a

quirements of reasonable foreseeability and causation are not identical. For example, *Public Citizen* recognized that, even when an environmental harm is "reasonably foreseeable" in the abstract or as a factual matter, *id.* at 766 (citation omitted), NEPA's causation standard is not met if the agency "has no ability to prevent" the harm "due to its limited statutory authority over the relevant actions," *id.* at 770.

In *Public Citizen*, the Court considered whether an agency had permissibly excluded certain environmental effects from its NEPA analysis based on the agency's limited statutory mandate. 541 U.S. at 767. The case involved a NEPA challenge to safety regulations for Mexican trucks that the Federal Motor Carrier Safety Administration (FMCSA) promulgated after the President decided to lift a moratorium on the entry of Mexican trucks. *Id.* at 756, 760. The agency's NEPA analysis considered the environmental consequences of the roadside inspections of the Mexican trucks required by the agency's new safety rules. *Id.* at 761. But the analysis did not consider the consequences of the increased presence of Mexican trucks in the United States because FMCSA determined that the increased presence was due to the President's decision to lift the moratorium rather than the agency's new regulations. *Ibid.*

Several challengers asserted that limiting the NEPA analysis in that way was improper because the trucks

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"reasonably close causal connection" was already captured by the pre-2020 regulation's longstanding principle of "reasonable foreseeability," *ibid.*, and the requirement that effects must be caused by the agency. Deleting the phrase that had been added by the 2020 regulations did not affect the courts' ability to consider whether there is a "reasonably close causal connection" between the agency's action and a particular harm in reviewing whether an agency acted arbitrarily and capriciously in declining to assess that harm.

could not enter the United States until the agency promulgated its regulations. *Public Citizen*, 541 U.S. at 765-766. In the challengers' view, that made FMSCA the "cause" of the entry of Mexican trucks. *Id.* at 766. Because the President's lifting of the moratorium and the entry of the trucks were also "reasonably foreseeable," the challengers argued that NEPA required the agency to consider the environmental consequences of the trucks' entry. *Ibid.* (citation omitted).

The Court rejected that argument, holding that NEPA does not require the "unyielding variation of 'but for' causation" the challengers had proposed. *Public Citizen*, 541 U.S. at 767. Instead, agencies may draw causal lines based on "the underlying policies behind NEPA and Congress' intent, as informed by the 'rule of reason'" inherent in the statute. *Id.* at 768. That "'rule of reason,'" the Court explained, "ensures that agencies determine whether and to what extent to prepare an [environmental impact statement] based on the usefulness of any new potential information to the decisionmaking process." *Id.* at 767. And the "rule of reason" is not satisfied where consideration of a particular environmental harm would not serve NEPA's goals of providing information to the agency to assist in its decisional process and to the public to enable it to offer meaningful input. *Ibid.*

Applying those principles in *Public Citizen*, the Court held that FMSCA could not be considered the "legally relevant cause" of the increased presence of Mexican trucks and their attendant emissions in the United States. 541 U.S. at 769. The Court explained that FMSCA had no "ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within

the United States." *Id.* at 766. To the contrary, the Court explained, it would "violate" the agency's statutory mandate for FMCSA to refuse to authorize operations by a Mexican motor carrier that was "willing and able to comply with" FMCSA's safety regulations based on concerns about the trucks' emissions, and thus to preclude the trucks' entry altogether. *Ibid.* In those circumstances, the Court determined that FMSCA's actions were not the "legally relevant cause" of any increased emissions from the trucks, and explained that requiring the agency to consider information about any increase in emissions would not satisfy NEPA's "rule of reason" or its statutory purposes because the agency was powerless to act on that information. *Id.* at 767-769.

2. *Public Citizen* establishes that, even when an environmental harm might be "reasonably foreseeable," it may still be excluded from an environmental impact statement where the agency lacks the ability to prevent the harm. In those instances, the requisite "causal connection" is missing, and the environmental harm cannot be considered an "impact" or "effect" of the agency's action for purposes of NEPA. *Public Citizen*, 541 U.S. at 768. That is clearly the case where, as in *Public Citizen*, the governing statutes prohibit the agency from taking the action necessary to stop the relevant harm from occurring. *Id.* at 769-770. And it is also the case where the decisions that give rise to the relevant effect are committed to the exclusive control of another agency. See *Sierra Club* v. *FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (finding that the Federal Energy Regulatory Commission was not required "to address the indirect effects of the anticipated export of natural gas" as part of its NEPA analysis of the authorization of new natural gas facilities because "the Department of Energy, not

the Commission, has sole authority to license the export of any natural gas going through the [new] facilities") (emphasis omitted).[4]

But *Public Citizen*'s reasoning indicates that an agency may also find that the requisite causal connection is absent or diminished where the scope of the agency action and the nature and requirements of the governing statutes render a particular harm too attenuated, speculative, contingent, or otherwise insufficiently material to the agency decision under consideration. Where an agency makes such a reasonable, context-specific determination, the agency is entitled to "draw a manageable line" that excludes any consideration of harms where a "reasonably close causal connection" is absent, or that appropriately limits the analysis of harms where the causal connection is simply less robust. *Public Citizen*, 541 U.S. at 767 (citations omitted). NEPA's "underlying policies" are not served by additional analysis of a harm that is too attenuated, speculative, or contingent to influence the agency's decisionmaking or to provide "'a springboard'" for meaningful public comments. *Id.* at 768 (citation omitted). And it would not "satisfy NEPA's 'rule of reason' to re-

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[4] In their certiorari-stage briefing, petitioners asserted (Pet. 24-25) that CEQ's recent amendments to its NEPA regulations have inappropriately narrowed the scope of *Public Citizen* by disregarding the proposition that an agency may exclude environmental effects that it has no power to prevent. In fact, in the preamble to its 2022 revisions to the NEPA regulations, CEQ merely explained that the Court's description of the causation issue in *Public Citizen* was necessarily informed by the particular context of the case, in which the agency was affirmatively barred by statute from acting on the basis of the alleged environmental harm. CEQ's discussion was not intended to place limits on an agency's discretion beyond those imposed by the statute itself. See 87 Fed. Reg. at 23,464-23,465.

quire an agency to" analyze a harm when it has concluded that the harm is too far afield from the agency's action to make "any new potential information" useful to the agency's "decisionmaking process." *Id.* at 767, 769.

3. This Court's cases regarding the standard of judicial review of the scope of an environmental impact statement further establish that agencies are afforded considerable latitude and discretion in determining the bounds of their NEPA analyses based on these considerations. The Court has repeatedly recognized that an agency's decision about whether and how to prepare an environmental impact statement "can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Public Citizen*, 541 U.S. at 763 (quoting 5 U.S.C. 706(2)(A)); see, *e.g.*, *Marsh*, 490 U.S. at 375. The Court has also stressed that a reviewing court should not treat an agency's factual determination regarding whether an environmental effect requires additional analysis as a "legal question" subject to searching review. *Marsh*, 490 U.S. at 376. A "court need only decide whether the agency decision was 'arbitrary and capricious.'" *Id.* at 375. And under that standard, a court should not reject an agency's decision unless the agency has made a "'clear error of judgment,'" even if the court believes that "another decisionmaker might have reached a contrary result." *Id.* at 385.

In *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976), for example, the Court held that "[a]bsent a showing of arbitrary action," a reviewing court "must assume" that the agency has "exercised [its] discretion appropriately" in deciding the scope of its environmental impact statement. *Id.* at 412. In considering the environmental im-

pacts at issue in that case, including the "[d]iminished availability of water, air and water pollution, increases in population and industrial densities, and perhaps even climatic changes," the Court held that the "determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." *Id.* at 413-414. The Court therefore recognized that the proper scope of a NEPA analysis calls for a context-specific determination that depends on the nature of the decision before the agency and its assessment of the facts on the ground.

4. CEQ's current regulations reinforce the principle that an agency may reasonably determine the scope of its NEPA analysis by assessing the extent to which environmental harms may be too attenuated, speculative, or otherwise insufficiently material to inform the agency's decisionmaking and to assist the public in providing meaningful input into that decisionmaking.

CEQ regulations provide that an agency must consider the "reasonably foreseeable" "direct," "indirect," and "cumulative" effects of its actions, and the definitions of those terms make clear that agencies cannot arbitrarily limit their analysis based on rigid measures of geographic distance, timing, or the number of other contributors to the effect. 40 C.F.R. 1508.1(i) (capitalization omitted).[5] But the regulations also expressly

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[5] In preparing the environmental impact statement in this case, the Board applied CEQ's pre-2020 regulations, Pet. App. 26a, which are substantially similar to the current regulations. In 2020, CEQ amended its regulations to eliminate the distinction among cumulative, indirect, and direct effects. See 85 Fed. Reg. at 43,343. But in

contemplate that agencies will engage in a "scoping" process at the outset of any environmental review to ensure that the agency focuses its attention on the effects that are most important to the agency's decisionmaking with respect to the project at hand. See 40 C.F.R. 1501.3(b), 1501.9(b), 1502.4. As part of the scoping process, the agency is required to "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). Similarly, CEQ's regulations provide that "[e]nvironmental impact statements shall discuss effects in proportion to their significance," providing "only brief discussion of other than important issues." 40 C.F.R. 1502.2(b). And the regulations provide that the length of environmental impact statements "should be proportional to potential environmental effects and the scope and complexity of the action." 40 C.F.R. 1502.2(c).

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In short, NEPA and its implementing regulations, as well as this Court's NEPA precedents, establish that an agency is not required to consider every environmental harm that the agency can reasonably foresee. Rather, the agency may draw a manageable causal line that excludes the harms that the agency lacks the statutory authority to prevent, and that takes account of whether and to what extent particular harms are too attenuated, speculative, or otherwise insufficiently material to the agency's decisionmaking to serve NEPA's purposes and satisfy its rule of reason, given the scope and nature of the agency action and the governing statutes.

2022, CEQ reestablished those longstanding categories. See 87 Fed. Reg. at 23,462-23,463.

B. Petitioners Err To The Extent They Suggest That An Agency May Impose Limits On Its Environmental Analysis That Do Not Comport With NEPA's Text Or Underlying Policies

Although NEPA and its implementing regulations permit an agency to refrain from analyzing environmental effects under the principles described above, an agency may not impose limits on the scope of its analysis that conflict with the statutory text or "the underlying policies behind NEPA and Congress' intent." *Public Citizen*, 541 U.S. at 768. In their certiorari-stage briefing, petitioners appeared to endorse three such unsupported, extra-textual limits: (1) that agencies may restrict their analysis to the effects they directly regulate, rather than relying on the nature of their statutory authority to inform a context-specific inquiry regarding the appropriate scope of the agency's environmental impact statement; (2) that agencies should base their analysis of causation on substantive standards from tort law, rather than treating the "'familiar doctrine of proximate cause from tort law'" as an "analog[y]" and looking to NEPA's underlying policies and rule of reason in drawing their causal lines, *id.* at 767 (citation omitted); and (3) that agencies may eschew the context-specific inquiry NEPA requires in favor of broad and bright-line rules based on geography, timing, or the specific number of contributors to the particular harm. Each of those arguments lacks merit.

1. At the certiorari stage, petitioners repeatedly asserted that "agencies need not study environmental effects that they do not regulate." Pet. 14 (emphasis omitted); see, *e.g.*, Pet. 4, 21. To the extent petitioners mean to suggest that agencies are not required to consider effects if they have no statutory power to prevent those

effects, that is nothing more than a restatement of *Public Citizen*'s holding. But if petitioners instead mean that agencies never have to consider environmental effects they do not *directly* regulate—that is, that they may ignore effects they are not expressly charged with overseeing under their organic statutes—then petitioners' argument is contradicted by NEPA's text.

NEPA contains an express requirement that agencies "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. 4332(2)(C); 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"). That provision tells an agency what it should do when the environmental consequences of its proposed action implicate another agency's regulatory jurisdiction, rather than (or in addition to) its own. The agency preparing the environmental impact statement must "consult" with the other agency, 42 U.S.C. 4332(2)(C), and it may also make the other agency a "cooperating agency," 42 U.S.C. 4336a(a)(3). Moreover, if the other agency has analyzed or will analyze the effect, that analysis can be incorporated by reference, thereby avoiding inefficiencies. See 40 C.F.R. 1501.2, 1502.4(d)(1). What the agency may not do is disregard an effect entirely based solely on the fact that another agency has more direct "jurisdiction by law" over the effect. 42 U.S.C. 4336a(a)(3).

Moreover, confining agencies' NEPA obligations to the consideration of environmental effects they already directly regulate would contravene Congress's com-

mand that "*all* agencies of the Federal Government" shall "to the fullest extent possible" comply with the obligation to prepare an environmental impact statement in connection with their major actions that have significant environmental effects. 42 U.S.C. 4332 (emphasis added). If agencies were to exclude environmental effects that are not within their direct regulatory jurisdiction, the many federal agencies that have no direct jurisdiction over environmental issues under their organic statutes would have no NEPA obligations at all, and the obligations of other agencies would shrink drastically. That is the opposite of what Congress required.

Interpreting NEPA to permit agencies to ignore any effect they do not directly regulate would also render the statute's procedural commands largely nugatory. NEPA was enacted to ensure that agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Public Citizen*, 541 U.S. at 768 (citation omitted). If the agency already directly regulates the environmental effects in question, it does not need NEPA to ensure that it has relevant information in front of it. That cannot be what Congress intended when it enacted its landmark statute establishing a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and to promote better environmental decisionmaking while enriching the understanding of the Nation's important natural resources. 42 U.S.C. 4321.[6]

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[6] See Comm. on Interior and Insular Affairs, *National Environmental Policy Act of 1969*, S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969) (Senate Report) (noting "rising public concern over the manner in which Federal policies and activities have contributed to en-

2. a. Petitioners also repeatedly suggest (*e.g.*, Pet. 4, 16, 23) that NEPA requires the application of the same proximate cause standards from tort law. Again, petitioners are correct to the extent they merely mean to assert that NEPA does not require an agency to assess all effects under a standard of "but-for" causation and instead permits agencies to exclude harms for which their actions are not the "legally relevant cause"; indeed, that is simply a restatement of the Court's holdings in *Public Citizen*. 541 U.S. at 767, 769. But recognizing that the agency's action must be the "legally relevant cause" of an environmental harm does not equate to a holding that NEPA incorporates the same proximate cause standards from tort law or require agencies to turn to tort law as the basis of analysis.

To the contrary, this Court has expressly rejected the proposition 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. Thus, while both *Metropolitan Edison* and *Public Citizen* "analogized" NEPA's requirement of a "reasonably close causal relationship" to "the 'familiar doctrine

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vironmental decay and degradation," and citing examples such as "the Santa Barbara oil well blowout," "the proliferation of pesticides and other chemicals," "the indiscriminate siting of * * * heavy industry," "the pollution of the Nation's rivers, bays, lakes, and estuaries," "the loss of publicly owned * * * open spaces * * * to industry, commercial users, and developers," and "rising levels of air pollution."); see *id.* at 4 (discussing "[t]he inadequacy of present knowledge, policies, and institutions," as reflected in problems such as "critical air and water pollution problems," "diminishing recreational opportunity," "rising levels of noise," "an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards," and "many, many other environmental quality problems").

of proximate cause from tort law,'" the comparison was intended to illustrate that NEPA causation turns on the responsibility of the federal agency; it was not intended to suggest that tort law itself should be used to define the scope of an agency's NEPA analysis. *Public Citizen*, 541 U.S. at 767 (citation omitted). Rather, in drawing causal lines in the two cases, the Court looked to the "underlying policies behind NEPA and Congress' intent." *Id.* at 768.

That is readily apparent in *Public Citizen*, where the Court relied on an analysis of NEPA's purposes and its "rule of reason" in concluding that the agency did not need to consider the effects of the increased presence of Mexican trucks in the United States. 541 U.S. 767; see pp. 24-25, *supra*. But it is equally true of *Metropolitan Edison*. In that case, the Court looked to NEPA's underlying purposes to determine whether the Nuclear Regulatory Commission was required to consider the psychological harms caused by the fear of nuclear accidents before authorizing a nuclear power plant to resume operations. *Metropolitan Edison*, 460 U.S. at 770-771. The Court determined that the agency was not required to consider those harms because NEPA's "central concern" is whether a project's "gains are worth a given level of alteration of our physical environment or depletion of our natural resources," not whether a project's gains are "worth its attendant risks." *Id.* at 775-776. The causal analysis was therefore focused on the extent to which the effect in question was one that Congress would have intended to cover.

b. Further, NEPA is distinct from the federal statutes that this Court has held incorporate a proximate cause standard borrowed from tort law. Those statutes typically permit the award of damages against private

parties found liable for specific harms, making the analogy to the common law of torts relatively close. See, *e.g.*, *Bank of Am. Corp.* v. *City of Miami*, 581 U.S. 189, 201 (2017) (Fair Housing Act, 42 U.S.C. 3601 *et seq.*, damages suit); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 133 (2014) (damages under the Lanham Act, 15 U.S.C. 1051 *et seq.*). By contrast, NEPA does not allocate responsibility for a particular harm or impose monetary damages. Instead, NEPA seeks to "reduce or eliminate environmental" harms by ensuring that federal agencies consider the environmental consequences of their actions. *Public Citizen*, 541 U.S. at 756 (citation omitted). There is no reason to think that, in enacting a statute designed to "reduce or eliminate environmental" harm, Congress intended to draw the same causal lines that the tort system uses to allocate blame among private parties for harms that have already occurred. Nor is it plausible that, in imposing NEPA's purely "procedural requirements," *ibid.*, Congress intended to require the precise kind of causal connection that is necessary to justify monetary damages.

c. Simply engrafting the same proximate cause standard from tort law onto NEPA would also introduce unnecessary confusion into the statutory scheme. "'[P]roximate cause'" is a term that has been used to refer to a variety of different things, including "the 'immediate' or 'nearest' antecedent test; the 'efficient, producing cause' test; the 'substantial factor' test; and the 'probable,' or 'natural and probable,' or 'foreseeable' consequence test." *CSX Transp.*, 564 U.S. at 701. Agencies and courts attempting to make sense of the term would be likely to come to diverging results about what must be included in an environmental impact

statement. And that is all the more likely because the Court has emphasized that, even when a federal statute incorporates tort principles of proximate cause, the contours of the analysis must nonetheless be drawn to reflect "the nature of the statutory cause of action." *Bank of Am. Corp.*, 581 U.S. at 201; see *id.* at 203 (remanding to the court of appeals to draw the "precise boundaries of proximate cause under the" Fair Housing Act). Accordingly, if the Court were to conclude that NEPA incorporates tort law governing proximate cause, that approach would still raise questions about what exactly the standard means in this context.

3. It would be similarly erroneous to impose rigid bright-line rules that woodenly exclude harms based solely on their geographic or temporal distance from the agency action or based on the number of intervening steps or the number of entities contributing to the harm. As explained, see pp. 27-30, *supra*, an agency may make a context-specific determination that, given the nature of the proposed action and the governing statutes, a particular harm is too attenuated, speculative, contingent, or otherwise insufficiently material to the agency's decisionmaking. But that does not mean that an agency can refuse to consider effects for which its actions are the legally relevant cause and which would inform the agency's decisionmaking merely because those effects are geographically or temporally removed or because other entities also play a role in bringing them about.

Indeed, many significant environmental harms—including some of the very effects that prompted NEPA's enactment, like water contamination and smog—are caused by many parties that are geographically and temporally removed from the location where the harm

is most keenly felt. Senate Report 8. If agencies woodenly applied bright-line rules based on geography, timing, or the specific number of other contributing actors, some of these significant effects might be disregarded entirely by agencies whose actions make material contributions to the harms.

4. All of these arguments seemingly boil down to a request to impose new limits on NEPA's established framework. The proper branch of government to address such requests is Congress. And in this case, the request is particularly misplaced because Congress itself recently amended NEPA without overriding this Court's precedents or making any of the changes that petitioners now seek from this Court.

Moreover, many of Congress's recent amendments were intended to address the process of developing an environmental impact statement. In addition to codifying the reasonable foreseeability requirement, 42 U.S.C. 4332(2)(C)(i), Congress adopted new timing requirements and page limits, as well as new procedures for inter-agency cooperation, see 42 U.S.C. 4336a. Congress also made alterations to the conditions under which environmental impact statements are required, *e.g.*, 42 U.S.C. 4336, and established a set of new statutory definitions, including a new definition of the "major Federal action[s]" to which NEPA applies, *e.g.*, 42 U.S.C. 4336e(10). Nor is this list comprehensive. But Congress did not choose to make any changes that would dramatically limit NEPA's reach in the way petitioners appear to advocate.

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

The court of appeals also erred in interpreting and applying NEPA's statutory requirements. The court held that the agency was required to perform additional and more detailed analysis of the upstream and downstream effects of oil and gas development because the effects were "reasonably foreseeable" and the Board's statutory authority was broad enough to permit their consideration. Pet. App. 30a-37a. But the court failed to recognize that, even in those circumstances, an agency may decline to perform additional analysis when it reasonably determines that the harms in question are too attenuated, speculative, contingent, or otherwise insufficiently material to the agency's decisionmaking in light of the nature of the proposed action and the statutes under which the agency is operating. The Board made such a reasonable determination here.

1. As a threshold matter, the certiorari-stage briefing has narrowed the scope of the court of appeals' decision that is properly before this Court. In their certiorari petition, petitioners focused their challenge exclusively on the court of appeals' assertedly erroneous interpretation of the NEPA causation standard articulated in *Public Citizen*. See Pet. i. Petitioners did not allege legal errors with respect to any other aspects of the court's decision. They did not challenge any of the court's findings that the Board erred in applying statutes other than NEPA. And they did not focus their challenge on aspects of the court's application of NEPA beyond the court's determination that the Board could not rely on *Public Citizen* to justify limiting its consideration of the upstream and downstream effects of oil

and gas development in its environmental impact statement. Pet. App. 36a-39a.

Moreover, in challenging the court of appeals' determination that the Board's treatment of the upstream and downstream effects of oil and gas development was inadequate, petitioners did not address the court's finding that the effects were reasonably foreseeable. And petitioners appeared to concede that the Board has the power to deny an exemption based on environmental effects that it concludes are material to its decision. See Pet. 23.

When respondents described the limited nature of petitioners' challenge in their briefs in opposition (*e.g.*, Gov't Br. in Opp. 17-18), petitioners briefly asserted (Cert. Reply Br. 10) that they had somehow preserved an argument regarding the validity of the court of appeals' application of NEPA to certain "downline impacts" and that a ruling on their behalf would "vindicate every part of the Board's NEPA review." But the only citations to the petition that they offered in support were to descriptions of the facts in the background section. See *id.* at 9-10 (citing Pet. 10, 12). And petitioners again failed to contest (*id.* at 11) the court's determination that the oil and gas development effects were "reasonably foreseeable," while expressly conceding (*ibid.*) that "the Board has authority to weigh environmental effects in its decisions."

Accordingly, the only aspect of the court of appeals' decision that is properly before this Court is the holding that *Public Citizen* did not permit the Board to forgo additional and more detailed analysis of the upstream and downstream consequences of oil and gas development in its environmental impact statement.

2. The court of appeals' decision on that issue was incorrect. The court of appeals concluded that the upstream and downstream consequences of oil and gas development were reasonably foreseeable and that the Board's organic statutes afforded it the authority to prevent those consequences from occurring by refusing to authorize the new railroad line.[7] Even assuming those conclusions were correct, the Board did not act arbitrarily and capriciously in declining to conduct further analysis of the consequences in its environmental impact statement. Rather, the Board reasonably determined that, based on the scope of the proposed action and the provisions of the Board's governing statutes, the upstream and downstream consequences of oil and gas development were too attenuated, speculative, and otherwise insufficiently material to the Board's decisionmaking to require additional consideration under NEPA. Because the statute permits agencies to draw such a manageable causal line, the court of appeals erred in setting aside this aspect of the Board's decision.

a. To begin, this is not a case in which the agency failed to identify potentially relevant effects, omitting them from its environmental impact statement altogether. To the contrary, the Board spent over 50 pages of its final environmental impact statement and its final decision on the rail project discussing the environmental consequences that might result from new oil and gas drilling and refining occurring after completion of the railway line. Those discussions included both a qualitative analysis of the potential for new oil and gas devel-

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[7] In its briefing before the court of appeals, the Board argued that neither conclusion was correct, but as explained, petitioners did not seek certiorari on those issues.

opment in the Basin, and quantitative estimates that the Board found were likely to exaggerate the aggregate amount of new crude oil that might be transported to refineries and the resulting greenhouse gas emissions. See, *e.g.*, J.A. 351-362, 365-474.

The discussions also included detailed explanations of why additional environmental analysis was not necessary. See J.A. 421, 477-482, 520-529; Pet. App. 107a-109a. The Board did not rely on bright-line rules to arbitrarily exclude environmental information that might have been useful to the agency in its decisionmaking process or to the public in commenting during the process. Instead, the Board explained the various context-specific factors that prompted it to conclude that additional analysis of the upstream and downstream consequences of oil and gas development would not "inform" its decisionmaking. J.A. 521; see J.A. 520-529.

Specifically, the Board relied on its governing statutes to determine the appropriate scope of the agency action before it. J.A. 522; see J.A. 421. The Board explained that it "has jurisdiction over rail transportation by rail carriers," citing 49 U.S.C. 10501 and 49 U.S.C. 10502's mandate to grant exemptions based on the transportation merits of a particular project. J.A. 522. The Board also cited the Interstate Commerce Act's common-carrier mandate, under which "railroads have a common carrier obligation to carry all commodities, including hazardous materials, upon reasonable request under 49 U.S.C. § 11101," explaining that it "therefore cannot restrict the types of products and commodities that are transported on rail lines." J.A. 421. And the Board observed that oil and gas development was "sub-

ject to the approval processes of other federal, state, local, and tribal agencies." J.A. 522.[8]

Based on this statutory framework, the Board found that it "lack[ed] sufficient control over future oil and gas development projects to make those projects part of the proposed action assessed in the [environmental impact statement]." J.A. 523. Further, drawing on the Interstate Commerce Act's common-carrier mandate, the Board explained that—while petitioners had proposed the new railroad line to fill a need for better transportation for crude oil—petitioners' request for Board authorization was properly understood as a request to provide "common carrier rail service connecting the Basin to the interstate common carrier rail network," rather than a request to approve new oil and gas development. J.A. 527.

In addition, the Board listed a number of factors that led it to conclude that the environmental harms from any "potential future" oil and gas development were too speculative and attenuated from the proposed action of authorizing the new railroad line to warrant more detailed consideration in the environmental impact statement. J.A. 527; see J.A. 527-528. The Board observed, for example, that any future oil and gas development in the Basin would involve "many separate and independ-

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[8] For instance, the Bureau of Land Management administers public lands in the Uinta Basin on which some of the oil and gas production would take place, and the Bureau has conducted NEPA analysis of the effects of various proposed oil and gas exploration and production projects in the Basin. See *Rocky Mountain Wild* v. *Bernhardt*, 506 F. Supp. 3d 1169, 1177-1185 (D. Utah 2020); *Southern Utah Wilderness All.* v. *United States Dep't of the Interior*, No. 13-cv-1060, 2016 WL 6909036, at *3-*13 (D. Utah Oct. 3, 2016); *WildEarth Guardians* v. *United States Forest Serv.*, No. 14-cv-349, 2021 WL 409827 (D. Utah Feb. 5, 2012).

ent projects that have not yet been proposed or planned," and that might vary according to the land on which they are situated and the scale of the drilling operations. JA. 528. The Board also found that, while it "is possible that" increased oil production could lead to increased oil refining by the Salt Lake City refineries that currently accept Uinta Basin crude oil, that refining might increase regardless of the Board's actions "depend[ing] on future market conditions." *Ibid.* The Board separately explained that it anticipated that most oil would be shipped to refineries on the Gulf Coast and Puget Sound, but it noted that "[t]he final destinations of the trains would depend on the ability and willingness of refineries in other markets to receive rail cars carrying Uinta Basin crude oil and process the oil in their refineries." J.A. 477.

Further, in its final decision authorizing construction of the new line, the Board reiterated its determinations regarding the scope of the proposed action, the limits of the Board's authority, and the attenuated and speculative nature of the harms from oil and gas development and refining. Pet. App. 105a-108a. The Board repeated that it was authorizing the construction of a new railroad line and that the Board lacked the "authority to control or mitigate" oil and gas development. *Id.* at 108a. And the Board also repeated its finding that any new oil and gas development in the Basin 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.* The Board also found 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.

b. The Board thus relied on the scope of the agency action and the Interstate Commerce Act's relevant statutory provisions to come to the reasonable conclusion that it was appropriate to forgo additional or more detailed analysis of harms that the Board found too attenuated and speculative to inform its decisionmaking. *Public Citizen*, 541 U.S. at 767-768. That determination accords with the principles of causation articulated in *Public Citizen*, as well as longstanding NEPA precedents and CEQ regulations, all of which establish that an agency has the discretion to make context-specific determinations regarding the scope of its environmental impact statement. The court of appeals therefore had no basis for finding that the Board's determination was arbitrary and capricious or otherwise contrary to applicable law.

Accordingly, the portion of the court of appeals' decision holding that the Board erred in declining to undertake additional analysis of the upstream and downstream effects of oil and gas development should be reversed.

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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APPENDIX

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APPENDIX

1. 42 U.S.C. 4332 (1970) provides:

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

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

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international co-

operation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

2. 42 U.S.C. 4332 provides:

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

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

(A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this

chapter, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

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

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

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

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

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

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

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

(D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document;

(E) make use of reliable data and resources in carrying out this chapter;

(F) consistent with the provisions of this chapter, study, develop, and describe technically and economically feasible alternatives;

(G) any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement. The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(H) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(I) consistent with the provisions of this chapter, recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international coopera-

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[1] So in original. The period probably should be a semicolon.

tion in anticipating and preventing a decline in the quality of mankind's world environment;

(J) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(K) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(L) assist the Council on Environmental Quality established by subchapter II of this chapter.

3. 49 U.S.C. 10501 provides:

General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection—

(A) the term "local governmental authority"—

(i) has the same meaning given that term by section 5302 of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "public transportation" means transportation services described in section 5302 of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over—

(A) public transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to—

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of

1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

4. 49 U.S.C. 10502 provides:

Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application

under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

5. 49 U.S.C. 10901 provides:

Authorizing construction and operation of railroad lines

(a) A person may—

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

(2) construct an additional railroad line;

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

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

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

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

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may ap-

prove the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

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

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

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

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

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

6. 49 U.S.C. 11101(a) provides:

Common carrier transportation, service, and rates

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have

violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.