

No. 23-975

IN THE
Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE
COALITION, *et al.*,

Petitioners,

v.

EAGLE COUNTY, COLORADO, *et al.*,

Respondents.

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

**BRIEF OF COLORADO
COMMUNITIES AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iii
INTERESTS OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	12
ARGUMENT.....	14
I. The Question Presented Has No Bearing on the Adequacy of the Board’s Analysis of Impacts to Western Colorado	14
A. No One Seriously Disputes That the Railway Will Foreseeably Impact Western Colorado and the Natural Resources on Which Amici Rely.....	16
B. The Board’s Own Regulations Reinforce the Foreseeability of the Railway’s Effects on Colorado.....	19
II. The Indirect Effects Analysis Discloses Critically Important Information Otherwise Unavailable to Local Governments.....	20
A. Local Governments Depend on the Information NEPA Discloses and the Collaboration It Requires	22

Table of Contents

	<i>Page</i>
B. Petitioners' Proposed Rule Would Unduly Constrict NEPA's Core Disclosure Function25
III. Petitioners Incorrectly Demonize NEPA By Overstating Its Burdens and Ignoring Its Many Successes.....	.27
CONCLUSION34
ADDITIONAL COUNSEL.....	.35

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Arizona v. Navajo Nation</i> , 599 U.S. 555 (2023).....	18
<i>City of Auburn v. United States</i> , 154 F.3d 1025 (9th Cir. 1998).....	21
<i>Department of Transportation v. Public Citizen</i> , 541 U.S. 752 (2004).....	15, 22, 25
<i>Marsh v. Or. Nat. Res. Council</i> , 490 U.S. 360 (1989).....	22
<i>Mid States Coal. for Progress v.</i> <i>Surface Transp. Bd.</i> , 345 F.3d 520 (8th Cir. 2003)	21
<i>Nat. Res. Def. Council v. McCarthy</i> , 993 F.3d 1243 (10th Cir. 2021).....	25
<i>New England Coal. on Nuclear Pollution v.</i> <i>Nuclear Regulatory Comm’n</i> , 727 F.2d 1127 (D.C. Cir. 1984).....	17
<i>Or. Nat. Desert Ass’n v Bureau of Land Mgmt.</i> , 625 F.3d 1092 (9th Cir. 2010).....	23
<i>Tex. Cent. Bus. Lines Corp. v.</i> <i>City of Midlothian</i> , 669 F.3d 525 (5th Cir. 2012).....	21

Cited Authorities

	<i>Page</i>
<i>Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.</i> , 595 U.S. 178 (2022).....	13, 20
<i>Yee v. Escondido</i> , 503 U.S. 519 (1992).....	20
 Constitution	
COLO. CONST. art. XX, § 6	2
COLO. CONST. art. XIV, § 16.....	2
 Statutes	
42 U.S.C. § 4331.....	23, 24, 26
42 U.S.C. § 4332.....	26
42 U.S.C. § 4336a.....	26
49 U.S.C. § 10501	21
Colo. Rev. Stat. § 24-33.5-707	21
Colo. Rev. Stat. § 25-15-06	20
Colo. Rev. Stat. § 29-20-104	21
Colo. Rev. Stat. § 29-22.5-101.....	21
Colo. Rev. Stat. § 30-11-101.....	20

Cited Authorities

	<i>Page</i>
Regulations	
40 C.F.R. § 1508.1(aa)	16
40 C.F.R. § 1508.7 (1979).....	22, 23
40 C.F.R. § 1508.8 (1979).....	16, 22, 23
40 C.F.R. § 1508.18	16
49 C.F.R. § 1105.7.....	19
Other Authorities	
65 Fed. Reg. 42,529, 42,529 (July 10, 2000)	26
85 Fed. Reg. 43,304, 43,376 (July 16, 2020)	16
<i>2021: Grizzly Creek Flooding and Debris Flows,</i> U.S. GEOLOGICAL SURV. (Aug. 24, 2021), https://bit.ly/3ETuAXd	5
<i>2021: Grizzly Creek Flooding and Debris Flows,</i> U.S. GEOLOGICAL SURV. (Aug. 24, 2021), https://bit.ly/3yTRqdA	4
<i>Collaborative Effort, COLO. DEP'T OF TRANSP.,</i> https://bit.ly/3ZNPn97 (last visited Oct. 23, 2024)	29

Cited Authorities

	<i>Page</i>
Colo. Leg. Council Staff, Colorado Local Government Handbook (Res. Pub. No. 795) (2023), https://bit.ly/4gRP8j	21
<i>Colorado River Cooperative Agreement</i> , COLO. RIV. DIST., https://bit.ly/4eSq0XR (last visited Oct. 23, 2024)	32
Dan Boyce, <i>Colorado’s Grizzly Creek Fire Shows Climate Change’s Threat to Transport Routes</i> , NPR (Sept. 29, 2020), https://n.pr/3DaUXqw	3
David Lassen, <i>News Photos: Union Pacific Reopens Route After Colorado Mudslides (Second Update)</i> , TRAINS (Aug. 4, 2021), https://bit.ly/4fygRV1	3
Dep’t of Transp., I-70 Mountain Corridor Record of Decision and Final Programmatic Environmental Impact Statement (2011)	28
<i>Glenwood Canyon and Debris Flows</i> (Dec. 16, 2021), https://on.doi.gov/3CJ8cx1	4
Glenwood Springs, <i>Glenwood Springs Water and Resiliency After the Grizzly Creek Fire</i> (2021), https://bit.ly/3ETpvOK	4
<i>Intergovernmental Agreement for the Learning By Doing Cooperative Effort</i> , GRAND CNTY. (May 15, 2012) https://bit.ly/4h56REh	32

Cited Authorities

	<i>Page</i>
<i>Interstate 70 Mountain Corridor Express Lanes: Managed Lanes Repurpose Highway Shoulders in Peak Periods to Improve Traffic Access</i> , HDR, https://bit.ly/487ZzeV (last visited Oct. 23, 2024)	29
John C. Ruple & Kayla M. Race, <i>Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases</i> , 50 ENV'T. L. 479 (2020)	27
<i>NEPA Reviews of Tolling and Road Pricing Projects: I-70 Mountain Express Lanes</i> , U.S. DEP'T OF TRANSP., https://bit.ly/4dCy4ez (last visited Oct. 23, 2024)	29
Press Release, Colo. Dep't of Transp., CDOT, CSP Urge I-70 Drivers in Glenwood Canyon to Follow All Safety Instructions and Help Prevent More Closures, https://bit.ly/3zYmVXx (last visited Oct. 23, 2024)	11
Ryan Spencer, <i>Colorado Department of Transportation Project Aims to Reduce I-70 Closures Near the Tunnels This Winter</i> , SUMMITDAILY (Nov. 8, 2023), https://bit.ly/3BQNcaY	11
Surface Transp. Bd., Draft Environmental Impact Statement for the Tongue River Railroad at 17-3 (2015), https://bit.ly/4gRYH1J	19

Cited Authorities

	<i>Page</i>
<i>Town Statistics and History</i> , MINTURN, https://bit.ly/40lj7KV (last visited Oct. 23, 2024)	7
<i>Wildfires in Glenwood Springs</i> , VISIT GLENWOOD SPRINGS, https://bit.ly/3CIRi1E (last visited Oct. 23, 2024)	5
<i>White River National Forest</i> , U.S. FOREST SERV., https://bit.ly/4hcBebG (last visited Oct. 23, 2024)	2

INTERESTS OF THE *AMICI CURIAE*¹

Amici curiae are a bipartisan coalition of local governments and communities located along the Union Pacific Rail Line and Interstate 70 (I-70) in western Colorado. This places them in what the Surface Transportation Board (Board) calls the “down-line study area” for the decision under review, which authorizes the construction of the Uinta Basin Railway (Railway). That poorly reasoned decision adversely affects Amici’s interest in numerous ways described below. This is why many of the Amici also filed an amicus brief in the D.C. Circuit, explaining the importance of the Board’s NEPA process for analyzing effects to Amici’s interests in wildfire prevention, water quality, public health, and safety, as well as the glaring defects in the Board’s analysis of those issues.²

Situated along the Union Pacific Line—which will receive 90% of the new rail traffic authorized by the Board, J.A.513—Amici are directly impacted by the decision approving the Railway. Ultimately, it is the Amici who are responsible for responding to the accidents, wildfires, river contamination, and destruction of private property inevitably caused by the Board’s decision. All of this places an enormous strain on these local governments’

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

2. Colorado communities, including the towns of Avon, Minturn, and Red Cliff, also participated in the Board’s NEPA process by submitting comments on the draft Environmental Impact Statement (EIS).

comparatively diminutive operating budgets and the ensuing environmental fallout threatens lasting damage to the outdoor recreation and tourism industry on which these communities heavily rely. Amici thus maintain a clear interest in understanding the full array of the downline effects in Colorado, i.e., foreseeable effects that will occur along existing railways due to the substantial increase in rail traffic, including what can be done to mitigate those impacts and how Amici should prepare to respond to them.

Glenwood Springs, Colorado is a home-rule municipality of roughly 10,000 residents in Garfield County.³ It sits in Glenwood Canyon at the confluence of the Roaring Fork and Colorado rivers. Surrounded by steep, rugged topography, Glenwood Canyon represents a natural mountain pass for both I-70 and the Union Pacific Line.

Glenwood Springs was established as and continues to be a respite for visitors to the Rockies. Annually, 1.5 million people visit Glenwood Springs to enjoy the world’s largest mineral hot springs, whitewater rafting, kayaking, fly-fishing, hiking, and skiing. The nearby White River National Forest receives “more than 12 million visitors per year,” making it “the most-visited recreation forest in the country.” *White River National Forest*, U.S. FOREST SERV., <https://bit.ly/4hcBebG> (last visited Oct. 23, 2024). Glenwood Springs’ economy is heavily dependent on tourism; nearly 40% of residents are employed in the

3. The Colorado Constitution empowers cities and towns to adopt “home rule” governance, allowing them to exercise greater control over matters of local significance. COLO. CONST. art. XX, § 6; *id.* art. XIV, § 16.

leisure, hospitality, and retail sectors, which is double the national average.

Glenwood Springs has witnessed a marked rise in wildfires due to extreme drought conditions that are fast becoming the norm. In August 2020, a fire ignited one mile east of Glenwood Springs that burned for 130 days and consumed 32,631 acres. That fire—known as the Grizzly Creek Fire—caused severe upheaval, including area-wide evacuations, long-term closures of I-70, food and supply shortages, and substantial property damage. See Dan Boyce, *Colorado's Grizzly Creek Fire Shows Climate Change's Threat to Transport Routes*, NPR (Sept. 29, 2020), <https://n.pr/3DaUXqw>. It also cost the city “tens of millions of dollars” in lost tourism revenue. *Id.* (“[T]he two-week-long highway closure wreaked havoc on the Glenwood Springs economy during a tourism season already wounded by the pandemic,” with some businesses losing “two-thirds” of their revenue “once travelers were cut off from the area by the fire.”).

Containment did not end the fire’s devastation. Because the fire stripped Glenwood Canyon’s steep slopes of vegetation, subsequent rainstorms triggered landslides and debris flows that covered the Union Pacific Line and deposited burnt sediment and toxic ash into the Colorado and Roaring Fork rivers. See David Lassen, *News Photos: Union Pacific Reopens Route After Colorado Mudslides (Second Update)*, TRAINS (Aug. 4, 2021), <https://bit.ly/4fygRV1> (depicting, via photographs, the effects of landslides on the Union Pacific Line). Those “debris flows have had enormous impacts on the citizens of Colorado,” including by threatening critical drinking water supplies. Boyce, *supra*. In turn, Glenwood Springs

has diverted millions of dollars to protect its residents' water. *See* Glenwood Springs, Glenwood Springs Water and Resiliency After the Grizzly Creek Fire at 2, 6 (2021), <https://bit.ly/3ETpvOK> (outlining turbidity monitoring, solids collection system, and other improvements made after the debris flows).

Debris flows caused repeated closures of I-70, which exacerbated economic harm to local businesses. In fact, in 2021, “[n]early every strong storm triggered debris flows that carr[ie]d mud, rocks, and woody material from steep side drainage basins into Glenwood Canyon,” damaging “portions of [I-70], as well as the Union Pacific [Line].” *Glenwood Canyon and Debris Flows* (Dec. 16, 2021), <https://on.doi.gov/3CJ8cx1>. The following photographs show the repeated annihilation of I-70 and the Union Pacific Line by post-fire debris flows in Glenwood Canyon.



Debris flow covering eastbound lanes of I-70⁴

4. Photo by U.S. Geological Survey (USGS). *See* June 26 and 27, 2021: *Grizzly Creek Flooding and Debris Flows*, U.S. GEOLOGICAL SURV. (Aug. 24, 2021), <https://bit.ly/3yTRqdA>.



Debris flow covering westbound lane of I-70⁵

Later investigations concluded that the fire was “human-caused,” likely from a single ignition-point on I-70. *Wildfires in Glenwood Springs*, VISIT GLENWOOD SPRINGS, <https://bit.ly/3CIRi1E> (last visited Oct. 23, 2024). Consequently, communities in this extremely fire-prone region have become vigilant about potential ignition sources in the Canyon, including the Union Pacific Line. Of course, increasing the number of trains traveling along this line necessarily increases the risk of large-scale wildfires. *See infra* at 19.

Grand County, Colorado is located in Colorado’s North Central mountains and is home to the headwaters of the Colorado River. Grand County’s watersheds are vital to both the Upper and Lower Colorado River Basins, as

5. Photo by USGS. *See June 26 and 27, 2021: Grizzly Creek Flooding and Debris Flows*, U.S. GEOLOGICAL SURV. (Aug. 24, 2021), <https://bit.ly/3ETuAXd>.

its streams and rivers bring clean, high-quality water to communities and agricultural operations throughout the West. Situated at the west entrance of Rocky Mountain National Park, Grand County's tourism-based economy is supported by year-round outdoor activities like world-class skiing at Winter Park Resort, boating and fishing on the county's many lakes, and rafting and fly-fishing on the Colorado River, which attracts over 7.7 million visitors a year. In 2020, the East Troublesome Fire—the second largest fire in Colorado's history—burned through 193,812 acres of land in Grand County, destroying over 500 structures and homes. After the 15,000-acre Williams Fork Fire, nearly 17% of Grand County was impacted by wildfire in 2020 and it continues to deal with the fallout from debris flows caused by those fires. Thanks to a multi-agency collaborative restoration effort, these fragile ecosystems and watersheds that are tributaries to the Colorado River are beginning to show signs of recovery.

The Union Pacific Line winds through Grand County along the Colorado River, passing through sharply curved and hard-to-access canyons where trains have repeatedly derailed within the last twenty years. Long stretches of railroad tracks are merely feet from the Colorado and Fraser rivers. Any oil spill into either river would have devastating impacts on outdoor recreation, agriculture, and the aquatic environment.

Grand Junction, Colorado is a home-rule municipality, located in Mesa County near the Utah border, and the most populous city in western Colorado. The City's name derives from its location at the confluence of the Gunnison and Colorado rivers. Beginning in the 1880s, and continuing today, two major railroads contributed to the development of Grand Junction and the Grand Valley.

The Union Pacific Depot and Railyard are fixtures in the City and accommodate significant daily commercial and passenger rail traffic in and through the City. The City has several at-grade crossings that may be impassable for extended periods with longer trains. The City is currently studying “quiet zones” and is interested in how additional trains may impact that effort, and/or what effect the type of train has on local safety concerns. The City holds significant water rights in the Colorado and Gunnison Rivers that would be impacted by any spills in the river. Grand Junction is in the 15 Mile Reach for Threatened and Endangered species. The City is fortunate to be surrounded by federal public lands—including the Colorado National Monument and McInnis Canyons National Conservation Area—that are subject to NEPA decisionmaking processes. The City’s economy relies on balancing industrial development with outdoor recreation’s need for the protection of its landscapes and waterways.

Minturn, Colorado is a home-rule municipality of 1,100 residents, located two miles south of I-70 in Colorado’s Vail Valley, near the Vail and Beaver Creek ski resorts, White River National Forest, and Holy Cross Wilderness. It was established as a strategic railroad town where workers “installed extra engines in railroad cars for more power over [the] steep mountain passes” characteristic of the Union Pacific Line. *Town Statistics and History*, MINTURN, <https://bit.ly/40lj7KV> (last visited Oct. 23, 2024). Today, however, Minturn relies heavily on travelers to keep local businesses and the town as a whole viable and vibrant. Indeed, Minturn suffered considerable harm to its economy as a result of the Grizzly Creek Fire, the ensuing debris slides, and the closures of I-70.

Avon, Colorado is a home-rule municipality located on I-70. It sits adjacent to Beaver Creek and eight miles west of the Vail Valley. It has a year-round population of 6,072, which increases significantly during the ski season. Avon is also a popular tourist destination for hiking, horseback riding, bicycling, kayaking, and rafting. Year-round tourism and winter recreation-related businesses account for a significant portion of employment and earned income of area residents. As such, it remains vigilant about wildfires and river contamination that may detract from the area's appeal. Avon, for example, now spends roughly \$80,000 per year on a wildfire fuel source removal program.

Red Cliff, Colorado is a town of 300 residents nestled between Beaver Creek and Vail. It sits along the Colorado Scenic Byway, ten miles south of I-70. Residents and tourists alike enjoy mountain biking, cross-country skiing, snowmobiling, kayaking, fly fishing, rock climbing, and hiking with fantastic wildflower viewing, all within and around Red Cliff. Like nearby towns, a single wildfire and its effects—including drinking water impacts, landslides, debris flows, and road closures—can cripple Red Cliff's tourism-based economy for years.

Crested Butte, Colorado was founded as a mining camp but once the coal and silver ran out it transitioned to agriculture and an outdoor recreation hub. When molybdenum ore was discovered and proposed to be mined in Mt. Emmons (a.k.a. Red Lady) the community banded together to "Save Red Lady" and nearly 50 years later that goal was accomplished through collaboration with local governments, the mine owner, community groups, and the federal government. The town is an active participant

in NEPA processes relating to the surrounding federal public lands that serve as the economic backbone of the community.

Basalt, Colorado is a home-rule municipality located in Eagle and Pitkin Counties at the confluence of the Fryingpan and Roaring Fork rivers, both known for their Gold Medal trout fishing. Basalt is home to several fishing guide services and fly-fishing shops that cater to and accompany anglers on the Colorado River. The Town utilizes its water rights in Ruedi Reservoir to help both game fish and endangered fish in the Colorado River survive during increasingly hot, dry summer conditions. Surrounded by state and federal public lands, Basalt appreciates that NEPA allows it to participate in the decisionmaking process for projects that impact its residents and infrastructure.

Routt County, Colorado has over 25,000 residents and extends north from Eagle County to the Wyoming border. The county seat is the City of Steamboat Springs, which shares its name with the world-renown ski resort located there. The resort is an outdoor-recreation and tourism hub, serving the public while providing significant economic benefit. The county's southern boundary lies within a couple of miles of the Union Pacific Central Corridor and any impacts from a fire or spill nearby would foreseeably result in negative effects to the county, its residents, and its economy. While I-70 lies outside of Routt County, the recommended detour during all Glenwood Canyon closures (Highway 40) traverses the entirety of the county, and Glenwood Canyon closures and subsequent detours significantly impact county infrastructure and the health, safety, and welfare of its residents.

Boulder County, Colorado has 330,758 residents and lies in north-central Colorado on the eastern slopes of the Rocky Mountains. It contains forests, mountains, and canyons, which hold creeks that supply water to the cities, high plains, grasslands, and farmlands in the eastern part of the county. Boulder County's extensive efforts to protect open space and promote conservation have attracted farming, business, recreation, and tourism revenue. Since 1989, Boulder County has experienced at least nine major wildfires, including the 2021 Marshall Fire—the most destructive in Colorado history—which destroyed more than 1,000 homes and over 30 commercial structures. Part of the Union Pacific Line travels through the county. Local water supplies for the county depend upon South Boulder Creek, which runs alongside the Union Pacific Line, and would be impacted by any contamination triggered by the Railway.

Pitkin County, Colorado is located in Colorado's Central Mountains. It has a population of 17,548 that swells during peak tourism seasons. Home to the famed Aspen-Snowmass ski resorts, it attracts summer and winter visitors for skiing, fishing, hiking, rafting, and other outdoor pursuits.

Northwest Colorado Council of Governments (NWCCOG) is an association of 31 county and municipal governments created by Executive Order as a regional planning district. Its purpose is to work together on a regional basis to provide benefits and services that could not be obtained alone. The region includes municipalities and counties located in the central mountain region of Colorado. Many of its members are located along

the proposed route.⁶ Through its water quality and quantity arm, NWCCOG works to enhance member local government efforts to protect and improve water quality. NWCCOG also is the designated Regional Water Quality Management Agency pursuant to Section 208 of the federal Clean Water Act.

The NWCCOG Region comprises the headwaters of the Colorado River and its major tributaries, where three counties and seven municipalities are adjacent to the River (and the Union Pacific Corridor). Outdoor recreation and tourism are significant drivers of the local economy in this region.

The NWCCOG Region would be severely impacted by any increase in spills, derailments, or wildfires caused by increased rail traffic from the Railway. Such incidents jeopardize drinking water supplies, interrupt fishing and rafting activities for months or years, and could shut down I-70. Between \$1–2 million is lost *every hour* that I-70 is closed in the mountain region. *See* Press Release, Colo. Dep’t of Transp., CDOT, CSP Urge I-70 Drivers in Glenwood Canyon to Follow All Safety Instructions and Help Prevent More Closures, <https://bit.ly/3zYmVXX> (last visited Oct. 23, 2024); *see also* Ryan Spencer, *Colorado Department of Transportation Project Aims to Reduce I-70 Closures Near the Tunnels This Winter*, SUMMITDAILY (Nov. 8, 2023), <https://bit.ly/3BQNcaY>. As with other Amici, the member jurisdictions of NWCCOG along the route are first responders to emergencies on

6. The Town of Gypsum, which is not located along the route, is not participating in this brief.

transportation corridors of national significance such as the I-70 and the Union Pacific.

SUMMARY OF THE ARGUMENT

The D.C. Circuit correctly held that the Board's analysis of downline impacts on western Colorado failed for numerous reasons under NEPA and the Administrative Procedure Act. This Court should affirm that decision.

1. The answer to the question presented has no bearing on whether the Board's analysis of downline impacts in western Colorado passed muster under NEPA and the Administrative Procedure Act. In the decision under review, the D.C. Circuit's analysis rests in part on the understanding that downline impacts fell within the agency's regulatory ambit and were a foreseeable result of the Board's decision to approve the construction and operation of a new railway that essentially serves as an extension of the Union Pacific line running through western Colorado's narrow mountain passes.

(a) In this Court, Petitioners suddenly contend that the Board was not obligated to consider the Railway's effects on western Colorado because now they feel those impacts are too "contingent and remote" to be considered under NEPA. Petrs. Br. 36. This is a sea change from prior proceedings; before now, no party has ever challenged the foreseeability of the Railway's effects on western Colorado. Indeed, the Board *did* consider these issues as part of its normal NEPA review, and the D.C. Circuit invalidated that analysis as "utterly unreasoned."

In any case, it would be impossible to dismiss the Railway's effects on western Colorado's environment

as unforeseeable. Ninety percent of the new rail traffic created by the Board's decision—i.e., up to 9.5 oil trains (or, 1,100 rail cars) every day—will travel on the Union Pacific line that bisects Amici's communities.

(b) The foreseeability of the Railway's effects on western Colorado, and therefore the Board's duty to consider those impacts, is further reinforced by the Board's own regulations implementing NEPA and other federal environmental laws. Where, as here, the Board must evaluate the transportation merits of a proposed railroad, those regulations compel the Board to consider the foreseeable environmental effects of increasing rail traffic on existing rail lines that will receive that new traffic. The Union Pacific corridor easily fits the bill and the Board's failure to disclose the full spectrum of those effects on that corridor thus flunks under NEPA *and* the Board's separate regulations.

Assuming the Court agrees that Petitioners' failure to contest the foreseeability of impacts on western Colorado at any time before now obscures the issues necessary to resolve the question presented, the Court can and should consider dismissing the petition as improvidently granted. *See Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 190 (2022) (Thomas, J., dissenting) (counseling in favor of dismissal where petitioners relied “on a different argument in [its] merits briefing” from that in its certiorari briefing, especially when that argument “was not clearly pressed or passed upon below”).

2. To the extent Petitioners actually propose a new test for delimiting the scope of NEPA, which is by no means clear, their proposed rule cannot be sustained by NEPA's text, is inconsistent with the Act's purposes, and

the Court should reject it. Amici strenuously object to the limitation that Petitioners have tried to foist on NEPA (i.e., limiting the scope of an effects analysis to issues within the lead agency's remit) because local governments depend on the information disclosures NEPA compels, as well as the collaborative approach to decisionmaking that allows small government bodies to have their concerns seriously considered and/or mitigated during the NEPA review process. If Petitioners get their way, Amici will lose the invaluable tools NEPA provides in all but the most direct impact cases. This kind of hyper-narrow limitation on NEPA review is neither supported by the Act's text nor consistent with its animating purposes.

3. Finally, Petitioners' claims about NEPA's allegedly exorbitant delays and costs are overblown and refuted by data. Amici's experiences with NEPA do not track with Petitioners' claims. If anything, in Colorado, NEPA has been used to formulate some of the state's most enduring, innovative compromises when dealing with otherwise intractable conflicts over the state's much-celebrated natural resources.

ARGUMENT

I. The Question Presented Has No Bearing on the Adequacy of the Board's Analysis of Impacts to Western Colorado

The question before the Court is whether NEPA "requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority." Pet. i. Although Petitioners do not stick to any one test, they suggest their

rule excuses a lead agency from considering unforeseeable impacts “far outside its limited remit.” *Petrs.* Br. 26.

Petitioners contend the second part of that question—i.e., whether an agency’s “regulatory authority” delimits its analysis—comports with the “rule of reason” described by this Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). But the holding in that case does not go as far as Petitioners hope. That holding merely reiterates the straightforward NEPA rule that “where an agency has *no ability to prevent* a particular effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of that effect.” *Pub. Citizen*, 541 U.S. at 770 (emphasis added).

Insofar as Amici’s interests in protecting western Colorado communities are concerned, the answer to the question presented has no bearing on the lower court’s holding correctly rejecting the Board’s failure to *adequately* consider the action’s inevitable impacts in the downline study area, i.e., the Union Pacific Line between Kyune, Utah and Denver, Colorado. There is no dispute here that the Railway’s environmental impacts on western Colorado are foreseeable, as confirmed by the Board’s own analysis. Nor is there any dispute that the Board retains authority to prevent those effects from coming to pass, as required by *Public Citizen*. *See* Pet.App.36a (“The Board concededly 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.” (citations omitted)); *see also* Pet.App.83a (describing the Board’s own authority to “deny the proposal[] or grant

it with conditions,” “including environmental mitigation conditions,” after analyzing “the environmental impacts associated” with its decision).

In short, NEPA—as well as the Board’s own regulations—required the Board to alert western Colorado communities to the foreseeable effects of its decision coming down the line. The Board’s failure to adequately analyze these indisputably foreseeable impacts is a run-of-the-mill violation of NEPA.

A. No One Seriously Disputes That the Railway Will Foreseeably Impact Western Colorado and the Natural Resources on Which Amici Rely

When the Board acted, longstanding, binding regulations implementing NEPA compelled the Board to consider and disclose to the public the “reasonably foreseeable” effects of its decision, including those “caused by the action [that] are later in time or farther removed in distance, but are still reasonably foreseeable,” 40 C.F.R. § 1508.8, 40 C.F.R. § 1508.18(b)⁷; *see also* Pet.App.107a-08a (acknowledging duty to examine same).

But throughout the litigation below and the Board’s administrative proceeding, nobody disputed the understanding that the Railway will foreseeably impact

7. Before the Board reached a final determination on the Railway, NEPA’s implementing regulations were amended to define “reasonably foreseeable” as being “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) (codified at 40 C.F.R. 1508.1(aa) (2021)).

western Colorado communities. Indeed, the Board's own analysis confirms that the Union Pacific corridor in western Colorado will receive 90% of all rail traffic emanating from the Uinta Basin. J.A.513. And, in the very decision under review, the Board admits it considered "reasonably foreseeable impacts that could occur outside the project area as a result of construction and/or operation of trains using the Line." Pet.App.110a. That consideration, however, simply did not go far enough to satisfy NEPA.

The dispositive flaw in that analysis identified by the D.C. Circuit rests on the fact that the Board washed its hands of adequately disclosing many foreseeable impacts to western Colorado by resorting to "utterly unreasoned" defenses of its analysis. Pet.App.44a. For example, with respect to the heightened wildfire risk in the downline area, the Board's decision is internally contradictory and, therefore, patently arbitrary. *E.g.*, *New England Coal. on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1130 (D.C. Cir. 1984) (Scalia, J.) (For an agency to say one thing and do another "is the essence of arbitrary and capricious action" (quoting *Squaw Transit Co. v. United States*, 574 F.2d 492, 496 (10th Cir. 1978))). Whereas the Board says its decision will not produce a significant wildfire risk to downline communities because "construction and operation of the [Railway] would not introduce a *new ignition source* for wildfires along the downline segments," Pet.App.95a (emphasis added), elsewhere it suggests the opposite conclusion, J.A.282 ("Trains can contribute to wildfires by providing an ignition source."); J.A.201 (acknowledging that increasing the number of rail cars increases the likelihood of ignition).

Petitioners' newly minted attempt to automatically dismiss all downline impacts as unforeseeable is simply not credible. The record here is crystal clear that the Board's decision will introduce roughly 1,100 new, crude-oil-laden rail cars *every day* to existing rail lines. J.A.513-14. The increased rail traffic foreseeably induced by and acknowledged in the Board's decision means that each train from the Uinta Basin will bring over two miles of rail cars filled with flammable waxy crude oil through the communities Amici are entrusted to protect on a daily basis. C.A.App.888.

The Board's analysis determined the risk of rail accidents will more than double on the Union Pacific Line as a result of the Board's decision, J.A.202, including possible derailments and spills contaminating the invaluable water supplies on which western communities depend, *see, e.g., Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023) (acknowledging that for the "western United States," especially those reliant on the Colorado River, "[w]ater has long been scarce, and the problem is getting worse").

In Amici's view, a commonsense reading of the Board's decision and supporting analysis under NEPA clearly illustrates the Railway's inevitable effects on the citizens and communities that Amici are entrusted to protect by Colorado law, *supra* at 22. According to the Board, eastbound trains will account for 90% of the new rail traffic emanating from the Uinta Basin. J.A.513. Not only is the Union Pacific Line (from Kyune, UT to Denver, CO) a foreseeable route for that new rail traffic, it "is the *only* practical route for all rail traffic moving eastward from the Uinta Basin Railway." *Id.* (emphases added). Thus, the Railway's effects on western Colorado

are plainly foreseeable with devastating consequences for Amici.

B. The Board's Own Regulations Reinforce the Foreseeability of the Railway's Effects on Colorado

Although Petitioners ignore the issue, the Board's regulations implementing NEPA (and other laws) further reinforce that the agency was required to consider the Railway's foreseeable impacts on western Colorado and the interests Amici seek to protect from unwise decisionmaking.

The Board's longstanding regulations compel it to consider downline impacts whenever certain magnitude thresholds have been met, just as they were in this decision. 49 C.F.R. § 1105.7(e)(11)(v); Pet.App.110a. The Board's regulations seemingly equate "down-line impacts" to "indirect" effects, *see id.*, although the Board has refined the meaning of the former by specifying that it specifically includes "impacts that could occur along existing rail lines as a result of increased rail traffic due to the addition of new trains originating or terminating on the proposed rail line." J.A.511. The Board has also consistently defined the "downline study area" as the "existing rail lines that could experience an increase in rail traffic ... if the proposed rail line were constructed." J.A.312; *see also* Surface Transp. Bd., Draft Environmental Impact Statement for the Tongue River Railroad at 17-3 (2015), <https://bit.ly/4gRYH1J> ("The study area for potential rail-related down-line impacts is defined as the mainline rail lines outside of the project area that could see an increase in train traffic coming from the proposed rail line.").

As detailed above, the Railway's effects on western Colorado satisfy both parts of the Board's understanding of downline impacts. Because it will receive 90% of the new rail traffic created by the Board's authorization, J.A.513, the Union Pacific corridor (from Kyune, UT to Denver, CO) will obviously "experience an increase in rail traffic ... if the proposed rail line were constructed." J.A.312. Hence, the Board's regulations also plainly compelled the disclosure and consideration of these issues.

This additional ground for rejecting the Board's incomplete analysis of downline effects adds yet another wrinkle to this case. To the extent the Court finds that this issue, or Petitioners' failure to contest the foreseeability of downline impacts in western Colorado before now, obscures the issues necessary to resolve the question presented, it can and should consider dismissing the Petition as improvidently granted. *See Unicolors*, 595 U.S. at 190 (Thomas, J., dissenting); *see also Yee v. Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990))).

II. The Indirect Effects Analysis Discloses Critically Important Information Otherwise Unavailable to Local Governments

Under Colorado law, counties and municipalities like Amici are tasked with protecting the public health, safety, and welfare of their constituents. Colo. Rev. Stat. §§ 25-15-06, 30-11-101 (2024). To execute those broader duties, state

law authorizes local governments to, *inter alia*, develop county-wide wildfire response plans, Colo. Rev. Stat. § 29-22.5-101 (2024), provide emergency management services, *id.* § 24-33.5-707, and “regulat[e] the use of land so as to provide ... protection of the environment in a manner consistent with constitutional rights,” *id.* § 29-20-104; *see also* Colo. Leg. Council Staff, Colorado Local Government Handbook (Res. Pub No. 795) at 19 (2023), <https://bit.ly/4gRP8j>.

Nevertheless, local governments are generally barred from exercising regulatory authority over railroads. The ICC Termination Act of 1995 (ICCTA), 49 U.S.C. § 10501(b), gives the Board “exclusive licensing authority for the construction and operation of rail lines.” *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 533 (8th Cir. 2003). Courts have interpreted the Board’s authority broadly, holding that the ICCTA ordinarily preempts state and local regulatory authority over the construction and operation of railroads. *See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530, 537 (5th Cir. 2012) (“Congress intended to preempt state and local laws that come within the Board’s jurisdiction,” including city ordinances designed to protect the “health and safety” of the public); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (holding that the ICCTA preempted local regulations aimed at preserving the environment).

Still, local governments must prepare to respond to a foreseeable uptick in spills, derailments, and wildfires that the Board acknowledges will result from increased train traffic. Local governments are also responsible for maintaining many of the roads that intersect with

railroad crossings through the Union Pacific Corridor. NEPA plays a crucial role in informing local governments of potential impacts to services and infrastructure within their domain, even without direct authority to regulate railroads. Even if they could, local governments often lack the resources necessary to properly inform their citizens about the effects of a proposed federal project in the way that NEPA does.

Now, Petitioners invite the Court to jettison NEPA's basic information gathering and disclosure function in most circumstances. The Court should decline to deliver this devastating blow to Amici and the many local communities throughout the United States that depend heavily on the participatory approach embodied by NEPA.

A. Local Governments Depend on the Information NEPA Discloses and the Collaboration It Requires

This Court has repeatedly stressed the twin aims served by NEPA. *E.g.*, *Pub. Citizen*, 541 U.S. at 768. First, it “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Id.* Second, NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Id.*; *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).⁸

8. NEPA's operative implementing regulations required the Board to disclose, *inter alia*, the Railway's direct, indirect, and cumulative impacts. *See* 40 C.F.R. §§ 1508.7-1508.8 (1979).

In NEPA, Congress sought to create a collaborative decisionmaking structure whereby local, State, Federal, and private expertise could be brought to bear on major federal issues affecting the environment. 42 U.S.C. § 4331(a) (declaring policies animating NEPA, including “cooperation with State and local governments ... to create and maintain conditions under which man and nature can exist in productive harmony”); *Or. Nat. Desert Ass’n v Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2010) (“NEPA’s purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is ‘almost certain to affect the agency’s substantive decision[s].’” (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989))).

NEPA reviews and the information gleaned from them are crucial for counties and municipalities in Colorado for a number of reasons. First, as discussed above, Colorado’s local governments are often specifically tasked by statute with the protection of their citizens’ health and safety, including emergency response and the maintenance of road infrastructure. NEPA assists local governments in discharging those duties by alerting counties and municipalities to federal projects that may affect their

“Direct effects” are defined as those “caused by the action and occur[ring] at the same time and place.” *Id.* § 1508.8 (a). “Indirect effects” are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b). And, “cumulative” effects (or “impacts”) “result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7.

constituents, or undermine their ability to fulfill their statutorily prescribed duties. If a federal authorization conflicts with local priorities (e.g., public safety and welfare), NEPA provides an avenue for local governments to present their concerns directly to the attention of the federal decisionmaker, who is required by law to give consideration to the views of local governments. 42 U.S.C. § 4331

Further, where a proposed federal action threatens to impede a local government's ability to fulfill its duties to its citizens, NEPA provides a forum for amicably resolving those disputes. As the examples discussed below reveal, *see infra* at 28-33, the mandatory collaboration prescribed by NEPA is an underappreciated aspect of the statute, and one that has been responsible for some of the most ingenious and enduring solutions to otherwise intractable conflicts over shared natural resources.

Finally, as Petitioners repeatedly stress in their brief, comprehensive environmental reviews of the kind generated under NEPA can be expensive, especially when considering projects of the magnitude of the Uinta Basin Railway. For local governments, which often lack the capital reserves necessary to fund such a review, the costs can be prohibitive. By partnering with state and federal agencies under NEPA, however, local governments can defray those costs while examining important issues related to public health, safety, and environmental concerns.

B. Petitioners’ Proposed Rule Would Unduly Constrict NEPA’s Core Disclosure Function

Petitioners argue that we need more NEPA rules to have less NEPA rules. They say lead agencies like the Board should only consider “reasonably foreseeable” effects within the “remit” of the lead agency (the agency foreseeing), not “the purview of other agencies[]”—especially when those other agencies could better address the issue if similarly situated. *Petrs. Br.* 26, 27.

But Amici do not read *Public Citizen* as imposing some free-standing limitation on top of that decision’s limits-of-authority holding. Instead, it merely reiterated straightforward NEPA precedent that excuses lead agencies from analyzing a given effect when doing so “would serve ‘no purpose’ in light of NEPA’s regulatory scheme as a whole” because the agency cannot prevent that effect from coming to pass. *Pub. Citizen*, 541 U.S. at 767-68; *see also Nat. Res. Def. Council v. McCarthy*, 993 F.3d 1243, 1251 (10th Cir. 2021) (“[W]here an agency action is non-discretionary and mandated by law, environmental analysis ‘would serve no purpose,’ and NEPA does not apply.” (citation omitted)).

Petitioners’ proposed rule, however, would reach far beyond the universal “rule of reason” endorsed in *Public Citizen* to cabin the scope of a NEPA review process to those effects within the agency’s delegated remit. That is contrary to the letter and spirit of NEPA, and therefore problematic for a number of reasons.

First, nothing in NEPA’s text or its implementing regulations supports such a draconian limitation on NEPA

analyses. If anything, Petitioners' proposed rule cuts against the interdisciplinary, all-of-government approach clearly embodied by the Act's terms. *See* 42 U.S.C. § 4331 (directing "Federal Government to use all practicable means" and measures to achieve NEPA's policy goals); *see also id.* § 4332 (instructing agencies to implement NEPA's provisions "to the fullest extent possible"); *id.* § 4336a(a) (authorizing "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" in the NEPA process).

Second, the rule Petitioners propose is ill-defined and Amici fear the questions left open by its formulation will lead to more, not less, litigation in the future. For example, under Petitioners' proposed rule, which agency would be responsible for determining the appropriate responder? If two agencies share overlapping expertise in a given subject matter—e.g., railroad safety, *see* 65 Fed. Reg. 42,529, 42,529 (July 10, 2000) (acknowledging the "statutory safety authority" delegated to the Federal Railroad Administration and Federal Transit Administration "straddle[s] the jurisdictional line")—which agency is responsible for analyzing and disseminating the relevant information? What if both agencies refuse to do so, washing their hands of the issue by pointing to the other agency's overlapping expertise? Which agency bears the burden of showing that a given action is (or is not) the proximate cause of a given effect? And what if those agencies disagree about proximate causation?

Finally, as this case and the examples discussed below illustrate, Petitioners' proposed rule threatens to arbitrarily cut local governments out of the decisionmaking

and dispute-resolution processes available under NEPA—even where, as here, the agency admits its decision will inevitably impact local interests and priorities in a negative manner. That is particularly concerning here because the ICCTA ordinarily preempts State and local regulations that might otherwise allow these communities to protect themselves from unwise federal decisionmaking. *See supra* at 21 (collecting cases discussing the ICCTA’s preemptive effect on non-federal regulation).

III. Petitioners Incorrectly Demonize NEPA By Overstating Its Burdens and Ignoring Its Many Successes

Petitioners, joined by several supporting amici, rehash familiar but tired policy attacks against NEPA, claiming that a vicious circle of litigation and agency caution have resulted in excessive delays and untold sunk costs. Petrs. Br. 6-7. The problem is that it fails to find purchase in the actual data collected on NEPA reviews and litigation. To the contrary, the data show “that NEPA litigation has not been used excessively in order to stop or delay federal decisions.” John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV’T. L. 479, 483 (2020). In fact, the research shows that “[o]nly a small fraction of NEPA decisions result in litigation,” where “approximately one in 450 decisions are litigated.” *Id.*

This lesser known but empirically supported view of NEPA tracks with Amici’s general experience. Indeed, Colorado is home to several recent examples of multidisciplinary NEPA reviews in which collaborative decisionmaking yielded simultaneously acceptable outcomes for the regulated entity, the environment, and

the local governments that will feel the proposal's effects most concretely. Below, Amici briefly recap some of those examples to illustrate why comprehensive NEPA review remains an imperative tool for counties and municipalities in Colorado.

I-70 Mountain Corridor Express Lanes

For residents and tourists alike, the I-70 corridor is infamous for its many chokepoints that can quickly snarl rail and vehicle traffic traveling to and from the West Slope (of the Rockies) to Denver and/or other points east. The steep canyon walls and narrow rock ledges that typify this corridor make it a difficult area to navigate safely, regardless of the mode of transport. During periods of peak congestion—mainly Fridays and Sundays during the ski season—the congestion on I-70 routinely added an hour or more to travel times in the area, with some reporting eight-mile drives taking as long as two-and-a-half hours through the mountains.

The Federal Highway Administration (FHWA) and Colorado Department of Transportation (CDOT) released a draft programmatic EIS in 2004 that recommended some solutions to the congestion issue. Those proposals, however, included several publicly unpopular and environmentally destructive choices, including recurring rockface blasting, unattractive retaining walls, and even channeling watercourses routinely utilized by outdoor recreationists. The agencies received “substantial public and agency comments” opposing the project and its predicted impacts. Fed. Hwy Admin. & Colo. Dep't of Transp., I-70 Mountain Corridor Record of Decision and Final Programmatic Environmental Impact Statement at 1-2 (2011).

To their credit, the agencies recognized from these comments an opportunity to build consensus. Rather than force through the project as proposed, the agencies formed a working group comprised of 27 diverse stakeholders to find an acceptable solution to the congestion issue. *Collaborative Effort*, COLO. DEP'T OF TRANSP., <https://bit.ly/3ZNPn97> (last visited Oct. 23, 2024). Eight months after it was formed, that group, called “Collaborative Effort,” recommended a multi-modal solution that included adding express travel lanes to the existing eastbound and westbound shoulders of I-70 to be opened as a relief valve during periods of peak congestion.

The results of that process speak volumes about how NEPA can be used to find consensus. CDOT opened the eastbound express lane on I-70 in 2015, making it “the first project in the United States to use a highway shoulder as a part-time lane based on recreational traffic instead of a regular commuter base.” *Interstate 70 Mountain Corridor Express Lanes: Managed Lanes Repurpose Highway Shoulders in Peak Periods to Improve Traffic Access*, HDR, <https://bit.ly/487ZzeV> (last visited Oct. 23, 2024). Since opening, moreover, “the eastbound express lane has relieved traffic congestion, reduced crashes, and increased reliability. Travel times have declined by 21 minutes and crash clean-up times by four minutes during periods when the lane is operating.” Fed. Hwy. Admin., *NEPA Reviews of Tolling and Road Pricing Projects: I-70 Mountain Express Lanes*, <https://bit.ly/4dCy4ez> (last visited Oct. 23, 2024). That, in turn, “relieves congestion on the local roads, improving access for residents, businesses, and emergency service providers.” *Id.*

If NEPA had not required a comprehensive, transparent process to analyze and disclose the full array of impacts (including indirect effects) of the original proposals, FHWA and CDOT likely would have built one of those initial (but environmentally harmful and highly unpopular) options without feedback from, or the benefit of collaboration and consensus-building with, important stakeholders such as affected local governments and their residents.

Thompson Divide Administrative Withdrawal

For those who live on the West Slope, the Thompson Divide area is special. It is beloved by locals in the Glenwood Springs, Carbondale, and Pitkin County communities as a respite from otherwise crowded recreational areas in the Roaring Fork Valley during peak tourism seasons. For instance, the Divide is home to Sunlight Mountain, a lesser-known yet cherished ski area utilized by locals when other places like Aspen and Vail become too busy. It is also an immensely popular location amongst sportsmen for its hunting and angling opportunities.

About 20 years ago, the Thompson Divide area became an attractive exploration location for extractive mineral operations. When a proposed project threatened to negatively impact the area's solitude and recreational opportunities, local stakeholders from across the ideological spectrum came together to voice their support for establishing long-term protections for the Thompson Divide. This included local governments that engaged in multiple NEPA processes to initially oppose extraction activities within or in close proximity to their jurisdiction, and later to support administrative protections. The

only reason that these communities learned of threats to their backyard was because of NEPA. The broad array of interests represented by the coalition and brought together by NEPA—including ranchers, hunters, recreational fisherman, and local governments—impressed decisionmakers in Washington. As a result, the Bureau of Land Management and the Forest Service agreed to a 25-year administrative withdrawal in the Thompson Divide, which honors the diverse interests that utilize and thus wish to conserve the unique resources of the Thompson Divide.

The foregoing withdrawal also included the backdrop to the Town of Crested Butte known as Mt. Emmons. For years, a series of mining companies had looked at extracting molybdenum deposits that would have effectively collapsed the mountain. Through NEPA, local communities—including the Town of Crested Butte and Gunnison County—were able to engage with the federal agencies and mining company to effectuate the withdrawal and a land exchange (in which the federal government conveyed 551 acres of less environmentally sensitive land to the mining company). This NEPA-inspired compromise has ensured Mt. Emmons will always stand as the iconic backdrop for the community.

The Moffat Collection System Project

The Moffat Collection System Project is large-scale water diversion project proposed by Denver Water. As with many of Denver Water's diversion projects, this action seeks to expand existing infrastructure that transports water from the West Slope—specifically, two headwater streams of the Colorado River known as the

Fraser and the Williams Fork rivers—to reservoirs on the East Slope, where that water can be treated and distributed to customers in the Denver Metro area.

Because the project required multiple federal authorizations, including a Section 404 permit under the Clean Water Act and a license amendment from the Federal Energy Regulatory Commission, the project was subject to review under NEPA. Serving as the lead agency, the U.S. Army Corps of Engineers began NEPA public scoping for the project in 2003. From that process, several upstream communities on the West Slope, including Grand and Eagle counties, learned that the project would have devastating indirect effects on West Slope water resources (e.g., increased water temperatures and turbidity due to Denver Water’s increased drawdowns).

Initially, both Denver Water and the West Slope communities signaled steadfast unwillingness to change position on the project; however, because of the NEPA process, both sides were forced to grapple with the others’ views on the project’s likely effects on both sides of the Rocky Mountains. That opened the door to negotiations between the West Slope communities and Denver Water.

Those negotiations resulted in multiple intergovernmental agreements that allowed Denver Water to move the project forward in exchange for long-term commitments to protect the originating water bodies. *See Colorado River Cooperative Agreement*, COLO. RIV. DIST., <https://bit.ly/4eSq0XR> (last visited Oct. 23, 2024); *see also Intergovernmental Agreement for the Learning By Doing Cooperative Effort*, GRAND CNTY. (May 15, 2012) <https://bit.ly/4h56REh> (establishing an ongoing duty amongst

signatories, including Denver Water, Grand County, and others from both sides of the Continental Divide, to adaptively manage the Fraser and Colorado rivers in response to on-the-ground problems after implementing the Moffat water diversion project). Those agreements are still viewed favorably throughout the State as an example of how controversial, large-scale water diversion projects can result in durable, collaborative solutions that benefit many stakeholders (rather than only one) that use and rely upon an important shared resource such as the Colorado River.

These are just a few of many anecdotal examples demonstrating that, contrary to popular misconception, NEPA remains an effective vehicle for resolving inter-governmental disputes and obviating unnecessary litigation. Amici routinely rely on and genuinely appreciate the invaluable tools NEPA provides to small governments. Thus, Amici urge the Court to stay its hand in disturbing this critically important regulatory regime that assists local governments in protecting the health, safety, environmental, and property interests of communities and their residents.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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