

No. 23-975

**In The
Supreme Court of the United States**

SEVEN COUNTY INFRASTRUCTURE COALITION AND
UINTA BASIN RAILWAY, LLC,
Petitioners,

v.

EAGLE COUNTY COLORADO AND CENTER FOR
BIOLOGICAL DIVERSITY, ET AL.,
Respondents.

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

**BRIEF OF NACCO NATURAL RESOURCES
CORPORATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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INTERESTS OF AMICUS CURIAE

Amicus¹ NACCO Natural Resources Corporation (“NACCO”) is the parent corporation of a number of mining and reclamation entities. NACCO mines coal, lithium, and industrial minerals, and has interests in oil and gas. Coal fuels power plants, and lithium is a core component for solar power and electric vehicles. NACCO subsidiaries’ coal mines supply in excess of 25 million tons a year to lignite-fired electrical generating units. NACCO’s business involves regular interaction with various governmental regulatory agencies, including, as part of permitting and leasing, the preparation of environmental assessments (“EAs”) and environmental impact statements (“EISs”) under the National Environmental Policy Act (“NEPA”). NACCO subsidiaries operate more than thirty mines across the country, including in Arkansas, Florida, Mississippi, Nevada, North Dakota, Texas, and Virginia, in the jurisdiction of multiple circuit courts.

Environmental reviews under NEPA cause significant project delay often lasting years, and projects requiring an EIS are frequent litigation targets. A key reason for both is that NEPA review has become sprawling and the bounds of required analysis uncertain, which lengthens the delay and increases the uncertainty caused by review and

¹ Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than amicus or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention to file this brief.

provides more avenues for attack in subsequent litigation.

Ignoring the decision of this Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the decision of the D.C. Circuit below exacerbates this uncertainty by requiring agencies to analyze upstream and downstream environmental impacts along the full supply chain of a project, regardless of whether those other effects are within the reviewing agency's jurisdiction. This approach conflicts with numerous other circuits. It provides no workable line for the limits of the environmental analysis under NEPA and subjects those seeking governmental approval, like NACCO, to increased delay and cost, at least, and conflicting agency determinations, at worst, with differing legal standards across the country increasing the uncertainty.

NACCO respectfully requests that the Court grant certiorari and reverse the D.C. Circuit.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The D.C. Circuit's opinion below analyzed an authorization of the Surface Transportation Board ("STB") regarding the construction of an 80-mile railroad in Utah. The D.C. Circuit found the project's EIS insufficient for failing to analyze the upstream greenhouse gas emissions from oil and gas wells that had not been constructed and the downstream emissions from refining oil and gas, presumed to later occur in Louisiana and Texas. *Eagle Cty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1179-80 (D.C. Cir. 2023).

That STB lacked any regulatory authority over either the upstream or downstream effects did not matter. *Id.* at 1180.

The D.C. Circuit's approach conflicts with this Court's decision in *Public Citizen*, which made clear that, under NEPA, an agency "cannot be considered a legally relevant 'cause' of an effect that it cannot prevent 'due to its limited statutory authority.'" 541 U.S. at 770. The *Eagle County* decision also conflicts with numerous other Courts of Appeals across the country, which faithfully apply *Public Citizen's* rule.

This circuit split causes significant uncertainty for those involved in regulatory approvals. It also delays project analysis and approval and needlessly creates opportunities for strategic litigation aimed at delaying projects. Those are the most immediate effects.

More importantly, the D.C. Circuit's approach gives every governmental agency vast veto power over disfavored projects based on vague statutes allowing agencies to act based on, for example, "public convenience and necessity"—even in areas outside their expertise, even based on effects outside their jurisdiction, and even when other agencies are responsible for permitting and approving those upstream and downstream impacts. It effectively results in a transformation of NEPA into a broad enabling statute, authorizing any agency to halt a development project based on environmental effects, or alleged environmental effects, occurring anywhere in the causal chain. The D.C. Circuit's approach gives federal agencies with no regulatory authority over, for instance, greenhouse gas emissions, the ability to obstruct and delay projects by mandating costly and

protracted studies of possible future CO2 emissions. This can amount to an environmental veto castable by any agency with any level of responsibility for approval of a federal project.

This problem will become even worse when currently proposed regulations requiring agencies to consider global environmental effects are enacted. Historically, most NEPA suits have been aimed at hindering fossil fuel development, but the law applies to all major federal actions, including solar and wind construction. Many of the minerals and metals for wind and solar projects are sourced almost exclusively abroad. Following the logic of *Eagle County*, agencies under the new regulations would be required to consider the upstream environmental impacts of notoriously pollutive rare earth elements extraction in China and the condition of child laborers in Congo's deadly cobalt mines. China, of course, is not within the jurisdiction of STB, but neither is oil refining.

No one benefits from this approach to NEPA, except those seeking to delay projects with the aim of killing them through increased costs and the passage of time. Agencies are tasked with studying the effects of actions they do not regulate in areas where they have no expertise. Companies face conflicting rules across the circuits and increased project costs from NEPA review and litigation. The country as a whole—currently lacking sufficient energy infrastructure, such as electricity transmission assets—loses the ability to construct energy infrastructure in anything resembling a remotely timely manner.

For these reasons, the Court should grant certiorari, reverse the D.C. Circuit, and clarify the

meaning of *Public Citizen* to place defined and manageable limits on NEPA review.

ARGUMENT

I. There Is a Circuit Split Over *Public Citizen's* Meaning That Needs To Be Resolved

In *Public Citizen*, this Court held that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect” for purposes of NEPA. 541 U.S. at 770. That holding drew upon the Court’s earlier decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), where the Court explained that the terms “environmental effect” and “environmental impact” in NEPA “include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue,” which the Court equated to “the familiar doctrine of proximate cause from tort law.”

A. The D.C. Circuit’s Decision Conflicts with Most Other Circuits

As amply documented in Petitioner’s brief at pages 14-20, most circuits faithfully follow *Public Citizen*, but the D.C. Circuit and the Ninth Circuit do not. For example, in the Seventh Circuit, “an agency is on the hook only for the decisions that it has the authority to make.” *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389, 400 (7th Cir. 2022). Likewise, in the Eleventh

Circuit, an agency performing a NEPA review is permitted “to draw the line at the reaches of its own jurisdiction.” *Ctr. for Biological Diversity, Manasota-88, Inc. v. United States Army Corps of Eng’rs*, 941 F.3d 1288, 1295 (11th Cir. 2019). To hold otherwise, the Eleventh Circuit explained, would turn NEPA review into a limitless analysis, much of it premised on uncertain, hypothetical impacts. *See id.* at 1297 (“If the Corps were required to consider all effects that it might indirectly police—even those far from its proper sphere of regulatory authority—its NEPA review would have to account for every conceivable environmental effect of fertilizer’s use.”).

Things are different in the D.C. Circuit. In the D.C. Circuit, an agency “cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments.” *Eagle Cty.*, 82 F.4th at 1180. *See also Sierra Club v. FERC* (“*Sabal Trail*”), 867 F.3d 1357, 1375 (D.C. Cir. 2017).

B. The Circuit Split Causes NEPA Delays and Increased Costs

Four years passed between the notice of intent to prepare an EIS in this case and the D.C. Circuit’s decision. That is fast work compared to normal. The average time to complete an EIS alone is four and a half years. COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, ENVIRONMENTAL IMPACT STATEMENT TIME-LINES 1 (2010-2018) (2020). Twenty-

five percent of EISs take more than six years to complete. *Id.*

Venue for challenging administrative actions often exists in the D.C. Circuit because most agencies are headquartered there. *See, e.g., Ravulapalli v. Napolitano*, 773 F. Supp. 2d 41, 56 (D.D.C. 2011). As a result, agencies across the country face a dilemma: they must either risk the possibility of litigation and remand in a forum with more expansive NEPA requirements or else preemptively consider those effects in case they are sued in D.C. rather than one of the other circuits.

Commentators have observed for many years that “[a]gencies will seek to protect EISs from legal challenges by producing piles of paperwork that exhaustively discuss every potential impact of the proposed action—creating a ‘bullet-proof’ EIS. Agencies may experience prolonged delays in the production of a bullet-proof EIS.” James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA’s Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 83 (2003). When upstream and downstream impacts are added, there is even more to “bullet proof.” *See Protect Our Parks*, 39 F.4th at 397 (“Preparing an EIS is expensive and time-consuming . . .”). And when an agency cannot control the impacts being studied, the process becomes a wasteful academic exercise. *See id.* at 400 (“It would be unreasonable to require agencies to spend time and taxpayer dollars exploring alternatives that would be impossible for the agency to implement.”).

C. Project Delay Can Cause Project Death, and That Is the Goal of Much Environmental Litigation

The lengthy EIS timelines cited above do not factor in subsequent litigation, which is common. Delay and increased costs are the primary goals of these lawsuits, because “NEPA is a procedural statute, not a substantive one.” *Id.* at 397. “NEPA suits are often used by environmental and industry groups to take financial resources away from developers and create such delay as to completely impede the progress of a project.” Sarah Imhoff, *A Streamlined Approach to Renewable Energy Development: Brining the United States Into a Greener Energy Future*, 26 GEO. INT’L ENVTL. L. REV. 69, 91 (2013).

The power to delay can be the power to destroy. Energy development projects are major targets. This case involves a rail line, but in reality the litigation takes aim at oil and gas development anticipated from the line’s completion. Wind and solar projects likewise face aggressive litigation under environmental statutes. Perhaps the most infamous contemporary example is the Cape Wind offshore wind farm project, which involved “a staggering cast of well-funded opponents who used an array of federal, state, and local siting and environmental compliance laws to grind the project into oblivion after a fight lasting over 16 years and costing the developers \$100 million.” J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 716 (2020).

The D.C. Circuit’s approach increases litigation risk, because including upstream and downstream

effects provides a virtually limitless array of targets. This case provides a good example: the EIS for a small railroad line located entirely in Utah was deemed inadequate because it did not account for emissions expected to occur during oil and gas refining in Louisiana and Texas (or, presumably, the use of those refined products by consumers).

II. The D.C. Circuit’s Approach Encourages Agencies to Act Outside Their Jurisdiction and Expertise

Beyond the circuit split, the D.C. Circuit’s *Eagle County* and *Sabal Trail* decisions should be undone because they effect an unauthorized expansion of administrative power to prevent development and encourage agencies to act outside of their authority and expertise.

A. Expansive NEPA Review Converts Vague Enabling Statutes Into Limitless Fonts of Veto Power

NEPA is procedural, not substantive. *E.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.”). Yet, the D.C. Circuit’s approach uses NEPA to graft onto agency-enabling statutes regulatory powers not given to those agencies.

STB has the power to authorize the construction of rail lines based on “public convenience and necessity.”

49 U.S.C. § 10901(c). It does not have any jurisdiction or power over oil drilling and refining. The D.C. Circuit acknowledged that fact, but found it irrelevant. *Eagle Cty.*, 82 F.4th at 1180 (holding that “the agency is not excused from considering the environmental impacts of a railway it approves even where it lacks jurisdiction over the producer or distributor of the [oil] transported by that railway” (citation omitted; alteration original)).

That holding would seem to fly in the face of *Public Citizen*’s proclamation that agencies need not consider under NEPA effects that “an agency has no ability to prevent.” 541 U.S. at 770. The D.C. Circuit, however, tried to square the circle by pointing to STB’s ability to consider “public convenience and necessity.” *Eagle Cty.*, 82 F.4th at 1180. As a result, the D.C. Circuit’s approach seemingly allows any agency with discretionary language like that—which is nearly every agency—to disapprove a project based on *any* environmental effect at *any* point upstream or downstream from the project, including where the agency’s action is not the proximate cause of those effects. *Id.* (finding NEPA required analysis of downstream effects even though STB “lacks authority to prevent, control, or mitigate those developments” because STB could deny the permit based on “anticipated environmental and other costs”).

B. The Resulting Problem Is Many Agency Czars With Overlapping Vetoes, Regardless of Expertise

In effect, the *Eagle County* and *Sabal Trail* decisions read discretionary language in agency

enabling statutes as permitting agencies to veto an action based on effects they could not regulate in the first instance. That makes little sense. STB has no expertise in oil and gas refining, and for obvious reasons. It authorizes railroads, not oil wells or refineries. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2612-2613 (2022) (“When an agency has no comparative expertise in making certain policy judgments . . . Congress presumably would not task it with doing so.” (cleaned up)). Here, as in many cases, numerous other agencies with more specific expertise are implicated, both upstream and downstream, ranging from the Utah Department of Natural Resources or, if federal land, the Bureau of Land Management, to the Environmental Protection Agency (“EPA”) and its state counterparts in Utah, Texas, Louisiana, and possibly elsewhere.

The D.C. Circuit allows STB to invade the regulatory sphere of all those other agencies. In dissent in the earlier *Sabal Trail* decision, Judge Brown identified this very issue in the context of an agency with an identically broad “public convenience and necessity” statute. 867 F.3d at 1382 (“Accordingly, nothing in the text of either statute empowers the Commission to entirely deny the construction of an export terminal or the issuance of a certificate based solely on an adverse indirect environmental effect regulated by another agency.”) (Brown, J., dissenting in part).

Under the D.C. Circuit’s case law, however, even though STB has no comparative expertise in refining, it can block a railroad based on potential downstream effects from that same refining. That view of virtually

limitless agency delegation cannot be reconciled with this Court's decisions. *See West Virginia*, 142 S. Ct. at 2609 (noting the “particular and recurring problem” of “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted”). Nevertheless, starting from the premise of unfettered veto power based on the mere potential of anything environmentally related, upstream or downstream, D.C. Circuit law requires STB to create an EIS that analyzes theoretical environmental effects anywhere in the possible causal chain.

The Eleventh Circuit colorfully, but accurately, described the world created by this “alternative, unbounded view of the public-interest review”, *i.e.*, the D.C. Circuit's approach, as one in which each agency functions as a “de facto environmental-policy czar.” *Army Corps.*, 941 F.3d at 1299. Because each agency involved anywhere upstream or downstream in a project would have equal blocking powers, Congress's regulatory design would be scrambled and the risk of inconsistent, project-killing agency determinations would be high. *See id.* at 1296 (“Requiring the Corps to enter those regulatory spheres not only offends congressional design but risks duplicative, incongruous, and unwise regulation. . . . Far from manageable, the new inquiries required of the Corps would bog down agency action in the name of duplicative and potentially incoherent regulation.”). *See also Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 709 (6th Cir. 2014) (“There are good reasons that Congress would not have designed a regulatory system in which each regulatory actor involved in a large operation, even in

a comparatively minor way, is required to consider all of the effects of the overall project.”).

III. Unlimited Consideration of Upstream and Downstream Effects Creates an Unworkable Standard for NEPA and Makes for Poor Policy

With respect to NEPA, this Court long has cautioned that the “scope of the agency’s inquiries must remain manageable.” *Metro. Edison*, 460 U.S. at 776. The decision below violates that principle. *See id.* (“Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it.”).

A. NEPA Review Beyond the Proximate Cause of an Agency’s Action Has No Logical Stopping Point

Public Citizen’s proximate cause test makes sense as a dividing line for what must be included in a NEPA analysis. In expressly rejecting the “particularly unyielding variation of ‘but for’ causation” sought by the challengers in that case, 541 U.S. at 767, the Court explained that NEPA’s purpose of ensuring that agencies act in an informed manner is not served by consideration of environmental effects where the agency “lacks the power to act” on them, *id.* at 768.

The decision below faulted STB for potential upstream emissions the agency cannot control *and* potential downstream emissions that the agency lacks the ability to regulate. Upstream, the D.C. Circuit faulted STB for not considering potential emissions

from oil development in the Uinta Basin—unknown and unplanned projects that may or may not occur and over which STB has zero authority. *Eagle Cty.*, 82 F.4th at 1177. Downstream, potentially somewhere in Texas or Louisiana, oil from the Uinta Basin conceivably could be refined by one or more of 31 possible refineries. STB plays no role whatsoever in regulating downstream refining. Yet, its EIS must account for those potential impacts. *Id.* at 1177-79.

Aside from being outside STB’s jurisdiction, these upstream and downstream effects are highly speculative and uncertain, requiring the agency to predict potential future changes in the energy markets, including development and refining levels, all of which are price, material, and production dependent, in hypothetical future worlds that do and do not include the project under consideration. No agency has that gift of prophecy, especially when the agency has no authority or expertise in the theoretical discipline, as with STB below. *Cf.* James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH L. REV. 119, 143 (2018) (“In practice, in unpredictably changing energy markets, it is nearly impossible to predict the upstream and downstream impact of a new pipeline project.”).

This is particularly true given the four-plus years it takes to prepare an EIS. The Keystone XL pipeline provides a case study. As part of its EIS for the pipeline, the State Department spent seven years analyzing whether approval of the pipeline would increase oil production in Canada. The EIS found that the impact on upstream production would depend

primarily on the price of oil per barrel, with the pipeline potentially impacting production only if oil prices hovered between \$65-\$75 a barrel. *See id.* at 143-44. During the many years of review, oil prices fluctuated between \$44 and approximately \$100. *Id.* “In its final decision, the State Department confirmed its view that the project was ‘unlikely to significantly impact [oil] extraction’ but said that it should be rejected anyway because, despite its analysis, it was ‘perceived as enabling’ oil extraction.” *Id.* at 145 (quoting U.S. DEP’T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION 12 (2015) (alteration original)).

Even if the state of the energy market many years in the future could be predicted accurately, forcing agencies to consider upstream and downstream effects over which they have no regulatory authority expands NEPA review into a limitless consideration of environmental effects that inevitably leads to first-order questions of energy policy. Here, STB was faulted for not considering every conceivable emission—whether currently existing or projected distant years into the future—from the oil leaving the ground through the refining stage, even though the only action in question was an 80-mile railroad in Utah. But, why should the analysis stop there? Basic economic principles lead to further effects that could be considered. Increased oil production affects supply, increased supply lowers costs, and cheaper gasoline induces more drivers to buy it and drive more, thus increasing emissions from cars and even potentially affecting the cost calculus of automobile owners debating whether to buy an electric vehicle, decisions

that have knock-on effects for overall U.S. climate policy.

Ultimately, that is where the analysis leads. In explicitly rejecting the D.C. Circuit's approach, the Eleventh Circuit, in a case involving phosphorous mining, explained that accounting for all downstream effects would require the Corps of Engineers under NEPA "to account for every conceivable environmental effect of fertilizer's use." *Army Corps.*, 941 F.3d at 1297. Then, "because the Corps could indirectly mitigate those effects by denying [the company] its Section 404 permit and thereby choking its fertilizer plants of phosphate, the Corps must consider the environmental effects of crop fertilization. That cannot be right." *Id.* And the effect of the D.C. Circuit's "unbounded view" of NEPA analysis would go further: "Rather than consider whether the Corps' own action is in the public interest, that broader view would have the Corps consider whether fertilizer production and use is really worth the cost." *Id.* at 1299. "And that," the Eleventh Circuit cautioned, "could be just the beginning. The next time the Corps is asked to approve a section of a gas pipeline running through a wetland, would the Corps be required to consider whether the country's reliance on fossil fuels is really in the public interest?" *Id.*

B. Forthcoming Regulations Will Exacerbate the Problem and Turn U.S. Federal Agencies Into Global Environmental Monitors

The current administration is in the second stage of revising the Council on Environmental Quality's

(“CEQ’s”) rules governing agencies’ NEPA reviews. Stage one focused on undoing an earlier rule that tied NEPA to *Public Citizen’s* proximate cause test. Without Congressional direction or authorization, CEQ “reconsidered its reasoning” and decided to strike from the rule “the ‘reasonably close causal relationship’ and ‘but for’ language drawn from *Public Citizen.*” National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453, 23465 (April 20, 2022) (codified at 40 C.F.R. § 1508.1).

Stage two will push NEPA review even further. In determining the appropriate level of NEPA review, agencies currently are directed to consider “the affected area (national, regional, or local) and its resources,” with the regulations indicating that “in the case of a site-specific action, significance would usually depend only upon the effects in the local area.” 40 C.F.R. § 1501.3. The proposed rules will transform that analysis, calling on agencies to “analyze the significance of an action in several contexts,” including “the potential global, national, regional, and local contexts as well as the duration, including short-and long-term effects.” National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 FR 49924, 49969 (proposed July 31, 2023) (to be codified at 40 C.F.R. § 1501.3).

Combining upstream and downstream review with a global focus will render NEPA review even more boundless and unmanageable. It also will turn every agency into a gatekeeper able to veto projects because of environmental considerations anywhere in the world. This regulatory shift will move beyond the problem created by the D.C. Circuit’s decision,

whereby agencies are responsible for environmental effects under the jurisdiction of *other* agencies, and usher in a new era where agencies are tasked with considering environmental effects in other countries under the regulatory jurisdiction of *no agency*. All of this will occur without any direction or authorization by Congress, even though such expansive global NEPA review would work directly against the interests of the U.S. economy.

Consider, for example, the close relationship between mining and energy. As discussed in greater detail below, the U.S. Department of the Interior, Bureau of Land Management (“BLM”), controls mineral leasing rights and for coal leases requires an environmental assessment of the coal burned by downstream power plants, even though those power plants are not under BLM’s regulatory control. Wind and solar projects similarly are intertwined with mineral extraction. Indeed, the “materials and metals demanded by a low-carbon economy will be immense.” Benjamin K. Sovacool et al., *Sustainable Minerals and Metals for a Low-Carbon Future*, 367 *SCIENCE* 30, 30 (2020). Unlike coal, however, the vast majority of these necessary minerals comes from abroad. *See id.* at 33 (charting global critical mineral production, including 95% of rare earth elements from China and approximately two-thirds of cobalt from Congo).

The extraction of these necessary upstream minerals for wind and solar is no different in terms of the causal chain than the coal inputs to a power plant. And reviewing agencies will not like what they find. The negative social and environmental consequences of mining in these countries are extraordinary. *See,*

e.g., *id.* at 30 (describing the use of child labor in Congo’s cobalt mines where workers often lack “basic safety equipment” and how China’s rare earth mining and processing “has resulted in chemical pollution from ammonium sulfate and ammonium chloride that now threatens rural groundwater aquifers as well as rivers and streams”); Sam Kalen, *Mining Our Future Critical Minerals: Does Darkness Await Us?*, 51 ENVTL. L. REP. 11006, 11009 (2021) (“China’s production of lithium has become an environmental and international human rights issue.”); *id.* at 11021 (“The abuses flowing from cobalt mining in the Democratic Republic of the Congo are unfathomable.”). Even when some of these necessary minerals are produced domestically, there can be international downstream impacts, such as the need to ship resources abroad for processing. *See id.* at 11019 (“[A] California rare earth mine arguably has abundant resources, but its product must be shipped to China for processing.”).

Adding the global regulatory focus of the forthcoming rules to the D.C. Circuit’s approach requiring upstream and downstream environmental review could bring these international environmental effects into the NEPA analysis, even though no U.S. agency has regulatory authority or any real influence whatsoever over mining or processing in China or Congo. This is where the D.C. Circuit’s approach leads, because the limits of regulatory authority do not matter under that approach.

C. Limitless NEPA Review Is Bad for Everyone

Much NEPA review involves the fossil fuel industry. But there is no NEPA exemption for solar and wind projects. They, too, must pass through the same onerous NEPA process, and the upstream/downstream logic applies to them with equal force.

Unsurprisingly, commentators have raised the alarm that the expansion of NEPA review over the past decade or so will delay renewable energy projects, possibly even more than fossil fuel projects. *See, e.g.*, Ruhl & Salzman, *Old Green Laws, supra*, at 695 (“The existing project siting and environmental protection regulatory regimes do not hand out a ‘green pass’ to infrastructure projects that promote desirable environmental outcomes.”); James Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 291 (2019) (“And the arguments for considering upstream and downstream consequences of electricity transmission are, if anything, more reasonable than the same case for oil pipelines Thus, renewable power is, if anything, more vulnerable than oil pipelines to delay-by-environmental-review tactics.”); *id.* at 299 (“[A]ggressive judicial expansion of environmental reviews is a unique danger to energy transport investment.”).

This system benefits no one other than those opposed to any sort of energy development. Forcing agencies to consider upstream and downstream effects in the wheelhouse of other agencies demands that

agencies act outside of their expertise and well beyond what Congress could have intended. *See West Virginia*, 142 S. Ct. at 2612-2613. Granting every agency involved in a project, however peripherally, a veto because of environmental effects, or claimed environmental effects, anywhere in the project chain “risks duplicative, incongruous, and unwise regulation.” *Army Corps.*, 941 F.3d at 1296. This overlapping set of czars is unlikely to generate better environmental analyses. Instead, the D.C. Circuit’s ruling primarily functions to multiply the opportunities to delay or derail energy projects. *See Coleman, Pipelines & Power-Lines, supra*, at 296 (“And there is no reason to think that subjecting each proposed project to multiple veto gates would improve overall economic and environmental results. Multiple veto gates just mean more opportunities to kill proposed investments—and that is true whether those investments are in oil, gas, or renewable power transport.” (footnote omitted)).

IV. NACCO’s Own Experiences Provide a Case Study of the Negative Consequences of Downstream Review

One of NACCO’s subsidiaries, North American Coal, LLC (“NA Coal”), through its mining subsidiaries, regularly enters into coal leases with BLM. One of NA Coal’s mines is the Falkirk Mine in North Dakota.

By statute, Congress has declared its intent to “assure that the coal supply essential to the Nation’s energy requirements, and to its economic and social well-being is provided” 30 U.S.C. § 1202(f). One

way Congress has encouraged the development of coal reserves from public lands is through the federal leasing program. As part of federal leasing, the Secretary of the Interior “is authorized to divide any lands . . . which have been classified for coal leasing into leasing tracts of such size as he finds appropriate and in the public interests and which will permit the mining of all coal which can be economically extracted in such tract” 30 U.S.C. § 201(a)(1).

Coal mines are planned out far in advance to operate across many years in order to ensure reliable fuel supply to associated power generating stations. Underlying supply contracts likewise span decades. Leasing of mineral rights typically occurs in stages, with areas to be mined at later dates leased at a point in time closer to when mining will occur.

NEPA review for a coal leasing application is conducted by BLM and the Office of Surface Mining and Reclamation Enforcement (“OSMRE”). Historically, these sorts of NEPA reviews took only a few months, but in recent years they have become almost interminable. The primary source of the delay comes from analysis of downstream factors, such as power plant emissions, over which neither BLM nor OSMRE has regulatory authority or expertise. In fact, by the time of NEPA review for the lease, the approvals and permits for the downstream activities generally already will have been secured from the appropriate regulatory authority. That is the case with Falkirk Mine and the associated power generating station.

Ownership of mineral interests in North Dakota is fragmented; interests owned by the federal

government are scattered between those owned by private parties in a checkerboard fashion. Falkirk Mine, which has been in operation since 1978, includes coal leased from both private parties and the government.

In anticipation of reaching new coal tracts in late 2024, Falkirk applied for a lease application under BLM's emergency lease procedures on October 30, 2019. The lease application still has not been acted upon in any way, requiring NA Coal finally to file a lawsuit against BLM. Complaint, *The Falkirk Mining Co. v. Dep't of the Interior*, No. 1:24-cv-00040-DLH-CRH (D.N.D. Feb. 29, 2024). During the past four and a half years, the government failed to complete the required NEPA review. Notably, this lease requires only an EA rather than the more arduous EIS; a draft EA was submitted shortly after the lease application. BLM planned to notice a public hearing on the draft EA in 2021, but then cancelled the planned public hearing without explanation. *Id.* at ¶ 44. No draft EA was published by BLM in 2022 either. In December 2023, after no substantive progress in the preceding four years, BLM notified NA Coal by telephone that the EA cannot move forward because no test exists to determine the impact of the lease on global CO2 emissions. *Id.* at ¶ 46. At no point has the government ever sent any notice of deficiency, as required by regulations, or any notice of any information purported to be missing. *Id.* at ¶ 47.

Instead, the lease application persists in regulatory purgatory, delayed by a NEPA review of emissions from sources outside BLM's control and not proximately caused by the action under review. *Cf.*

Sabal Trail, 867 F.3d at 1381 (“[T]he truth is that [the agency] has no control over whether the power plants that will emit these greenhouse gases will come into existence or remain in operation.”) (Brown, J., dissenting in part).

There is great irony in the government using NEPA review to delay the Falkirk lease application indefinitely. Because of how coal mining works and the geographic distribution of federal and private coal in North Dakota, rejecting the application would only *increase* air emissions. Falkirk Mine would have to go around the federal holdings. Avoiding that coal would force the mine to excavate in a less efficient pattern that would disturb an additional 433.5 surface acres. NA Coal estimates that doing so would burn an additional 908,144 gallons of diesel fuel between the truck shovel fleet, dozers, and blades necessary to do this additional work. Conversely, if NA Coal were able to mine through the federal coal, it could rely on its more efficient electric dragline and reduce emissions. NORTH AMERICAN COAL CORPORATION, COMMENTS ON THE DRAFT RESOURCE MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT FOR THE BUREAU OF LAND MANAGEMENT NORTH DAKOTA FIELD OFFICE 22-23 (May 17, 2023), available at <https://perma.cc/G85J-6CK8>.

The downstream emissions from electricity generation will occur regardless of whether BLM approves the lease, because Falkirk Mine will substitute other privately held coal in the area. Approving the lease would result in *fewer* emissions, because the mining itself—the activity actually triggering agency action in the lease application—

would be conducted more efficiently. Yet the lease application cannot proceed more than four years after its initial filing because, among other alleged effects outside its authority and expertise, BLM belatedly claims an inability to adequately measure the downstream impacts on global CO₂ emissions under NEPA—emissions that BLM cannot stop or reduce, even if it denies the lease. Indeed, given that all of Falkirk Mine’s coal is consumed by existing power plants that EPA has thus far been prevented from regulating for CO₂ emissions, the only apparent purpose served by reviewing power plant CO₂ emissions under NEPA is circumventing the constitutional limits that this Court recognized on EPA’s authority. *See West Virginia*, 142 S. Ct. at 2616.

In sum, Falkirk Mine offers a cautionary example of the regulatory shenanigans and real-world impact made possible by rulings like the D.C. Circuit’s decision below, which empower an unfettered administrative state.

CONCLUSION

The petition for a writ of certiorari should be granted, the D.C. Circuit should be reversed, and NEPA review should be limited to those environmental effects within an agency's jurisdiction and proximately caused by the agency's action.

Respectfully submitted,

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