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 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

Amicus[1] 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. NACCO's coal mines supply over 25 million tons a year to lignite-fired electrical generating units. NACCO's business involves regular interaction with 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. In addition, NACCO subsidiary Catapult Mineral Partners recently executed a purchase agreement to acquire oil and gas interests in Utah's Uinta Basin. If developed, these oil and gas interests would greatly benefit from completion of the rail line in this case.

Environmental reviews under NEPA cause significant delay, and projects requiring an EIS are frequent targets of litigation. A key reason for both is that the bounds of NEPA review have become uncertain because of different circuit court interpretations of the statute. This promotes sprawling EISs, results in costly or even project-

[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.

killing delay, and opens more avenues for attack in 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 sets no workable limits on 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.

NACCO respectfully requests that the Court 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 88-mile railroad in Utah. The D.C. Circuit found the project's EIS insufficient for failing to analyze upstream development of oil and gas wells that had not been constructed and downstream greenhouse gas emissions from refining that same 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 view of NEPA advanced by the D.C. Circuit prolongs and adds uncertainty to environmental review, delays project approval, and needlessly creates opportunities for strategic litigation aimed at halting development 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.

This view of the law effectively results in a transformation of NEPA into a broad enabling statute, authorizing any agency to halt a development project based on alleged environmental effects occurring anywhere in the causal chain. It enlarges the grasp of the regulatory state in a manner this Court has adjudged unlawful in recent decisions. *E.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). 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 amounts to an environmental veto castable by any agency with any level of responsibility for approval of a federal project, and is particularly troublesome when that agency does not have the expertise to analyze potential CO2 emissions.

This problem will become even worse in light of the recently promulgated NEPA regulations requiring agencies to consider "global" environmental effects. 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, for example, the upstream environmental impacts of notoriously pollutive rare earth elements extraction in China. 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. Under this approach, 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 reverse the D.C. Circuit and clarify the meaning of *Public Citizen* to place defined and manageable limits on NEPA review. In doing so it should reject the Federal Respondents' position that agencies have discretion to draw their own "context-specific causal lines" under NEPA, Fed. Br. at 18, and make clear that NEPA review should be limited to environmental effects within an agency's jurisdiction and proximately caused by the agency's action.

ARGUMENT

I. The Majority View Among the Circuits Correctly Interprets *Public Citizen*

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."

Public Citizen elaborated that "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and

to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." 541 U.S. at 767. As a result, when the environmental effects at issue fall outside an agency's scope of authority, "the agency need not consider these effects in its EA." *Id.* at 770.

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). The Sixth Circuit follows the same rule. *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014) ("It stands to reason that, in the context of a complete regulatory scheme, agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility."). 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.[2] 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) ("[T]he existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis").

That approach runs contrary to *Public Citizen*, which expressly rejected the "particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect." 541 U.S. at 767.

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[2] They were not always so. Before its *Sabal Trail* decision, the D.C. Circuit faithfully adhered to *Public Citizen*. In a trio of 2016 decisions, for example, it ruled that FERC did not have to consider in its NEPA review of natural gas pipelines the upstream or downstream effects of gas production, transmission or consumption, such as "additional greenhouse gas emissions," because FERC had no regulatory authority over such activities—just as STB has none here. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016); *see also Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016).

II. The D.C. Circuit's Outlier Interpretation of *Public Citizen* Makes for Bad National Policy and Forces Agencies to Act Outside Their Jurisdiction and Expertise

Despite being out of line with most other circuits, the D.C. Circuit's interpretation of *Public Citizen* has outsized importance nationally. 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 by the D.C. Circuit, with its onerous NEPA requirements, or else preemptively try to follow those requirements because they might be sued in D.C. rather than one of the other circuits.

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

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.").

Litigation over NEPA 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: Bringing 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 the real target of dilatory litigation is oil and gas development that the line is expected to facilitate.

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 project emissions related to possible oil and gas refining in Louisiana and Texas. Under this approach, unqualified agencies could pile speculation upon speculation to reach untenable conclusions outside their area of understanding, let alone expertise.

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

The D.C. Circuit's *Eagle County* and earlier *Sabal Trail* decisions effect an unauthorized and unwise expansion of administrative power to prevent development and encourage agencies to act outside of their authority.

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, expertise, or power over oil drilling and refining. The D.C. Circuit acknowledged that, 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 flies 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 allows any agency with discretionary language like that—which is nearly every agency—to disapprove a project based on *any* environmental effect, real or imagined, at *any* point upstream or downstream from the project, including where the agency's action is not the proximate cause of those effects. The court of appeals thus held that 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." *Id.*

Under the D.C. Circuit's decision, if STB thinks that the costs of oil and gas development outweigh the benefits, STB can deny a permit to build a railroad

facilitating that development. Reaching that conclusion requires using NEPA to supercharge catchall language like "public convenience and necessity" in a way that destroys the overarching regulatory structure. As STB points out in its brief in support of Petitioners, STB must enforce common carrier obligations, which require "railroads to carry all commodities upon reasonable request." Fed. Br. at 4. The D.C. Circuit ruling prevents STB from carrying out its statutory mandate.

Consider, first, that STB's authorizing statute directs that STB "*shall issue* a certificate" for building a railroad "*unless* the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c) (emphasis added). The statutory language starts with a presumption in favor of issuing a certificate to build.

The statute then describes, in fifteen subparts, "the policy of the United States Government" with respect to "regulating the railroad industry." 49 U.S.C. § 10101. First on the list of policies is "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." *Id.*, § 10101(1). Second on the list is "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." *Id.*, § 10101(2). Nowhere on the list does one find "hinder the development and shipment of disfavored commodities."[3]

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[3] One does, however, find a policy "to foster sound economic conditions in transportation and to ensure effective competition

Nevertheless, according to the D.C. Circuit, because STB can act for "public convenience and necessity," *any* environmental effect can be a justification to deny a permit, even if STB does not oversee that effect; as a result, NEPA requires analyzing that effect. *Eagle Cty.*, 82 F.4th at 1180.

In reaching that conclusion, one must stack hypotheticals atop counterfactuals and then work backwards to the application at issue. First, STB must imagine a world in which the rail line is built. Second, STB must forecast upstream oil and gas development after construction, including at various price points for the end product and various costs levels for initial development, all of which are affected by a multitude of factors and can change rapidly. Third, STB must conclude that these upstream drilling projects will be approved by the relevant regulators. Fourth, STB must conclude that the subsequent refining of the oil generated upstream will be approved by other downstream regulators. Fifth, STB must analyze the emissions from the full lifecycle of these approved projects, from extraction through refining, years into the future. Sixth, STB must conclude that the environmental costs of those emissions outweigh the benefits, even though the agencies overseeing the permitting of the (hypothetical) upstream projects and downstream refining of the output of those (hypothetical) projects concluded otherwise. Effectively, STB must conclude

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and coordination between rail carriers and other modes." *Id.*, § 10101(5). In this case, the entire purpose of the proposed rail line is to allow more efficient transport because of the difficulties of shipping by truck on the limited nearby roads. *Eagle County*, 82 F.4th at 1166.

in advance that the upstream and downstream permitting agencies will make what STB deems to be the wrong decision. As a result, STB chooses not to authorize the railroad at all, premising its decision on "public convenience"—contrary to true public convenience, which is to be able to engage in interstate commerce and, for Utah citizens, to be able to sell their goods in a profitable manner.

Thus, from a statute explicitly prioritizing rail development to maximize competition among carriers and expressly seeking to minimize federal regulation over the rail system, we arrive at a conclusion that the railroad should not be built at all because STB disagrees with the potential future decisions of other regulators with expertise in overseeing oil and gas drilling and refining. Only through that backwards logic can the D.C. Circuit conclude that STB needed to consider under NEPA the upstream and downstream effects at issue here.

The actions of other permitting authorities—upstream and downstream—are necessary links in the causal chain over which STB has no control. Unless those agencies take independent action, there will be no environmental effects from oil production or consumption to even discuss. By analogy to "the familiar doctrine of proximate cause from tort law," *Metro. Edison*, 460 U.S. at 774, the consequence of such intervening actions is that STB is not a legally relevant cause of effects that might arise from production or consumption approved by other agencies.

C. 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, for obvious reasons. It authorizes railroads, not oil wells or refineries. *See West Virginia*, 142 S. Ct. at 2612-2613 ("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 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. "[N]othing 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." 867 F.3d at 1382 (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 speculative 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. This approach led the D.C. Circuit to dismiss as "simply inapplicable" the principle of this Court's *Public Citizen* decision that an agency "need not consider effects it cannot prevent." *Eagle Cty.*, 82 F.4th at 1180.

The Eleventh Circuit colorfully, but accurately, described the world created by the D.C. Circuit's "alternative, unbounded view of the public-interest review" 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*, 746 F.3d at 709 ("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

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.

Aside from being outside STB's jurisdiction, the upstream and downstream effects cited by the D.C. Circuit 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. *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."). No agency has that gift of prophecy, especially when the agency has no authority or expertise in a given arena, like STB here.

This is particularly true when considering the length of time it takes to prepare an EIS and the volatility of energy markets. 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)).

Comparing that real-world example to the D.C. Circuit's supercharging of the "public convenience and necessity" language in STB's enabling statute, one is left with a disturbing conclusion. Not only might STB get the analysis wrong and block important infrastructure development based on an errant analysis of upstream or downstream factors beyond its scope of authority, but STB might veto a development project merely on the basis of "perceived" environmental concerns caused by upstream or downstream effects outside of its regulatory bailiwick.

Invariably, even if the state of the energy market many years in the future could be predicted accurately—and it cannot—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 directly leads to first-order questions of energy policy. Here, STB was faulted for not considering every 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 88-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 causes more drivers to buy it and drive more, affecting the cost calculus of

automobile owners debating whether to buy an electric vehicle, a decision with knock-on effects for overall U.S. climate policy.[4]

Ultimately, that is where the analysis leads. In explicitly rejecting the D.C. Circuit's approach, the Eleventh Circuit, in a case involving phosphate 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.* 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

[4] One can readily imagine other far-ranging inquiries opened up by the D.C. Circuit's approach. The focus on oil and gas assumes that is the only significant new development in the Uinta Basin. But a decade or two down the line, the nature of the Uinta Basin could change entirely, spurring new settlement and significant population growth. New businesses may want to ship their cargo, and new residents may wish to use the line for commuting. The railway, as a common carrier, must transport it all. Must those impacts be included in an NEPA analysis too? The amounts of upstream and downstream greenhouse gas emissions are no less speculative than the long-term land uses of the Uinta Basin.

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.* Such decisions are reserved to Congress.

The approach advanced by the Federal Respondents is no better, because it provides no standard at all. The government argues what the standard is not, but does not tell the Court what it thinks it should be.

Thus, according to the government, the standard is not the limits of an agency's authority. Fed. Br. at 32-33. The standard also is not the tort doctrine of proximate cause. *Id.* at 34-37. The standard is not reasonable foreseeability, because the government maintains that even if the upstream and downstream effects were reasonably foreseeable, STB did not need to consider them. *Id.* at 41. Instead of any workable standard, the government proposes "context-specific causal lines," *id*. at 18, described with this word salad:

> the agency may draw a manageable causal line that excludes the harms that the agency lacks the statutory authority to prevent, and that takes account of whether and to what extent particular harms are too attenuated, speculative, or otherwise insufficiently material to the agency's decisionmaking to serve NEPA's purposes and satisfy its rule of reason, given the scope and nature of the agency action and the governing statutes.

Id. at 30.

The government cites no law in support of this vague pronouncement, which seems invented from

whole cloth to support a reversal here without providing any guidance to agencies or courts on the bounds of required NEPA analyses going forward. The government's supposed "causal line" is no line at all, but only a case-by-case, effect-by-effect, discretionary assessment, usually in areas outside of the regulator's expertise. Such an approach would eliminate none of the uncertainty caused by the decision below.

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

The current administration recently finalized the second phase of revising the Council on Environmental Quality's ("CEQ's") rules governing NEPA reviews. Stage one focused on undoing an earlier rule that tied NEPA to *Public Citizen*'s proximate cause test. 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).

Phase two pushes NEPA review even further. In determining the appropriate level of NEPA review, agencies previously were 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(b)(1) (2023). The new rules obliterate that restrained focus, 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." 40 C.F.R. § 1501.3(d)(1) (2024). Further emphasizing the international focus of the review, CEQ added "climate change-related effects" to a list of effects to be analyzed under NEPA, "including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives." 40 C.F.R. § 1508.1(i)(4).

In five years, companies have faced three dramatically different versions of CEQ's NEPA regulations: the pre-2020 rules; the Trump administration rules; and the Biden administration rules. Through all this regulatory flip-flop, *Public Citizen*'s proximate cause ruling remained, as did the statutory command tying the effects under a NEPA analysis to "action" being analyzed. 42 U.S.C. § 4332(C)(i). No statutory change has occurred since *Public Citizen* that would authorize the free-ranging environmental review demanded by the D.C. Circuit, and the new regulations further exacerbate the problem. *Cf. Loper Bright*, 144 S. Ct. at 2272 (critiquing how a "statutory ambiguity . . . becomes a license authorizing an agency to change positions as much as it likes . . . even when Congress has given [it] no power to do so").

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, real or imagined, 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 interest 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 post-mining combustion of coal by downstream power plants, even though those power plants are not under BLM's regulatory control or within its expertise. So, too, are wind and solar projects inextricably 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 new 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 under it the

limits of regulatory authority do not matter. This is not what Congress authorized.

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 gauntlet, 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 and related infrastructure development. Forcing agencies to consider upstream and downstream effects in the wheelhouse of other agencies—even effects that already are permitted—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 and is likely to generate inconsistent analyses of the same effects. 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)).

In sum, NEPA does not require or authorize agencies to engage in costly and time-consuming analyses of possible upstream and downstream effects of agency actions that will not be proximately caused by those actions. The Court should emphatically reject the D.C. Circuit's assertion that limits on agency authority are "simply inapplicable" to the

scope of a NEPA analysis, *Eagle Cty.*, 82 F.4th at 1180, and should reaffirm the rule of *Public Citizen*.

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 far in advance to operate for many years in order to ensure a steady and reliable fuel supply to associated power generating stations. Coal supply contracts can span decades, and the leasing of mineral rights typically occurs in stages, with areas to be mined at later dates leased closer in time to when mining will occur.

NEPA review for a coal mine 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 this delay comes from analysis of downstream factors, such as power plant emissions, over which neither BLM nor OSMRE has regulatory authority or expertise. In the case of power generating stations that NACCO supplies, by the time of NEPA review for the lease, the approvals and permits for the downstream activities have already long been secured from the appropriate regulatory authority.

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. NA Coal's Falkirk Mine, which has been in operation since 1978, includes a combination of coal leased from both private parties and the government.

In anticipation of reaching new coal tracts in late 2024, Falkirk applied to BLM for a lease on October 30, 2019. Five years later, the lease application still has not been acted upon in any way, and the government has failed to complete the required NEPA review, requiring NA Coal finally to file a lawsuit against BLM. Amended Complaint, *The Falkirk Mining Co. v. Dep't of the Interior*, No. 1:24-cv-00040-DLH-CRH (D.N.D. Apr. 4, 2024).

Notably, this lease required only an EA rather than the more arduous EIS, or so everyone involved thought at the beginning. 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 ¶ 45. 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 could not move forward because no test exists to determine the impact of the lease on global CO2 emissions. *Id.* at ¶ 47. 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 ¶ 49.

Instead, the lease application persists in regulatory purgatory, delayed by a NEPA review of emissions from already-permitted 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). Most recently, after the filing of NACCO's lawsuit, the government attempted to moot the lawsuit by changing its position and claiming that the lease will require a full-blown EIS, which, of course, will take even longer.

There is great irony in the government using NEPA review to delay the Falkirk lease application initially for five years and now, according to the government's estimate, until late 2025, at the earliest.

Because of how coal mining works and the geographic distribution of federal and private coal in

North Dakota, rejecting the application would *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. Yet the lease application cannot proceed nearly five 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, permitted power plants that EPA has 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, to stop an activity that is otherwise allowed, and even encouraged, by existing law. *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.

CONCLUSION

The D.C. Circuit should be reversed, and NEPA review should be limited to environmental effects within an agency's jurisdiction and proximately caused by the agency's action.

Respectfully submitted,

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