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 THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS OPPOSING PETITIONERS

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TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

REGULATIONS AND REGULATORY ACTIONS

OTHER AUTHORITIES

Page

Page

Page

INTEREST OF *AMICUS CURIAE*

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)[1] is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, focusing primarily on environmental issues.[2]

Policy Integrity has worked extensively with the National Environmental Policy Act (NEPA), including submitting comments on environmental impact statements on federal permits for energy infrastructure, and on implementing the "reasonable foreseeability" test in NEPA regulations. *See*, *e.g.*, Inst. for Pol'y Integrity, Comment Letter on FERC's Draft Environmental Impact Statement for the Regional Energy Access Expansion Project (Apr. 25, 2022), https://perma.cc/5UYS-9GBW; Inst. for Pol'y Integrity, Comments on NEPA Implementing Regulations Revisions Phase 2 (Sept. 29, 2023), https://perma.cc/5U8D-DUH5.

Policy Integrity's expertise in environmental and administrative law, especially in best analytical practices across a range of agency decisionmaking contexts, provides a unique perspective on this case. Policy Integrity submits

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1. Per Supreme Court Rule 37.6, no party's counsel authored this brief wholly or partly, and no entity or person outside of amicus curiae contributed money intended to fund its preparation or submission.

2. This brief does not purport to represent the views, if any, of New York University School of Law.

this *amicus curiae* brief to address how NEPA aligns with general tenants of rational decisionmaking.

SUMMARY OF ARGUMENT

The National Environmental and Policy Act (NEPA) requires agencies to consider indirect environmental effects that are reasonably foreseeable. Env't Resps. Br. 8. That requirement makes sense for the many reasons Environmental Respondents and Eagle County provide. *Id.* at 23–30; County Br. 22–39. But it also makes sense for another salient reason: the longstanding "reasonable foreseeability" test produces environmental assessments that reflect the best practices for government analysis that prevail across a wide range of agency decisionmaking contexts. The novel approaches offered by Petitioners and the Government, Petrs. Br. 37, Gov't Br. 41, by contrast would promote arbitrary analyses inconsistent with those general best practices, by allowing agencies to count indirect and uncertain benefits even while they ignore similarly foreseeable indirect environmental costs.

The Surface Transportation Board (Board)'s actions here reflect such irrationality: the Board was more than capable of evaluating indirect regional economic growth and job creation *benefits* but professed inability to evaluate indirect environmental *costs* that would accompany those benefits.

I. NEPA commands agencies to "develop methods" to ensure environmental harms are given "appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). Best analytical practices across the federal government require

agencies to evenhandedly consider important indirect or less-than-certain effects of their actions. Courts have consistently—and correctly—criticized agencies for failing to do so. NEPA regulations and caselaw require agencies to engage in these same best practices. An interpretation of NEPA that invites agencies to behave irrationally by ignoring foreseeable environmental costs would run contrary to Congress' clear command to give such effects "appropriate consideration." *Id.*

II. Petitioners' contortions of NEPA doctrine would leave environmental reviews incomplete compared to non-environmental analyses, allowing agencies to disregard significant foreseeable effects. This approach would create an imbalance between how agencies treat environmental effects versus economic and technical effects. Meanwhile, the Government's approach elides the fact that the Board arbitrarily minimized indirect environmental costs, while taking credit for similarly indirect economic benefits. NEPA cannot be interpreted to bless such irrational approaches to decisionmaking.

III. The Board's environmental impact statement (EIS) touts many indirect economic *benefits*—including hundreds of "induced" jobs, millions in local tax revenue, and projected economic growth based on assumed new oil production—but fails to account for environmental impacts that result from the same assumptions. Other EISs demonstrate that the Board could have readily accounted for the environmental impacts of, for example, downstream refining activity, either quantitatively or qualitatively. The Board's imbalanced approach violates best analytical practices.

For these reasons, this Court should affirm the judgment below.

ARGUMENT

I. Best Analytical Practices Require Agencies To Fully Consider Reasonably Foreseeable Indirect Effects, And NEPA Requires Best Practices.

Best analytical practices—both under NEPA and in other contexts—require agencies to evenhandedly consider the indirect costs and benefits of their actions, including effects that may not be certain but are still reasonably foreseeable. It is biased to tout indirect and uncertain economic benefits—as the Board did here—while ignoring similarly indirect but foreseeable environmental costs. The longstanding approach to interpreting "reasonably foreseeable" as summarized by Environmental Respondents, Env't Resps. Br. 23–30, produces environmental assessments that reflect the best practices for government analysis that prevail across a wide range of agency decisionmaking contexts. New approaches offered by Petitioners and the Government, Petrs. Br. 21–23, Gov't Br. 18, by contrast would promote arbitrary analyses inconsistent with those general best practices.

A. NEPA requires sound analytical practices.

NEPA prescribes that "all agencies . . . shall . . . develop methods" to "*ensure* presently unquantified environmental" effects can receive "*appropriate* consideration in decisionmaking *along with economic* and technical considerations." 42 U.S.C. § 4332(2)(B) (emphases added).

"Appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors, health and safety benefits on the one hand and costs on the other." *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir.) (Kavanaugh, J., concurring); *accord Michigan v. EPA*, 576 U.S. 743, 752–53 (2015) (endorsing that quote, and interpreting "appropriate" to require "paying attention to the advantages *and* disadvantages of agency decisions," including "harms . . . to human health or the environment").

"Along with" means "together with" or "side by side with," 1 Oxford Eng. Dictionary 358 (2d ed. 1989), and so implies parity. NEPA's call for agencies to *appropriately* consider unquantified environmental effects *along with* economic factors therefore requires developing methods to assess unquantified environmental effects that are reasonably comparable to the methods that agencies use to assess economic factors. Indeed, Congress intended NEPA to rectify how, "[i]n the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors." S. Rep. No. 91-296 at 20 (1969); *see also* H.R. Rep. No. 91-765 at 8 (1969) (Conference Report, adopting the Senate bill and emphasizing that the provisions apply "*to the fullest extent possible*").

Given this clear articulation of sound analytical practices, it would be odd to interpret NEPA's "reasonably foreseeable" criteria in a way that instead produces arbitrary, biased analyses. "[R]easonably foreseeable effects are those that are sufficiently likely to occur and

capable of being considered in sufficient detail." Env't Resps. Br. 1. Agencies need reasonable, non-arbitrary reasons for determining which effects are foreseeable. *Id.* at 27. Agencies should not, for example, apply inconsistent assumptions and methodologies to count indirect economic benefits while dismissing similarly indirect environmental costs as unforeseeable. The proper understanding of "reasonably foreseeable" should produce analyses that reflect best analytical practices. As the following subsections show, the best analytical practices that prevail across NEPA and many other agency decisionmaking contexts require appropriate consideration of indirect and less-than-certain effects, as well as evenhanded consideration of costs and benefits.

B. Best analytical practices require consideration of indirect effects.

Agency decisions inevitably result in direct and indirect effects.[3] To engage in rational decisionmaking, agencies must consider both types of effects. This fundamental, longstanding principle prevails across a wide range of decisionmaking contexts.

The line between direct and indirect effects in agency analyses can be blurry. Generally, direct effects tie more closely to agency actions, while indirect effects are more removed. This general definition applies both within NEPA, *see* 40 C.F.R. § 1508.1(i)(1), (2), and within the

3. Indirect effects are sometimes called additional or ancillary costs or benefits, countervailing risks, or co-benefits. *See, e.g.*, Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis 40 (2023), https://perma.cc/CH4U-LA5C [hereinafter Circular A-4].

context of agency decisionmaking writ large, *see*, *e.g.*, Circular A-4, *supra*, at 39–40. Indirect effects include effects that may arise from intermediary actions between agency decisions and final outcomes. *Id.* at 40.

Critically, indirect effects may or may not be related to the primary purpose of agency actions. For example, when an agency regulates vehicle fuel economy, an important but indirect countervailing risk could be effects on traffic mortality, because vehicle size may affect both fuel economy and safety. *See Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.* (CEI II), 956 F.2d 321, 326–27 (D.C. Cir. 1992). Nobody would insist that an agency should ignore traffic mortality risk simply because it is an indirect effect and outside the agency's primary goal to increase fuel economy.

Unsurprisingly, agency consideration of significant indirect effects is a necessary component of rational decisionmaking. As discussed below, the direct effect of the Board's action here is railway construction. But the Board's justifications include many indirect benefits, such as promoting local economic growth and creating jobs thanks to additional economic activity that the railway supports. Some types of job creation can be rather removed from the railway's approval: if the railway spurs new drilling operations, newly hired workers could increase demand at nearby restaurants, which, in turn, could lead businesses to hire additional employees. These benefits are indirect and present a degree of uncertainty. But the Board can, should, *and does* consider them when deciding whether to approve railways. *See infra* Section III.

Indeed, failing to consider indirect effects would often lead to agencies "entirely fail[ing] to consider an important aspect of the problem." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Experts from both Democratic and Republican administrations agree that indirect costs and indirect benefits are important factors under rational decisionmaking. *See*, *e.g.*, Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 Mich. L. Rev. 877, 887–88 (2010) (reviewing Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2008)) ("There appear to be no legal, political, or intellectual (certainly not from us) impediments to treating ancillary benefits and countervailing risks equally in cost-benefit analysis[.]"); Revesz & Livermore, *Retaking Rationality*, *supra*, at 55–65 (similar); *see also* Inst. for Pol'y Integrity, *Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders* 5–6 (2016), https://perma.cc/RZR6-9EXD [hereinafter *Strengthening Regulatory Review*] (reflecting the consensus of eight former top officials from the Office of Information and Regulatory Affairs (OIRA)).[4]

Considering indirect effects is a best practice across a wide array of federal analyses. The Office of Management and Budget (OMB) is consistent throughout its guidance on diverse topics—including regulatory impact analyses, programmatic cost-effectiveness analyses, lease-purchase

4. Richard L. Revesz is the current OIRA Administrator under President Biden. Christopher DeMuth and the Honorable Douglas Ginsburg served as OIRA Administrators under President Reagan. *Strengthening Regulatory Review*, *supra* at 5.

analyses, and capital asset valuations—that agencies should consider indirect costs and benefits. *See*, *e.g.*, Circular A-4, *supra*, at 1, 39–40 (describing best practices in federal regulatory decisionmaking after undergoing expert peer review, interagency review, and public comment); OMB, Circular A-94: Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs 7 (2023), https://perma.cc/Q8BG-GVSQ [hereinafter Circular A-94] (federal program analysis) (explaining that "both direct and indirect benefits and costs" should be identified); *id.* at 18–19, 24 (federal lease-purchase analysis) (explaining "[l]ife [c]ycle [c]ost" includes "direct and indirect initial costs plus any periodic or continuing costs"); OMB, Circular A-11: Preparation, Submission, and Execution of the Budget, Capital Programming Guide, app. 1, at 54 (2024), https://perma.cc/NU4Y-76P2 [hereinafter Capital Programming Guide] ("The cost of a capital asset is its full life-cycle costs, including all direct and indirect costs. . . .").

The best practice of considering indirect effects is also recognized beyond OMB's guidance. For example, the regulations governing federal energy management and planning programs include the following required prompt for evaluating energy-efficiency programs: "What are the direct and indirect impacts of this measure?" 10 C.F.R. § 436.104(b)(3). Agencies similarly account for indirect upstream and downstream effects when assessing federal water investments. *See* Council on Env't Quality, Principles and Requirements for Federal Investments in Water Resources 1, 6 (2013), https://perma.cc/LX2P-D8BC (encouraging a watershed approach that "allows for consideration of upstream and downstream conditions, needs, and potential impacts").

As these examples demonstrate, the consensus view across a range of contexts and peer-reviewed federal guidelines is that agencies should typically consider indirect effects. But Congress knows how to draft statutes that depart from this default rule when it wants to. For example, when Congress required agencies to analyze regulatory impacts specifically to small entities, it obligated them to consider only *direct* costs to regulated small entities and to exclude indirect costs. *See* 5 U.S.C. § 603(b)(4) (requiring "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule"); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (interpreting the Regulatory Flexibility Act to exclude consideration of effects on small businesses affected only indirectly by the regulation). Congress drew similar distinctions between direct and indirect costs in setting requirements for analyzing "unfunded mandates." *Compare* 2 U.S.C. § 1551(b)(1) (distinguishing between "indirect costs and benefits" and "direct costs and benefits"), *with* 2 U.S.C. § 1532(a)(2) (using the broader "costs and benefits"). Yet Congress made no such distinction in NEPA.

C. Best analytical practices require consideration of less-than-certain effects, provided they are reasonably foreseeable and not speculative.

Direct and indirect effects often present a degree of uncertainty about the effect's magnitude or likelihood. Both legal principles of rationality and best analytical practices distinguish between less-than-certain but still reasonably foreseeable effects, versus effects too "speculative" to be assessed with quantitative or qualitative methods.

As a legal matter, while agencies may reasonably exclude effects that are "too speculative to permit meaningful consideration," Env't Resps. Br. 23, it is generally arbitrary to "put a thumb on the scale" by ignoring an otherwise significant effect just because its estimated range is somewhat uncertain. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1199–1200 (9th Cir. 2008). As discussed above, NEPA addresses agencies' tendency to ignore environmental effects simply because they were too "difficult" to quantify. *Supra* Section I.A.

Best analytical practices also distinguish between two categories: (1) effects that are "not . . . known for certain" but can still be "reasonabl[y] estimate[d]" or qualitatively assessed, Circular A-4, *supra*, at 67, versus (2) effects that are "highly speculative," such that assessments would not be "credible, objective, realistic, and scientifically balanced." *Id.* at 67–68. Because uncertain costs and benefits may be "an important contributor" to the overall effects of agency action, when it is "possible to use available evidence" to assess such uncertain effects, analytical "robustness" depends on their inclusion. *Id.* at 67; *see also* Circular A-94, *supra*, at 13–15 (explaining how to treat uncertainty in federal program assessments); 10 C.F.R. § 436.24 (same in life-cycle cost analyses); Capital Programming Guide, *supra*, at 15 (same in capital programming).

Agencies have myriad tools to quantitatively or qualitatively assess uncertain effects. Options include statistical techniques to characterize probability distributions; numerical sensitivity analysis to test uncertain inputs; formal probabilistic analysis; expert

elicitation to bridge information gaps; breakeven analysis to test whether additional quantification could change the decision; or qualitative assessment. Circular A-4, *supra*, at 68–75. The goal of such tools is not to invite "exhaustive" analysis but rather to empower agencies to "provide sufficient information for decision makers to grasp the degree of scientific uncertainty." *Id.* at 70. Such tools are therefore compatible with the bounds of reasonable foreseeability under NEPA, which extends to effects only if they can be described with sufficient, reliable detail to be useful. Env't Resps. Br. 23; County Br. 26.

D. Best analytical practices necessitate evenhanded consideration of costs and benefits.

Agencies must consider the effects of their decisions—including indirect and uncertain costs and benefits—evenhandedly. It is irrational to apply one set of assumptions to inflate benefits, while refusing to apply similar assumptions or methodologies when they might inconveniently reveal costs—as the Board did here. *See infra* Section III.

Agencies may not pick and choose assumptions to make their analyses look more favorable. When agencies make reasonable assumptions about the world, those assumptions must apply evenly to both benefits and costs. For example, in *Air Alliance Houston v. EPA*, the Environmental Protection Agency (EPA) sought to delay implementation of a rule that would require chemical facilities to implement safety protocols. 906 F.3d 1049, 1055–57 (D.C. Cir. 2018). EPA claimed that the delay would yield immediate cost-savings to industry without sacrificing any of the original rule's benefits. *Id.* at 1068.

The U.S. Court of Appeals for the D.C. Circuit held that EPA's conflicting analytical assumptions for costs and benefits was arbitrary, because EPA touted that the delay would substantially relieve compliance when counting cost-savings, but downplayed the effect that delayed compliance would have on forgone benefits. *Id.* Agencies cannot "inconsistently and opportunistically fram[e] the costs and benefits." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

E. Courts consistently fault agencies for failing to appropriately consider indirect and less-than-certain but foreseeable costs in other contexts.

In the context of non-environmental agency decisionmaking, courts have consistently—and correctly—criticized agencies for failing to evenhandedly consider important indirect and less-than-certain effects. And courts have observed that costs falling outside an agency's typical purview, or that cannot be predicted with 100% certainty, may be among the most important factors to consider. The following three cases shed light on how courts assess indirect and less-than-certain effects in agency decisionmaking processes.

Returning to an example from above, in *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, the D.C. Circuit found a fuel-efficiency standard arbitrary because the National Highway Traffic Safety Administration (NHTSA) failed to consider how the standard might affect traffic fatalities. 956 F.2d 321, 326–27 (D.C. Cir. 1992). The court reasoned that, because the fuel standards were tied to vehicle weight, they could incentivize manufacturers to produce lighter

vehicles. *Id.* As lightweight vehicles were then thought to be comparatively less safe in crashes, an "uncertain" but possible indirect effect of the regulation was increased vehicular fatalities. *Id.* at 325–27. Despite the relevant statutory amendment's focus on energy conservation (and failure to mention safety[5]), the court determined the agency "must exercise its discretion" by "conducting a serious analysis of the data" to compare fuel savings versus the fatality risks, even though neither the lightweighting of vehicles nor the connection to accident risks were necessarily certain to occur. *Id.* at 327.

In *Corrosion Proof Fittings v. EPA*, the U.S. Court of Appeals for the Fifth Circuit vacated a near-complete ban on asbestos, which was commonly used in numerous products. 947 F.2d 1201, 1207–08, 1224–25 (5th Cir. 1991). EPA issued the ban because asbestos caused "unreasonable risk to human health[.]" *Id.* at 1207. But the court focused on an indirect effect: asbestos was commonly used in vehicle brakes, and a ban would necessitate switching to substitute materials. *Id.* at 1224–25. The court criticized EPA for failing to consider whether replacement brakes would perform adequately or present countervailing health risks. *Id.* at 1225. Despite EPA's lack of authority over either vehicle safety or car manufacturers' choices for substitute materials, the court determined EPA should have considered this indirect and uncertain effect. *Id.* at 1225–26.

In *American Dental Association v. Martin*, the U.S. Court of Appeals for the Seventh Circuit criticized the

5. *See Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.* (CEI I), 901 F.2d 107, 120 (D.C. Cir. 1990) ("Congress did not directly address safety in the [fuel economy standard] legislation.").

Occupational Safety and Health Administration (OSHA) for failing to consider how a rule designed to protect healthcare workers from bloodborne pathogens (for example, by requiring special syringes) might indirectly increase healthcare costs, ultimately resulting in higher fatalities caused by decreased access to care. 984 F.2d 823, 826 (7th Cir. 1993) (Posner, J.). The court cautioned that, because the agency's "consideration of the indirect costs of the rule is . . . incomplete," it is not possible to know whether the rule would ultimately result in lives saved or lives lost. *Id.* at 826.

These cases exemplify the rigor to which agencies are held in other analytical contexts, but other examples abound. *See*, *e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 731–33 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (contending EPA's revocation of a mine's permit was arbitrary because it failed to consider indirect costs, including lost income for businesses selling products to the mine, lost tax revenues, and possible changes in electricity prices); *but see id.* at 719, 723–24 (majority opinion) (holding the mine forfeited these cost arguments). When considering non-environmental costs, courts have consistently required the careful, evenhanded consideration of indirect and uncertain effects.

F. Courts interpret NEPA to align with these same principles of rational agency decisionmaking.

The environmental context is no different. Since NEPA's inception, this Court, lower courts, and the Council on Environmental Quality (CEQ)—which issues NEPA's governing regulations—have understood NEPA to align with general principles of rational agency

decisionmaking, including evenhanded consideration of indirect and uncertain effects. Even the Board's own regulations underscore the importance of considering indirect effects.

Considering indirect effects has been a core part of NEPA analyses for over fifty years. As this Court recently emphasized, "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining [a] statute's meaning." *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2262 (2024). CEQ issued its initial guidance on NEPA in 1971, just one year after the statute's passage. Consistent with best practices, this early guidance called for attention to "secondary significant consequences." Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724, 7725, 7727 (Apr. 23, 1971). In 1978, CEQ promulgated its first regulations, which remained essentially unchanged for forty years. *Compare* National Environmental Policy Act Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55978, 56004 (Nov. 29, 1978), *with* 40 C.F.R. § 1508.8 (2019). Those regulations called for the consideration of "reasonably foreseeable" effects. 40 C.F.R. § 1508.8(b) (2019). Even the Board's own regulations implementing NEPA agree that indirect effects are critical. 49 C.F.R. §§ 1105.7(e)(11)(v), (vii) (requiring applicants to "[d]escribe the effects, including [certain] indirect or down-line impacts" as well as certain "societal impacts").

Courts interpreting NEPA also require consideration of indirect effects, including effects that carry some uncertainty. In 1976, the U.S. District Court for the

District of Columbia found deficient the Federal Highway Administration's EIS for a project to build a road from Panama to Colombia, linking North and South America. *Sierra Club v. Coleman*, 421 F. Supp. 63, 65–66 (D.D.C. 1976). The court held that the agency had erroneously labelled as "insignificant" a risk that the road could facilitate the spread of foot-and-mouth disease to the United States, potentially causing up to $10 billion in losses in the first year. *Id.* The Federal Highway Administration's lack of authority over agriculture or animal-borne disease did not excuse its inattention to this indirect effect.

True, NEPA analyses need not consider every possible effect, but the longstanding reasonable foreseeability test does not require them to do so. In determining whether effects are too attenuated, this Court explained that NEPA covers indirect effects with a "reasonably close causal relationship" to the agency action. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). But the Court took great pains to explain that any analogies to tort law "do not . . . suggest that any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS." *Id.* at 774 n.7.

Relatedly, NEPA's rule of reason requires agencies to assess effects only when useful to inform the decisionmaking process—an important limitation on NEPA's reach. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 754 (2004). In *Public Citizen*, the Court held that it would not "satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental

impact of an action it could not refuse to perform." *Id.* at 769.[6]

NEPA's rule of reason is consistent with best analytical practices for agencies. While agencies should carefully weigh the effects of their actions, it is inefficient to consider effects that cannot inform the decisionmaking process. *Compare id.*, *with* Circular A-4, *supra*, at 12 (explaining that agency analysis need only highlight direct and indirect effects stemming from the agency's exercise of discretionary authority, with non-discretionary actions treated as part of the comparative baseline). As discussed above, however, *see supra* Section I.E, agencies are regularly required to consider effects that their discretionary actions cause either directly or indirectly, even if they do not have regulatory authority over those effects.

Finally, NEPA requires—consistent with best agency practices—evenhanded consideration of costs and benefits. For example, in *Sierra Club v. Sigler*, the Fifth Circuit found that the Army Corps of Engineers' lopsided consideration of indirect effects was arbitrary. 695 F.2d 957, 979 (5th Cir. 1983). In *Sigler*, the Army Corps permitted a dredging program. *Id.* at 961. Although the project was designed to make a channel accessible to oil supertankers, the agency cited increased bulk commodities trading among the benefits. *Id.* at 979. Such increased trading could carry environmental harms from additional traffic and the construction of new shipping

6. It is uncontested that, here, the Board could have rejected the application on environmental grounds, Gov't Br. 40, so there is no question that the Board had authority to avoid negative environmental effects.

terminals for bulk commodities, but the Corps ignored those costs. *Id.* As the Fifth Circuit aptly summarized, an agency "cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs." *Id.* at 979. Rather, "[s]imple logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively." *Id.*; *see also supra* Section I.A.

As discussed in the following section, Petitioners' and the Government's treatment of NEPA caselaw would narrow the scope of environmental reviews to be far more hampered than typical agency analyses.

II. Petitioners' And The Government's Approaches Run Afoul Of General Principles Of Agency Decisionmaking.

NEPA requires agencies to take a "hard look" at environmental effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted). Petitioners' interpretations would prohibit such hard looks and lead agencies to assess environmental impacts irrationally and less rigorously than agencies assess non-environmental impacts. Petitioners' approach would create an automatic haircut for environmental costs relative to other types of costs and benefits, in a manner that does not exist in any other sphere. NEPA's command to "appropriate[ly]" assess environmental effects "*along with* economic and technical considerations," 42 U.S.C. § 4332(2)(B) (emphasis added), calls agencies to assess environmental effects comparably with non-environmental effects. Petitioners' interpretation is therefore fatally flawed.

The Government's treatment also gives agencies too much leeway to arbitrarily scope their environmental reviews. Drawing a manageable line to determine which effects are relevant may be context-specific, Gov't Br. 21–22; nevertheless, across many contexts, courts have long policed that line and should not permit biased treatment of costs versus benefits.

A. Petitioners' interpretation would create an imbalanced assessment of environmental costs relative to non-environmental benefits.

Petitioners' suggested limits on NEPA analysis—an amorphous test of proximate cause and a re-wired rule of reason, *see* Env't Resps. Br. 38–39 (summarizing Petitioners' "eleven formulations" of their test)—would create an illogical imbalance between the consideration of environmental and non-environmental harms.

Proximate cause is not the standard for determining which indirect effects should be considered outside of the environmental context, nor should it limit agency considerations within the environmental context. True, if a decedent's estate sued OSHA because its pathogen rule indirectly increased healthcare costs, leading to the decedent delaying care and, ultimately, to their untimely death, the estate would surely be "laughed out of court." *See* Petrs. Br. 2, 17, 37. But OSHA, while protected from tort liability in that setting, should not put on blinders when considering the effects of its actions. For that reason, and consistent with general principles of rationality discussed above, the Seventh Circuit criticized OSHA for failing to consider the same kind of indirect effect that Petitioners would now place off limits. *Am. Dental Ass'n*, 984 F.2d at

826 (7th Cir. 1993). If agencies were permitted to ignore any environmental effects not proximately caused by their actions, environmental costs would be treated differently than non-environmental costs.

Undergirding Petitioners' proximate cause argument is the assumption that effects outside proximate cause are too uncertain. Petrs. Br. 17. But it would be irrational if agencies could choose to ignore effects merely because they were not 100% certain. Nor would it be acceptable in non-environmental contexts. While some effects may be too speculative to assess, the mere fact that an effect carries a degree of uncertainty is not alone reason to disregard it. *See* Circular A-4, *supra*, at 67. Returning to the car example again, the causal connection between fuel economy standards, average fleetwide car size, and traffic fatalities is uncertain, but an agency cannot assess whether an uncertain effect is meaningful if it ignores it altogether. *See CEI II*, 956 F.2d at 326–27.

Petitioners' re-wired rule of reason would also fail scrutiny outside the environmental context. Petitioners urge that effects outside an agency's expertise or those effects an agency could not directly regulate should not factor into NEPA analyses. Petrs. Br. 31–32. But, as noted above, EPA's lack of authority over vehicular safety did not prevent the Fifth Circuit from holding the agency accountable for considering potential increases in traffic fatalities when banning asbestos from car brakes. *Corrosion Proof*, 947 F.2d at 1224. Petitioners seek to create an environmental carve-out to rational agency decisionmaking, wherein agencies get a hall-pass from doing the analytical work that would be required in any other context.

B. The Government's approach deviates from evenhanded consideration of effects.

The Government contends that agencies have substantial leeway to determine whether effects are significant enough to assess and that the Board properly excluded the environmental effects at issue here. Gov't Br. 20–21. While determining the reasonable scope of analysis is certainly context-specific, the Government fails to acknowledge that common sense, caselaw, and best analytical practices dictate that agencies should apply the same standards to both costs and benefits. *See*, *e.g.*, *Sigler*, 695 F.2d at 979; Circular A-4, *supra*, at 11–13 (explaining, for example, that costs and benefits must be analyzed against the same baseline assumptions). Because the Board did not do so here and instead highlighted indirect, uncertain benefits while ignoring similarly indirect but foreseeable costs, *see infra* Section III, the limits it imposed on its analysis were arbitrary. An interpretation of NEPA that allows agencies to take credit for indirect or uncertain benefits while dismissing the related environmental costs as too speculative would promote irrational decisionmaking. *See Sigler*, 695 F.2d at 979.

* * *

Petitioners and the Government both urge interpretations of NEPA at odds with best analytical practices and fundamental tenants of administrative law.

III. Just As It Accounted For Indirect And Uncertain Economic Benefits, The Board Easily Could Have Accounted For Similarly Indirect But Foreseeable Environmental Costs.

The Board's EIS accounts for numerous indirect and uncertain economic benefits, including "indirect" and "induced" employment, local tax revenue, and benefits from increased oil production stimulated by the project. JA326–46, Surface Transp. Bd., *Uinta Basin Railway Final Environmental Impact Statement* 3.13-9 to -31 (2021), https://perma.cc/B2G4-XMEW [hereinafter EIS]. Yet the Board refused to assess similarly indirect but foreseeable environmental costs that are readily quantifiable despite some degree of uncertainty—as other federal agencies' analogous analyses prove. It is irrational for agencies to selectively focus on benefits while ignoring costs. As Board Member Martin Oberman explained in his Record of Decision dissent, "if the majority is to weigh the economic benefits of [local economic] development, it should weigh *all* of its harms as well." Pet. App. 142a n.21. In short, the Board's imbalanced approach violates best analytical practices.

A. The Board quantified and touted multiple indirect and uncertain economic and other benefits.

The Board's EIS and Record of Decision tout indirect and induced economic effects by modeling employment, labor income, local tax revenue, and regional economic growth, even though these effects are projections and not guaranteed. The EIS similarly selectively quantifies certain indirect emissions reduction benefits.

1. The Board relied on "indirect" and "induced" employment benefits.

The Board used the IMPLAN model—an economic model commonly used by government agencies to calculate effects from policy changes or actions—to project economic impacts like employment, largely by applying "multiplier" rates to the project's construction cost and operation cost estimates. Surface Transp. Bd., *Uinta Basin Railway Final Environmental Impact Statement* App. Q at Q-1 to -4 (2021), https://perma.cc/LV9S-SMPL [hereinafter EIS App. Q]. The EIS reports three types of employment impacts:

- "Direct" employment includes not just construction, operation, and management jobs for the railroad itself, but also "impacts in the primary industries where . . . expenditures [will be] made," including jobs with "railroad track manufacturers. *Id.* at Q-2.

- "Indirect" employment includes jobs in "industries that supply or interact with the primary industries," such as the lumber industry that provides "source material" for track manufacturers. *Id.*

- "Induced" jobs are one step further removed. They include potential new hires resulting from "increased spending by workers who earn money due to the proposed project, such as when construction workers spend their wages at local restaurants." *Id.* Documentation on IMPLAN's website elaborates that induced jobs include new hires that result from

> spending by direct employees on groceries and health care,[7] as well as "paying rent, eating out" and even "*buying engagement rings*."[8]

For the project's recommended route,[9] the EIS estimates thousands of direct, indirect, and induced job-years created over the two-year construction period, plus hundreds of more direct, indirect, and induced jobs continuing annually for long-term operation and maintenance—all together worth nearly half a billion dollars in labor income. JA336, 345. The EIS touts the overall employment benefits as "locally significant," JA125, and the Record of Decision explicitly relies on those EIS estimates of "long-term employment [and] labor income," including "indirect and induced employment," to justify the project. Pet. App. 28a, 107a & n.14 (citing EIS, *supra*, at 3.13-26 to -33).

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7. Joe Demski, *Understanding IMPLAN: Direct, Indirect, and Induced Effects*, IMPLAN Blog (June 18, 2020), https://perma.cc/X5KZ-EE9A.

8. Candi Clouse, *Examining Results & Interpreting Direct, Indirect, and Induced Effects*, Launch IMPLAN (Nov. 12, 2019) (emphasis added), https://support.implan.com/hc/en-us/articles/360038799153-Examining-Results-Interpreting-Direct-Indirect-and-Induced-Effects (last visited Oct. 14, 2024).

9. The EIS considers three alternative routes: the Indian Canyon Alternative, the Wells Draw Alternative, and the Whitmore Park Alternative. The Whitmore Park route was the preferred alternative. JA135–36.

Table: The Board's Estimates of Direct, Indirect, and Induced Employment from the Preferred Route

	Direct Jobs	Indirect Jobs	Induced Jobs
Examples (given by either the EIS or the IMPLAN Model's website)	Construction; rail operators; jobs at "track manufacturers"	Industries that supply primary industries, like lumber	Jobs created if direct employees spend at "local restaurants," on groceries, or even when "buying engagement rings"
Job-Year and Annual Job Estimates[10]	3,260 job-years, plus up to 270 annual jobs	**1,510 job-years, plus up to 120 annual jobs**	**1,240 job-years, plus up to 80 annual jobs**
Labor Income Estimates[11]	$316 million	**$62 million**	**$41 million**

10. Data from EIS App. Q, *supra*, at Q-8 to -9.

11. Data from *id.* at Q-9.

2. The Board estimated local tax revenue based on multiple assumptions.

The Board also took the projected labor income from direct, indirect, and induced employment, made further assumptions about the uncertain rate of in-state versus out-of-state residency for new hires, and estimated $7.3 million in state income tax revenue for the preferred route. JA340. For sales and use taxes on construction expenses, the EIS estimates $27 million in state revenue, plus about another million from operation-related taxes. JA341, 346. The EIS qualitatively discusses even more indirect tax revenue, from "county option sales taxes," local levies to support transit, right-of-way payments for the Ute Indian Tribe, operational revenue for the Ute Indian Tribe "[i]f" they "become an equity partner" in the railway, easement revenue for the state land trust, business fees, and "transient room tax revenue" from construction workers residing in hotels. JA329–30, 340–41. The Record of Decision relies on the EIS's estimates of overall "local and state tax revenue," among other indirect and uncertain economic benefits, to justify selecting the preferred route over other alternatives. Pet. App. 116a (citing EIS).[12]

12. Although tax revenue is actually one side of a zero-sum transfer, Circular A-4, *supra*, at 14, the EIS considers only one side of the transfer effect and treats "increased local tax revenue" among "beneficial impacts." JA125.

3. The Board projected economic benefits from induced oil production, by assuming Gulf Coast refineries will receive new crude oil from the Uinta Basin.

Despite the Board's insistence that induced oil production is too "unknown and unknowable" to qualitatively assess certain upstream environmental impacts, Pet. App. 31a, the Board had no qualms about projecting economic benefits from increased oil production. Yet these economic benefits are no more direct or certain than the environmental costs the Board refused to calculate. *See* Pet. App. 123a (Oberman, dissenting) ("rais[ing] grave concerns" about the project's "financial viability given the increasingly uncertain global market for crude oil").

The EIS estimates that "between 49 and 131 new wells annually" would be drilled to supply up to 350,000 additional barrels of oil per day to the railway. JA456. This oil production scenario was developed in a 2018 "pre-feasibility study." *Compare* JA352–53, *with* Seven County Infrastructure Coalition Response to OEA's September 25, 2019 Information Request No. 2, at 2 & n.4 (Oct. 10, 2019), https://perma.cc/9V6N-53SY. That study conducted "interviews covering 11 potential end user refineries" and then based its 350,000 barrel-per-day estimate on "an assumed greater acceptance of the Uinta Basin's crudes at various refineries, primarily located in Gulf Coast states." R.L. Banks & Associates, *Pre-Feasibility Study of a Prospective Railroad Connecting the Uinta Basin to the National Rail Network* vii, 12 (Aug. 9, 2018), https://perma.cc/A5FS-CC5E. In other words, the EIS's prediction of increased oil development—and all the

projected economic benefits flowing from that predicted new development—was derived by assuming that Gulf Coast refineries in particular would be receptive to processing additional Uinta crude.

The Board then used that assumed capacity of specific refineries to project that the "estimated increase in annual oil production would generate long-term employment . . . , income taxes and sales and use taxes," plus "additional revenue for the state through royalties and lease payments." JA456. The EIS similarly predicts myriad economic benefits for the Ute Indian Tribe from new oil and gas development stimulated by the railway, including royalties, lease payments, compensation for water use agreements, business fees, employment, income for "Indian-owned businesses," JA456–57, and "potential lower transportation costs and access to new markets," JA330. The Record of Decision relies on the EIS's prediction of such royalty revenue and other "additional revenue for Utah" from "new wells drilled" to help justify the project. Pet. App. 107a (citing EIS, *supra*, at 3.15-51).

The EIS is even more quantitative about indirect benefits from the subsequent construction of rail terminals. Though beyond the scope of the Board's review authority, the EIS recounts how "shippers of crude oil or other third parties would construct terminals" at the railway's end points. JA140. The EIS estimates that terminal construction will create jobs for "up to 600 workers," JA457, and terminal operations will create up to 250 total long-term jobs, JA458 (providing estimates for "each of the two rail terminals"). Each job created if the project induces construction of terminals will in turn indirectly generate "income taxes" and other economic

benefits. JA457. The EIS further projects that, if the terminals are constructed, "increase[d] employment for short-haul trucking" would fulfill the additional "622 [to] 1,675 truck trips per day" needed to transport oil to the rail terminals. JA458.

4. The Board calculated emission reduction benefits from diverted trucks by assuming average emission factors.

The EIS also notably quantifies certain emissions benefits that the Board predicted would result if crude oil previously transported by heavily polluting trucks was transported instead by rail. EIS, *supra*, at 3.7-14. The EIS estimates annual reductions in particulate matter, hazardous toxics, and carbon dioxide, in some cases down to one-thousandth of a ton. *Id.* at 3.7-15 (calculating a 0.001 ton per year reduction in 1,3-Butadiene). To make these calculations, the Board estimated the decrease in truck miles and applied national-average emissions factors for truck emissions per mile traveled, as well as road dust emissions per mile traveled. Surface Transp. Bd., *Uinta Basin Railway Final Environmental Impact Statement* App. M at 59 (2021), https://perma.cc/SX4V-97QQ (using data from EPA's MOVES model and AP-42, which compile air emissions factors).

* * *

The Board thus reported both quantitative and qualitative estimates of indirect and uncertain economic benefits and other benefits—even though those benefits are several steps removed from the railway project. To do so, the Board made multiple assumptions, including

that: specific refineries would likely receive new oil production stimulated by the railway, third parties outside the Board's jurisdiction would construct terminals, and average emissions factors applied to local short-haul trucks. The Board's refusal to also discuss foreseeable, if indirect, environmental costs was biased and arbitrary, particularly because other agency EISs demonstrate how such costs could have been readily assessed, as shown next.

B. The Board's refusal to assess indirect effects like refinery emissions diverges from its own approach to calculating economic benefits, other agencies' NEPA reviews, and best analytical practices.

The same assumptions and approaches that the Board relied on to quantitatively or qualitatively estimate indirect, uncertain benefits—like employment, taxes, or emissions reductions from diverted trucks—could have been applied to assess environmental effects that the Board ignored, like emissions from downstream refineries. Indeed, other agencies routinely assess such effects in their EISs. The Board's failure to do so was inconsistent, biased, and arbitrary.

1. Other agencies' analyses routinely assess downstream refinery emissions.

Public commenters flagged how additional shipments of thousands of barrels annually to Gulf Coast refineries could increase air emissions in "some of the most polluted [areas] in the nation" and in communities "disproportionately plagued by high levels of toxic

and criteria pollutants." JA540. The Board responded that expanding the scope of the EIS "would not be appropriate." JA540. The EIS never qualitatively, let alone quantitatively, assesses impacts from refinery activity.

Yet other federal agencies' EISs demonstrate how straightforward it would have been for the Board to assess this important indirect environmental impact. For example, in a recent EIS on an Alaskan development plan, the Bureau of Land Management acknowledged that oil developed under the plan would inevitably be refined. Bureau of Land Mgmt., *Willow Master Development Plan Final Supplemental Environmental Impact Statement*, App. E.3C-6 (2023), https://perma.cc/9T8R-5HG9. It further noted that oil refineries in general—including Texas refineries far outside the Alaskan project area—emit various hazardous air pollutants, including "benzene, toluene, hydrocarbons, and other volatile pollutants," and that such refinery emissions may correlate with "serious health impacts," including "elevated risk of cancer diagnostics across all observed cancer types." *Id.* at App. E.3C-8.

Other agencies go further and quantify changes in air emissions from oil refineries, even when such emissions are the indirect and not 100% certain result of the agency's action. For example, in 2020, when the Trump administration's NHTSA decreased vehicle fuel economy standards, the agency calculated how the resulting increased demand for gasoline would lead to increased emissions from the production and refining of additional oil. Specifically, NHTSA presented additional nationwide emissions of a range of criteria and hazardous pollutants from indirect "upstream" effects, including

refinery emissions. Nat'l Highway Traffic Safety Admin., *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021–2026 Passenger Cars and Light Trucks Final Environmental Impact Statement* 4-29 to -46 (2020), https://perma.cc/L6N8-5RMA [hereinafter SAFE FEIS]; *id.* at 2-20 (defining "upstream emissions" to include refinery emissions). NHTSA even estimated the precise contribution to negative health outcomes per ton of additional refinery emissions, from increased premature mortality to number of work-days lost from exposure to particulate matter. *Id.* at 4-28 (showing "incidence-per-ton values for health outcomes" for the "refineries sector"). *See also*, *e.g.*, Bureau of Ocean Energy Mgmt., *Outer Continental Shelf Oil and Gas Leasing Program: 2017–2022 Final Programmatic Environmental Impact Statement* 4-6 to -7 (2016), https://perma.cc/4R9W-HFJ4 (quantifying particulate emissions from cumulative activities, including "onshore processing of oil and gas products").

2. The Board could have used comparable assumptions and tools to assess the significant cost of indirect effects like refinery emissions.

The Board could have followed the best practices of these other federal EISs and assessed refinery emissions either quantitatively or qualitatively. Just as the Board predicted that the railway's construction would induce new hiring at local restaurants and hotels as well as indirect tax revenue, the Board could have reasonably foreseen that the railway would induce new oil production that inevitably would go to refineries. Just as the Board assumed capacity at specific refineries to predict new

oil development and the resulting economic benefits, the Board could have reasonably foreseen increased refinery activity in the Gulf Coast. And just as the Board used national average emission factors to quantify emissions reduction *benefits* from the projected diversion of short-haul trucks, the Board could have used similar national average emissions factors to estimate the *cost* of increased emissions at refineries.

NHTSA's methodology to calculate downstream refinery emissions from its fuel-economy rule is instructive. NHTSA used the GREET Fuel-Cycle Model, a model developed by the Department of Energy's (DOE's) Argonne National Laboratory. SAFE FEIS, *supra*, at 2-21. DOE's GREET Model provides a variety of free, easy-to-use spreadsheets, online calculators, and modules to calculate emissions from energy systems and infrastructure. Argonne National Laboratory, Energy Systems and Infrastructure Analysis R&D GREET Model, https://greet.anl.gov/index.php (last visited Oct 14, 2024).

In 2020, DOE published a Refinery Products Volatile Organic Compounds (VOC) Emissions Estimator tool, which provides, among other useful outputs, statistics on national average VOC emissions from refineries for a given input of number of barrels-per-day of crude petroleum. Argonne National Laboratory, Refinery Products Volatile Organic Compounds Emissions Estimator (RP-VOC), https://greet.anl.gov/files/rp_voc_manual (last visited Oct. 14, 2024). That tool, for example, shows that, when

processing 200,000 barrels-per-day,[13] refineries typically would emit about 350 tons per year of VOCs.[14]

For comparison, 350 tons is nearly ten times the annual operations-related VOC emissions that the Board estimated would occur "from locomotives, worker commuting, and reductions in truck trips," EIS, *supra*, at 3.7-25 to -26 (estimating 40 tons/year in VOCs for the preferred route's high-traffic scenario). And it's over 800 times the "emissions benefits" that the Board calculated from VOC reductions due to "diverted crude oil truck trips." *Id.* at 3.7-15 (estimating a 0.42 ton/year reduction in VOCs). It is arbitrary for the Board to claim that the environmental and health costs of hundreds of tons of increased VOC emissions from refining new Uinta crude was not sufficiently foreseeable or analyzable to include in its EIS, when it used similar assumptions and methods to quantify an assumed benefit from reducing just 0.42 tons of VOC emissions from indirect truck diversions.

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13. The Board estimated the railway would transport between 130,000–350,000 barrels-per-day of new, increased production from Uinta Basin. JA352.

14. The spreadsheet tool, based on copyright-protected software, is available for download at https://greet.anl.gov/tool_rp_voc (last accessed Oct. 10, 2024) with an approved account. The "VOC_Summary" tab shows "national average" emissions for "Tank Emissions, Refinery" (169.6 tons/yr) and "Fugitive Emissions, Refinery" (176.1 tons/yr) based on 211,091 bpd.

CONCLUSION

Analysis that encompasses full consideration of indirect and uncertain *benefits* without also attending to similarly indirect and uncertain—but foreseeable and non-speculative—environmental *costs*, as the Board does here, is not rational. The Court should affirm.

Respectfully submitted,

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