SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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SEVEN COUNTY INFRASTRUCTURE   )

COALITION, ET AL.,   )

       Petitioners,   )

        v.   ) No. 23-975

EAGLE COUNTY, COLORADO, ET AL.,   )

       Respondents.   )

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Pages: 1 through 118

Place: Washington, D.C.

Date: December 10, 2024

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11   Washington, D.C.

12   Tuesday, December 10, 2024

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14   The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 10:09 a.m.

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1   APPEARANCES:

2   PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on

3   behalf of the Petitioners.

4   EDWIN S. KNEEDLER, Deputy Solicitor General,

5   Department of Justice, Washington, D.C.; on behalf

6   of the Federal Respondents, supporting the

7   Petitioners.

8   WILLIAM M. JAY, ESQUIRE, Washington, D.C.; on behalf

9   of Respondents Eagle County, et al.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:09 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 23-975, Seven

5   County Infrastructure Coalition versus Eagle

6   County, Colorado.

7   Mr. Clement.

8   ORAL ARGUMENT OF PAUL D. CLEMENT

9   ON BEHALF OF THE PETITIONERS

10   MR. CLEMENT: Mr. Chief Justice, and

11 may it please the Court:

12   NEPA is a self-described procedural

13 statute. It is designed to inform government

14 decision-making, not paralyze it. Nonetheless,

15 it has become the single most litigated

16 environmental statute. The decision below helps

17 explain why.

18   Despite an environmental impact

19 statement spanning 3600 pages, including 20

20 appendices, that addressed major impacts, minor

21 impacts, downline impacts, and cumulative

22 impacts, the D.C. Circuit demanded more. It

23 insisted that the Board study the future project

24 developments in the entire basin, the prospect

25 of accidents in train lines hundreds of miles

 1   away, and the effect on refineries in Gulf

 2   communities thousands of miles away.

 3   All of that is not just remote in time

 4   and space but falls well outside the STB's

 5   limited remand -- remit, and it falls within the

 6   jurisdiction of other agencies that can address

 7   those issues comprehensively and concretely if

 8   and when they arise. And the EIS here addressed

 9   almost all of those issues or at least

10   identified them.

11   But, in classic "no good deed goes

12   unpunished" fashion, the D.C. Circuit held that

13   because the agency identified the issue or

14   flagged the issue, it was therefore foreseeable

15   and they had to do more.

16   That's a recipe for turning a

17   procedural statute into a substantive roadblock.

18   After all, infrastructure requires investment,

19   and, for investors, time is money. Project

20   opponents, by contrast, know that time is on

21   their side and a remand just for a little more

22   process can kill a project.

23   The combined effect of proximate cause

24   and the rule of reason should have made this a

25   straightforward case. The Board was not

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1    heedless of environmental effects here.  It

2    consulted with dozens of agencies, considered

3    every proximate effect, and ordered 91

4    mitigation measures.  Eighty-eight miles of

5    track should not require more than 3600 pages of

6    environmental analysis.

7              I welcome the Court's questions.

8              JUSTICE THOMAS:  Mr. Clement, to the

9    extent that some of these issues fall in the

10   jurisdiction of other agencies, what role would

11   Public Citizen play in disposing of those?

12             MR. CLEMENT:  So Public Citizen, I

13   think, instructs that when these -- when these

14   issues are both remote in time and effect and

15   within the jurisdiction of other agencies, then

16   the agency that approves this EIS is not the

17   legally relevant cause, to use the phrase from

18   Public Citizen, of any of the environmental

19   effects.

20             I think it's important to contrast the

21   role of other agencies when it comes to things

22   that are outside the scope of the project

23   because, if other agencies have a partial role

24   in issues that are within the scope of the

25   project -- here, for example, the Forest Service
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         1   had to approve a right-of-way for the train --
         2   that is all taken care of in the consultation
         3   process. And, here, there was consultation to a
         4   fare-thee-well. There were five other
         5   cooperative agencies. There were 27 agencies
         6   that were consulted.
         7   But it never occurred to the Board
         8   that they should consult with Port Arthur,
         9   Texas. And those issues that are far outside
        10   the proximate effects of the -- of the project,
        11   if other agencies have those within their
        12   jurisdictions, then they're going to be the
        13   legally relevant cause of upstream development
        14   in the basin if it takes place 10 years from
        15   now. If there's a -- an accident in Colorado on
        16   the train tracks, that's an FRA issue, not an
        17   STB issue.
        18   And, obviously, what's going on in the
        19   Gulf communities is issues for Port Arthur,
        20   Texas, or maybe the EPA.
        21   JUSTICE SOTOMAYOR: I don't know how
        22   to articulate your rule in writing. The NE --
        23   EPA itself says that -- requires agencies to
        24   "consult with any federal agency that has
        25   jurisdiction by law or special expertise with

1   respect to any environmental impact involved."

2   So we can't write and say you don't

3   have to think about things that other agencies

4   have jurisdiction over because the NEPA says

5   that's what you got to do. And I don't think

6   you're saying that if the Department of

7   Transportation wants to authorize a highway

8   running near a wetland, that NEPA wouldn't

9   require the DOT to consider the environmental

10   effect on the wetlands, even though a different

11   agency has primary jurisdiction over wetlands.

12   So it's -- your generalized rule, I

13   don't have to think about it if another agency

14   has jurisdiction, doesn't make much sense in

15   this statutory scheme.

16   MR. CLEMENT: Well --

17   JUSTICE SOTOMAYOR: It has to be

18   something more nuanced.

19   MR. CLEMENT: I -- I -- I agree. And

20   that's why my favored rule is not just, if it's

21   another agency's jurisdiction, you don't have to

22   look at it. But what I tried to articulate in

23   answering Justice Thomas's question is if the

24   effect's already remote in time or space and in

25   the jurisdiction of another agency.

1   JUSTICE SOTOMAYOR: -- I don't even

2   know what that means, because most environmental

3   effects, like effects on wetlands, are going to

4   be sometimes remote in time and geography. And

5   even the Restatement says on the issue of

6   proximate cause -- Restatement Third basically

7   says time and geography are not at issue.

8   If you've got a -- if you put a car in

9   the stream of -- of -- of commerce where you

10   know after a thousand miles it's going to blow

11   up, it could go a thousand miles and 40 states

12   away and blow up. That's a reasonably

13   foreseeable consequence that is remote in

14   geography and time.

15   These rules -- these absolute rules or

16   how we explain them really depend on each

17   individual case, so why don't we go back to this

18   case for a moment, okay?

19   I think your basic proposition and the

20   one that Justice Thomas was saying, how is this

21   similar to power? And I see it as similar to

22   power because I think what you're trying to say

23   is this agency's charged with putting a railroad

24   in place. Its obligation is to carry passengers

25   and cargo. The nature of that obligation may

1   downstream have an effect, but it doesn't affect

2   the actual decision this agency is making about

3   where to site that railroad. So it is a

4   different agency that has to decide whether the

5   extra production of oil somewhere else is going

6   to affect the environment.

7   I -- and that's much closer to the

8   power situation because that decision is not

9   going to directly affect the agency's decision

10   about where to site this railroad.

11   MR. CLEMENT: So, I -- I mean, I -- I

12   don't disagree with where you ended that -- that

13   question, which is to say --

14   JUSTICE SOTOMAYOR: I hope not. I was

15   trying to help you.

16   (Laughter.)

17   MR. CLEMENT: Yeah -- no, no. I --

18   well -- at the end, I think you were trying to

19   help me. I think, along the way, you may have

20   done some damage to the position that --

21   JUSTICE SOTOMAYOR: Sure --

22   MR. CLEMENT: Because I think the --

23   JUSTICE SOTOMAYOR: -- because you

24   want absolute rules that make no sense.

25   MR. CLEMENT: With respect, I -- I --

 1   I -- I guess you'll decide whether they make

 2   sense, but I think the lower courts are in

 3   desperate need of some guidance here. And

 4   simply to repeat Public Citizen to the D.C.

 5   Circuit that thinks Public Citizen means that

 6   the STB has to study the output of refineries in

 7   Port Arthur, Texas, and Shreveport, Louisiana, I

 8   don't think is going to be good enough. And I

 9   think the guidance you need to give them is to

10   start with the project at hand, which is where

11   you ended.

12   This is 88 miles of track in

13   northeastern Utah. And with respect to those 88

14   miles of track, there are consultation

15   obligations, and they were done here to a

16   fare-thee-well. And, when you're talking about

17   something that the agency actually controls,

18   they can really use NEPA to -- in a very

19   granular way.

20   So, in this case, they have a

21   mitigation measure that's designed to protect

22   six residents from noise pollution from the

23   tracks.

24   But, when you lose sight of the

25   project itself and you start thinking about,

1   okay, well, you know, this is going to lead to

2   this and it's going to lead to this and might

3   lead to this and this thing, then it takes you

4   way outside the lane of this agency and you make

5   them consider things that are just not their job

6   at all.

7   And, from the very beginning, the CEQ

8   has been concerned that if these environmental

9   impact statements balloon and become thousands

10   of pages long, they become useless ease -- even

11   for the things that the agency can control. So

12   I think the test is saying if it's remote in

13   time and space and it's in another agency's

14   jurisdiction, I think is the right test.

15   But another way of looking at it would

16   be to start with what's really before the

17   agency. They're supposed to consider

18   alternative routes and they're supposed to

19   consider mitigation measures.

20   JUSTICE JACKSON: So, Mr. --

21   MR. CLEMENT: So --

22   JUSTICE JACKSON: Sorry, Mr. Clement.

23   Keep going if you're not finished.

24   MR. CLEMENT: Well, I -- I'll just

25   finish the thought --

1   JUSTICE JACKSON: Yeah.

2   MR. CLEMENT: -- which is, you know,

3   if the environmental impact statement is focused

4   on the project, it will inform -- you can pick

5   one route versus another or you can -- the

6   agency itself can impose mitigation measures.

7   But, if you've -- have to look at everything

8   under the sun, that's outside the ambit of the

9   agency.

10   I'm sorry, Justice.

11   JUSTICE JACKSON: Yeah. No, I just

12   was wondering whether we need a new test or

13   whether the law in terms of what we have already

14   said is supposed to be happening here is enough.

15   And -- and I thought curious the fact that your

16   brief and your argument didn't rely on what this

17   Court has said about deference to the agency's

18   own determinations regarding the scope of its

19   authority.

20   I mean, I understood that an EIS,

21   based on what even Public Citizen said, is about

22   the usefulness of any new potential information

23   to the decision-making process, and the agency

24   is making a determination about that.

25   And so, in Kleppe, we said that NEPA

 1   analysis requires a high level of expertise and

 2   is properly left to the informed discretion of

 3   responsible federal agencies.

 4   So I was just curious as to your

 5   decision to sort of propose a new test outside

 6   of this deference framework, as opposed to just

 7   saying the problem here is that the D.C. Circuit

 8   did not give the agency sufficient deference, as

 9   we have said they're supposed to do.

10   MR. CLEMENT: So I think what's needed

11   is a new test plus deference. And, of course,

12   you know, there was a little bit of division of

13   labor here, and I think Mr. Kneedler's going to

14   come to the podium and talk a lot about

15   deference.

16   And I -- I suppose it is maybe true

17   that if you restated Public Citizen, reaffirmed

18   the rule of reason, reemphasized arbitrary and

19   capricious review, and reminded the D.C. Circuit

20   that the APA itself builds in harmless error

21   review, you might make the world a better place.

22   But I guess the problem from my

23   standpoint and the standpoint of people that are

24   trying to invest in these projects is all of

25   that's on the books and yet the D.C. Circuit and

 1   the Ninth Circuit hasn't gotten the message.

 2   And the agencies are kind of in this

 3   position where they don't really have a choice.

 4   They have to lard up these environmental impact

 5   statements to become thousands of pages because

 6   they know the challenge is coming. And it's not

 7   going to come in the Eleventh Circuit. The

 8   challenge is going to come in the D.C. Circuit,

 9   where all these agencies are based and any EIS

10   challenge can be brought.

11   JUSTICE BARRETT: Mr. Clement, what

12   if --

13   JUSTICE KAGAN: So, if I understood --

14   JUSTICE BARRETT: Go ahead. Go ahead,

15   it's fine.

16   JUSTICE KAGAN: If I understood your

17   test, it's like remote in time and effect. Is

18   that -- is that the --

19   MR. CLEMENT: Plus outside the

20   jurisdiction.

21   JUSTICE KAGAN: Plus outside the

22   jurisdiction.

23   So I -- I think I get "outside the

24   jurisdiction." What does "remote in time and

25   effect" mean? And -- and I think it would help

 1   me if you applied it to this case and to the

 2   particular things that the agency should have

 3   considered in -- under that and -- and didn't

 4   have to consider under that.

 5   MR. CLEMENT: Sure. What I'm trying

 6   to do with "remote in time and space" is to get

 7   it outside of the realm of the project itself

 8   and the realm of where mitigation measures could

 9   be brought to bear or alternatives would make a

10   difference because, if -- if it's -- if it's

11   inside that realm, then, if another agency has

12   some partial jurisdiction, that's supposed to be

13   taken care of in the consultation process.

14   JUSTICE KAGAN: So is it within the

15   realm of the project -- for example, here's this

16   88 miles of line, and railroads are going to

17   cross it and wildfires are going to start as a

18   result. Is that within time and space?

19   MR. CLEMENT: Totally.

20   JUSTICE KAGAN: And --

21   MR. CLEMENT: And within that time and

22   space, they're not just supposed to be, well --

23   you know, they're not supposed to say: Well,

24   we're the STB, all we care about is railroad

25   commerce, so we're not going to talk to the

 1   local officials or we're not going to talk to,

 2   you know, Fish and Wildlife or other agencies.

 3   All of that took place here.

 4   It's just that once you get outside of

 5   that, now you're thinking about --

 6   JUSTICE KAGAN: And the pollution that

 7   those trains are going to cause, that's also

 8   time and space -- within the time and space that

 9   you have the trains running?

10   MR. CLEMENT: Yeah, yeah, within --

11   within -- within the confines of those 88 miles.

12   But then, as you asked me to apply it to this --

13   sort of this -- this plan, so now you're talking

14   about tracks that are a -- 500 miles away, that

15   have already been there, that are already

16   regulated by other agencies. And then the

17   question is, like, what is the STB supposed to

18   do about it?

19   And I think the answer is not much

20   because they're not in a position to mitigate

21   there. I mean, the reason they can put

22   mitigation measures on my clients is because

23   they're going to own and operate that 88 miles

24   of track.

25   JUSTICE KAGAN: Are -- are -- are you

1 saying that anything that falls outside these 88

2 miles is not their problem?

3   MR. CLEMENT: I'm saying that anything

4 that is outside that 88 miles and is in the

5 jurisdiction of another agency is not something

6 that should be fatal to an EIS.

7   I'm not saying that the agency can't

8 take it into account. And I think one of the

9 problems with the D.C. Circuit's approach is it

10 actually kind of -- you know, it has this "no

11 good deed unpunished" flavor where, if the

12 agency says a little bit about downline traffic

13 or a little bit about where this sort of waxy

14 crude is going to go, then, aha, it was

15 foreseeable, so now you have to study it to a

16 fare-thee-well.

17   And so I -- I -- I think the way I'm

18 thinking about it is you can't be reversed as

19 the agency for something that is remote in time

20 and space, plus in another agency's bailiwick.

21   CHIEF JUSTICE ROBERTS: Thank you,

22 counsel.

23   I wanted to just ask you about what I

24 think you just started to touch on. I have

25 trouble seeing how this is going to work out as

1   a practical matter. If you're at the agency or

2   the counsel for the private party, I -- I mean,

3   what are you going to do? You going to say:

4   Okay, I've identified this possible issue, but I

5   think it's too far away?

6   I mean, do you counsel your client to

7   say: Well, you better put it in because they

8   might decide that it's not too far away? Or do

9   you counsel your client in saying: Well, I

10   think that's remote enough, so don't put it in?

11   I -- I mean, it seems to me that --

12   it's hard to figure out what you should require

13   as a matter of law when it's -- a -- a agency is

14   going to -- or your -- your client in -- in

15   front of the agency is -- is going to put enough

16   in I would say sort of no matter what.

17   Like, if you come in and you're --

18   whoever's advising them and say this might be

19   included, I think you'll want to address it.

20   Otherwise, you're making judgments and have a

21   higher risk when you go to court to say that

22   this should have been addressed and wasn't.

23   MR. CLEMENT: I agree, Mr. Chief

24   Justice. And in some respects, I think it would

25   be helpful to sort of distinguish between that

        1   which can get an agency reversed and that which

        2   is, you know, something that is available to the

        3   agency.

        4   And, you know, Congress in this

        5   BUILDER Act is provided direction to the

        6   agencies that they should try to knock these

        7   environmental impact statements out in 150

        8   pages. I mean, that's going to be impossible

        9   unless there is a reaffirmation that you don't

        10   have to look at things that are not within the

        11   immediate ambit of the project and are in

        12   another agency's lane.

        13   And -- and I think, you know, that

        14   could promote better decision-making in the long

        15   run because I think, if you look at the 91

        16   mitigation measures that were imposed here, and

        17   that's on top of 56 voluntary measures, if you

        18   stick to the 88 miles of track, you can be

        19   incredibly helpful and you can direct the S --

        20   you can direct my clients to consult with the

        21   Railroad Safety Administration, and you can

        22   direct them to consult with local agencies to

        23   make sure that, like, the crossing where the

        24   railroad crosses the road has the right signage,

        25   or where the railroad crosses a water, that it's

1   done in a way that protects the environment,

2   including where that stream is going to go next.

3   JUSTICE SOTOMAYOR: Mr. Clement --

4   CHIEF JUSTICE ROBERTS: Thank -- thank

5   you, counsel.

6   Justice Thomas?

7   I -- I think we'll go --

8   JUSTICE SOTOMAYOR: Okay.

9   JUSTICE THOMAS: Mr. Clement, would

10 you just briefly state with respect to the 88

11 miles what your test would be?

12   MR. CLEMENT: So my -- my test would

13 be as to the 88 miles that there is an

14 obligation on the agency to cooperate with other

15 agencies that have necessary permits and to

16 consult with other agencies that have expertise

17 to bring to bear on the project itself.

18   And that happened here. There was

19 cooperation with four federal agencies and Utah,

20 and then there was consultation with 27 federal

21 and state agencies and the Ute tribe.

22   All of that happened. Among the many

23 sins that the D.C. Circuit found in this case,

24 there was no sin in terms of not doing enough

25 consultation. So that's what you need to do

1   with the project, and that was that.

2   JUSTICE THOMAS: But how far downline

3   or -- or upstream or downstream should you look?

4   MR. CLEMENT: You should stop there.

5   And you should understand -- and -- and let's

6   just take the three things that they were

7   faulted for. So upstream development, that's

8   all in the future.

9   JUSTICE THOMAS: Yeah.

10   MR. CLEMENT: And that's going to be

11   permitted either by Utah or the Ute tribe, and

12   they're going to have their own environmental

13   review.

14   So the next thing that they -- they

15   fault us for is downline. It's about 500 miles

16   in Eagle County, Colorado. That's already

17   regulated by other agencies, and that's track we

18   don't even own, so we can't mitigate there.

19   And then the last thing, kind of

20   the -- you know, the cherry on the proverbial

21   sundae, is this -- you know, is Gulf community

22   environmental quality, and, again, that's --

23   that's in the regulatory agencies of those local

24   communities. They can affect it directly. They

25   could -- they could expand the refinery.

 1   They -- could shut it down tomorrow.

 2   It would be perverse to say, yeah,

 3   let's put the kibosh on 88 miles of track in

 4   northeastern Utah because of effect in a

 5   community when the community itself could

 6   regulate it directly.

 7   CHIEF JUSTICE ROBERTS: Justice Alito?

 8   JUSTICE ALITO: Could you just say a

 9   word about the relationship of the tort concept

10   of proximate cause to the test that you're

11   asking us to apply?

12   MR. CLEMENT: Yes. I think there are

13   two things that are relevant but -- that -- from

14   proximate cause principles. One is the

15   principle that this Court already derived in

16   Public Citizen from Prosser and Keeton, which is

17   the idea that when you're looking at proximate

18   cause in tort, what you're trying to figure out

19   is who's the legally responsible party.

20   And so you applied that in Public

21   Citizen. Obviously, the FMCSA was not the

22   responsible -- legally responsible party. It

23   was the president's determination to let the

24   trucks in subject to the safety inspections.

25   And, here, the legally responsible party for all

1   of these disparate things are the agencies that

2   will ultimately regulate them directly.

3   But the other principle, I guess I

4   would almost think of it as like a cross-check,

5   which is, if you think that -- if you sort of

6   try to re- -- restate the EIS violation in --

7   tort liability claims, if it doesn't even come

8   close, if it doesn't pass the straight-face

9   test, then I think you're expanding the -- the

10   NEPA too far.

11   JUSTICE ALITO: Thank you.

12   CHIEF JUSTICE ROBERTS: Justice

13   Sotomayor?

14   JUSTICE SOTOMAYOR: I think that my

15   colleague, Justice Jackson, had a -- a point

16   that -- that is hard to get out of in addressing

17   this case, and it's not the argument that you've

18   made in your brief, but it is embedded in the

19   argument you're making here.

20   This agency did look at all the

21   reasonably foreseeable impacts. So it's not a

22   question of did it fail to look at something.

23   The only qualification to that might be the

24   effect of the railroad on the Colorado River.

25   That's a separate issue, okay?

 1   But it did look at the impact upstream

 2   and downstream. So the question before us was,

 3   was it arbitrary and capricious for it not to

 4   consider something more?

 5   But that's not how you want us to

 6   rule. You don't want us to say it wasn't

 7   arbitrary and capricious because what it did was

 8   enough and why. You want us in the process to

 9   create rules that say -- even though you said to

10   the contrary a little while earlier, the agency

11   can choose to look at almost anything. The

12   question is, if it says I looked at it, but it

13   won't impact my views, is that arbitrary and

14   capricious?

15   MR. CLEMENT: So, to be clear, I mean,

16   you know, I'm here in front of -- you know,

17   in -- in front of -- on the behalf of seven

18   counties that want this project to move forward

19   and an investment group that, you know, got

20   streamlined approval for this track in 2021.

21   So, if you want to -- if you want to

22   reverse the D.C. Circuit and say this

23   environmental impact statement is sufficient

24   based principally on arbitrary and capricious

25   review, I'd be delighted. But I do think we're

 1   here at least in part because the lower courts

 2   are divided on this issue and need additional

 3   guidance, so I'm also trying to be responsive to

 4   that. And I think the way to be responsive to

 5   that is to say focus on the project. Focus on

 6   the 88 miles, and do your consultations.

 7   JUSTICE SOTOMAYOR: But they did.

 8   MR. CLEMENT: I --

 9   JUSTICE SOTOMAYOR: That's not --

10   MR. CLEMENT: And yet still we're here

11   thanks to the D.C. Circuit --

12   JUSTICE SOTOMAYOR: That may --

13   that -- that has --

14   MR. CLEMENT: -- that's faithfully --

15   in its mind, faithfully applying Public Citizen.

16   JUSTICE SOTOMAYOR: Okay.

17   CHIEF JUSTICE ROBERTS: Justice Kagan?

18   JUSTICE KAGAN: I'm wondering whether

19   your test sounds pretty good for this project

20   but may not sound quite as good for other

21   projects in the sense that, like, your project,

22   it's 88 miles, so focus on 88 miles. And that

23   sounds big enough. Thanks.

24   But, you know, suppose that the

25   project is just a single facility. I mean, you

 1   wouldn't say just focus on the one square mile

 2   that that plant is, right? I mean, you would

 3   acknowledge that some kind of plant can have

 4   effects that are far broader than just the, you

 5   know, 50 acres on which it sits.

 6   So how does your project work in any

 7   number of other sorts of projects that might be

 8   much smaller or, alternatively, might be larger,

 9   like a FERC pipeline or something?

10   MR. CLEMENT: So I -- I think it's a

11   fair question. I think that, in reality, I

12   think the lower courts haven't actually

13   struggled much with the smaller projects, and

14   they've been able to understand that, yeah --

15   you look at -- I mean, you look where the

16   smokestack, you know, and the smoke goes and you

17   don't just, like, you know, look at the -- the

18   boundary of the property, but you keep focused

19   on the project.

20   And I -- I don't think it's an

21   accident that the lower courts that have

22   approached this more the way that I would like

23   them to have largely been dealing within the --

24   in the context of Army Corps projects, where

25   it's a pretty discrete project and they say,

 1   yeah, this is -- you know, we'll look at how it

 2   affects the immediate environment, but the fact

 3   that it actually facilitates phosphate mining,

 4   that's not something we're going to look at.

 5   That's somebody else's problem.

 6   I think, you know, the FERC pipelines

 7   are probably the hardest case because, you

 8   know -- and -- and -- and I think they're --

 9   they're less remote in the sense that, you know,

10   the pipeline might go all the way to the -- near

11   a power facility. And the D.C. Circuit has this

12   Sabal Trail case, which we don't like very much,

13   and we would say, even in Sabal Trail, pipeline

14   goes to the plant, but the emissions of the

15   plant are regulated by Florida, and so that's a

16   case where you don't have to study the

17   greenhouse gas emissions. That's our position.

18   But you could disagree with us on that

19   because you think our test would apply a little

20   differently to the pipeline. But I think our

21   test is a pretty good start. And, I mean, look,

22   you know, in the realm of defining proximate

23   cause, if I could give you a 10-word test that

24   took care of every hard case, I mean, you know,

25   they'd give me tenure at Harvard. But --

1   (Laughter.)

2   MR. CLEMENT: -- but -- but -- but I

3   think, you know, having a test --

4   JUSTICE KAGAN: I'm sure they'd give

5   you that anyway.

6   (Laughter.)

7   MR. CLEMENT: I -- I -- I -- I --

8   but -- but I think, if -- if you move it in the

9   right direction and -- and maybe note that,

10   yeah, maybe this is going to play out

11   differently, maybe, you know, you have to take

12   another NEPA case someday in a pipeline, I think

13   that would still move the ball in the right

14   direction for that.

15   JUSTICE KAGAN: Can I -- can I go back

16   to Justice Alito's question about how this

17   relates to proximate cause and, you know, in --

18   in -- in Metro Edison, we clearly said that

19   there's an analogy to proximate cause concepts

20   and we're supposed to sort of think about those

21   concepts kind of. But -- but it also said "kind

22   of." It -- it said, like, whether you would be

23   held liable in a tort suit is not the right

24   inquiry.

25   And are you suggesting a change in

 1   that view, or are you copacetic with it?

 2   MR. CLEMENT: Call it a refinement.

 3   And -- and my refinement is exactly what I told

 4   Justice Alito. I mean, I think the principal

 5   thing that you've already derived out of

 6   proximate cause is this idea that you got to

 7   think about who's the legally responsible party.

 8   And that's what proximate cause does

 9   in general, and that's why, if there's another

10   agency, if it's -- if we're miles and miles from

11   the project and there's another agency that's

12   supposed to be focused on it, if something goes

13   wrong, they're going to be the legally

14   responsible party.

15   And then the other thing I think is

16   useful is just as a cross-check. I mean, nobody

17   in their right mind would say that a project in

18   northeastern Utah is the legally relevant cause

19   or the proximate cause of additional pollution

20   in Shreveport, Louisiana. Nobody. And if it's

21   not even a close case, then -- then the analogy

22   is got to be useful.

23   And the problem is my friends on the

24   other side describe proximate cause principles

25   as a fundamental mismatch, and that's pretty

1   unfaithful to Metropolitan Edison and Public

2   Citizen.

3   JUSTICE KAGAN: Thank you.

4   CHIEF JUSTICE ROBERTS: Justice

5   Kavanaugh?

6   JUSTICE KAVANAUGH: Can I ask you

7   about the nature of judicial review and the

8   nature of deference? Arbitrary and capricious

9   review, of course, is deferential, but it does

10   have both a procedural and substantive

11   reasonableness component.

12   When we're talking about NEPA, it's

13   purely procedural. So how should we think about

14   the role of the Court applying deference to

15   something that's purely procedural? How does

16   that affect what we normally say about arbitrary

17   and capricious review?

18   MR. CLEMENT: I mean, I would say

19   that, if anything, that calls for an even

20   lighter touch. And if you're thinking about --

21   I mean, you know, who is better than the STB to

22   decide what it needs to consider and what's

23   outside of its ken or what it can sort of, you

24   know, usefully study and what it can usefully

25   not study. So I think there, because it's

 1   procedural, you probably want to be even more

 2   deferential.

 3   And then I do think, you -- you know,

 4   it's -- it's -- it's always worth remembering

 5   the sort of due regard for prejudicial error

 6   point of the APA. And so, in a case like this,

 7   you know, if you think that the agency didn't

 8   perfectly study something it didn't have to

 9   study, boy, that just seems to me to be the

10   quintessential application of a harmless

11   error-type principle.

12   And so I think, if you added all of

13   that to the test that I'm suggesting, I think we

14   would have a much better situation and we'd be

15   much closer to the situation Congress seems to

16   want and the CEQ initially envisioned, which is

17   you didn't have encyclopedias; you had

18   relatively tight environmental impact statements

19   that were focused on the alternatives and

20   focused on mitigation measures and things the

21   agency could control.

22   JUSTICE KAVANAUGH: What do you think

23   we should say about Sabal Trail in this

24   opinion --

25   MR. CLEMENT: Well --

 1   JUSTICE KAVANAUGH: -- from your

 2 perspective?

 3   MR. CLEMENT: -- I -- I -- I think you

 4 should say that it's wrong. But, if you want to

 5 reserve the pipeline question or something, I

 6 think what Sabal Trail has come to be known for

 7 is worse than the decision itself, which is this

 8 notion that as long as the agency mentions

 9 something, that makes it foreseeable and,

10 therefore, they have to do more.

11   And I think part of the problem with

12 the D.C. Circuit's approach and, I would

13 respectfully suggest, my friend's position

14 here is that they want to decouple

15 "foreseeable" -- "reasonably foreseeable" from

16 "environmental effects."

17   And, as the SG's brief says, those --

18 those are either separate requirements or

19 they -- they clearly tell you that just being

20 reasonably foreseeable is not enough.

21   There's nothing more reasonably

22 foreseeable than, once the FMCSA in Public

23 Citizen gave the final regulations for

24 inspections, those trucks were coming across the

25 border and they wouldn't be great for air

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 1    quality this side of the border.  That was all

 2    reasonably foreseeable.

 3              But this Court said:  No, not the

 4    legally relevant cause.

 5              JUSTICE KAVANAUGH:  Then last, just a

 6    bigger-picture question of how to think about

 7    NEPA more generally.

 8              When NEPA was enacted -- or since NEPA

 9    was enacted, there have been all sorts of

10    amendments and new environmental statutes, and

11    you've alluded to this in your comments so far,

12    that so many different agencies are involved, so

13    many different environmental checks are in place

14    on land, air, water, pollution.

15              What is NEPA adding to the substantive

16    statutes, and how should that affect how we

17    think about NEPA in terms of what the judicial

18    role is with respect to enforcing NEPA?

19              MR. CLEMENT:  As it's currently

20    applied in the D.C. Circuit and the Ninth

21    Circuit, NEPA is adding a juicy litigation

22    target for project opponents.  And I think that,

23    you know, if you --

24              JUSTICE KAVANAUGH:  But what -- what

25    should it add properly construed?
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1   MR. CLEMENT: Well, I -- I -- I think

2   it should be more focused on the project at hand

3   and NEPA challenges -- you know, the universe of

4   situations where the NEPA challenge is

5   successful but the substantive environmental

6   statute challenge is unsuccessful should be a

7   pretty small universe.

8   And it should either be pretty

9   egregious violations of -- you know, of -- of --

10   of -- of the scope of what they should be

11   looking at, or, you know, you can also have NEPA

12   violations where they've made a consultation

13   error, which we don't have here, or there are

14   situations where you have a scoping -- or a --

15   you know, the -- the -- the segmentation

16   problem, where they break up a project into a

17   bunch of little projects and only do EAs and not

18   EISs.

19   So, like, there still would be a role

20   for NEPA in this kind of narrower view, but I --

21   I do think that sort of historical perspective

22   is important because, when NEPA was first

23   passed, there were very few substantive

24   environmental statutes, and so it was really

25   designed to make sure that the agencies weren't

1   heedless of the environmental consequences.

2   Now, with all these substantive

3   environmental statutes, I don't think an agency

4   could possibly be -- be heedless of the

5   environmental consequences.

6   JUSTICE KAVANAUGH: Thank you.

7   CHIEF JUSTICE ROBERTS: Justice

8   Barrett?

9   JUSTICE BARRETT: So this dovetails

10   with Justice Kavanaugh's questions.

11   I mean, NEPA's a procedural statute.

12   And, as you mentioned, now, with the amendments,

13   we've shrunk down to pretty significant page

14   limits, and now you're looking in the

15   neighborhood of 150, and you have judicially

16   enforceable deadlines. So you have shrinking

17   from the thousands of pages, like the report in

18   this case.

19   What effect do you think those

20   procedural requirements are? I mean, it's going

21   to be impossible for agencies to consider as

22   many downstream and upstream effects as they did

23   in this case just because of the procedural

24   constraints.

25   So what are -- what can we add? Or do

         1   you see that -- I mean, obviously, this case

         2   happened before the amendment. But what can

         3   this add to that, or how can it dovetail with

         4   that when we have an eye looking forward to, you

         5   know, the amendments?

         6   MR. CLEMENT: Yeah. And I suppose, if

         7   you remanded here for additional NEPA analysis,

         8   that would be subject to the statute. So I

         9   think the statute is highly relevant.

        10   I mean, I -- you know, I view the fact

        11   that it slimmed things down as a feature, not a

        12   bug. And I think, you know, to me, what would

        13   be most useful is reaffirming the principle that

        14   this Court has already said, which is, you know,

        15   the purpose of this thing is largely to inform

        16   the agency.

        17   But, in the context of NEPA in

        18   particular, what it should be informing the

        19   agency about are the environmental qualities of

        20   the reasonable alternatives that they're

        21   supposed to consider. And the CEQ itself is

        22   called the heart of the EIS, is the analysis of

        23   the reasonable alternatives and the mitigation

        24   measures.

        25   And all of that is going to be

1   naturally focused on the project at hand, and

2   all of that is like -- 150 pages ought to be

3   pretty good to tell you that, yeah, Route 3 is

4   better than Route 2, and Route 3 will be even

5   better if you adopt the following however many

6   mitigation measures.

7   All of that, I think, can make an

8   150-page EIS still be valuable and, frankly,

9   probably more valuable than a 3600-page EIS.

10   JUSTICE BARRETT: Follow up on the

11   proximate cause questions you've already

12   answered.

13   I mean, I had taken your brief to take

14   a harder line on proximate cause than you have

15   today, so are you soft-pedaling proximate cause?

16   Would it be -- it's hard for me to see when I

17   think about how an opinion would write if you

18   win. You know, is it you start with proximate

19   cause and then you ask: Well, should we go a

20   little bit beyond this, maybe applying a rule of

21   reason? So -- or are you still kind of

22   pushing -- maybe I mis -- overread your brief.

23   Are you pushing for a harder proximate cause

24   line?

25   MR. CLEMENT: So, I mean, I -- I

1   think, as -- as -- I'd -- I'd go where this

2   Court went, which is proximate cause maybe isn't

3   the alpha and omega, but it sure is helpful.

4   JUSTICE BARRETT: Mm-hmm.

5   MR. CLEMENT: And then I -- I do

6   think, having, you know, ruminated on the

7   question a fair bit, that maybe the best thing

8   that you could say is: If it is remote in time

9   or space, which gets at proximate cause

10   principles, and in the jurisdiction of another

11   agency, then you're outside the consultation

12   requirement and you're -- you're talking about

13   something that if things go wrong years from

14   now, the STB and this project is not going to be

15   the legally relevant cause.

16   You know, maybe it'll be poor

17   management by the Federal Railroad

18   Administration or the wrong speed limit in

19   Colorado. Or maybe it'll be because Port

20   Arthur, Texas, actually likes having refineries

21   because it's the best thing for their local

22   economy. But you're not going to say 88 miles

23   of track in northeastern Utah is the legally

24   relevant cause.

25   JUSTICE BARRETT: So you see it as

1   saying what we've said before but maybe putting

2   a little bit more flesh on the bone with your

3   "remote in time and place" language as kind of

4   the measure of when you go beyond proximate

5   cause? Is that how you would think of it?

6   MR. CLEMENT: Yeah, and -- but I would

7   emphasize that if it's in the jurisdiction of

8   another agency and -- and remote --

9   JUSTICE BARRETT: Mm-hmm.

10   MR. CLEMENT: -- that really means

11   it's not the legally relevant cause because

12   another way to explain the split --

13   JUSTICE BARRETT: Mm-hmm.

14   MR. CLEMENT: -- is, you know, some

15   people look at Public Citizen and they get just

16   what I've told you out of Public Citizen.

17   Other people look at Public Citizen

18   and they say either that's a case about the

19   president or they say that's a case where the

20   last agency to act had no discretion whatsoever.

21   And I think that way narrows what Public Citizen

22   should stand for.

23   So, in -- in a sense, if -- if --

24   if -- if you make clear that Public Citizen and

25   its test for the legally relevant cause really

1   looks to another agency that's in a better

2   position to regulate it and not -- it's not

3   just, like, a ticket for, you know, one train --

4   JUSTICE BARRETT: Mm-hmm.

5   MR. CLEMENT: -- sorry, the pun --

6   then -- then I think that will have a lot of

7   help.

8   JUSTICE BARRETT: And do you see your

9   position as inconsistent with the government's

10   since they don't really kind of -- I don't want

11   to say go as far as you do, but they don't

12   articulate the same test. So how do you see the

13   daylight?

14   MR. CLEMENT: I -- I don't think

15   there's a lot of distance or daylight between

16   our positions, but I think what daylight there

17   is reflects the fact that my clients have to

18   invest money and they need predictability.

19   And so the idea that, you know, there

20   are all these factors, but don't make any one of

21   them too dispositive, don't provide too much

22   guidance -- I mean, you know, I love almost

23   everything in the government's brief except when

24   it says "context-specific" or, you know, "a

25   factor but not dispositive."

1   People who are actually trying to

2 invest in these infrastructure projects need a

3 little more clarity on that and a little more

4 assurance that they're not going to get hung up

5 for years and years based on litigation in the

6 D.C. Circuit and the Ninth Circuit.

7   JUSTICE BARRETT: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9 Jackson?

10   JUSTICE JACKSON: So I guess I think

11 that my concern with your test, the remote in

12 time and effect plus outside the jurisdiction,

13 is that it feels to me to be unmoored from the

14 purposes of NEPA, which you have, I think,

15 articulated correctly as to informing the agency

16 with respect to its own decision-making process.

17   So I -- I'm trying to figure out how

18 to best articulate the concern, but -- your

19 focus is on identifying who is legally

20 responsible if this were to go wrong, as if NEPA

21 is about solely mitigation measures.

22   I thought NEPA was about the agency

23 who has some responsibility over an aspect of

24 this project determining whether or not to

25 approve it, and it's got to take into account

 1   not only the environmental consequences of the

 2   actual building of its piece but whatever

 3   approving its piece is going to have happen in

 4   the environment broader than that.

 5   Now I understand that's really hard to

 6   do, it's -- gets far afield, and we can fight

 7   about the extent of that. But your argument

 8   looking only at the 88 miles, I think, might

 9   narrow in too closely for a purpose of really

10   informing the agency about its approval of this

11   piece of the project.

12   MR. CLEMENT: So I -- I -- I'm going

13   to disagree. And I'm going to disagree -- I

14   mean, I -- I think you've identified there's a

15   difference in sort of what you just

16   articulated --

17   JUSTICE JACKSON: Yeah.

18   MR. CLEMENT: -- and the position I

19   think you should adopt.

20   JUSTICE JACKSON: Okay.

21   MR. CLEMENT: And I think the position

22   you've articulated I don't think is really

23   consistent with 150-page EISs. And I think one

24   way to articulate the difference is I -- I think

25   part of the problem with that is that views the

 1   agency under NEPA, whatever its -- its organic

 2   statute power gives it, that sort of suggests to

 3   every agency that they can put the kibosh on a

 4   project for reasons that have nothing to do with

 5   the details of the project or their own

 6   jurisdiction.

 7   JUSTICE JACKSON: But, no, I mean,

 8   isn't that where we come in? I mean, that's

 9   where I say -- that's where I say deference and

10   where the Court has previously said deference is

11   supposed to be taken into account and, you know,

12   advocacy, right? There are people who appear

13   before the agency and explain to them that the

14   statute actually presumptively says in this case

15   you're supposed to approve, Agency, and, you

16   know, if you're, like, arbitrarily saying no,

17   you can't do it because of something that's

18   happening 200,000 miles away or whatever, then

19   the -- we're going to go to court because that's

20   a problem. And the -- and I would expect the

21   court to recognize that under those

22   circumstances.

23   But what I worry about with your test

24   is that you're suggesting that the agency can't

25   even look at the, you know, effects of the

1   project outside of the -- the very piece that it

2   has sole responsibility for, and -- and I don't

3   know that NEPA was actually designed to be that

4   narrow.

5   MR. CLEMENT: So just two responses.

6   I mean, one is what I'm saying is, if

7   they look way outside their bailiwick, it's not

8   that they can't do it. It's that they shouldn't

9   get reversed for not doing it well enough or for

10   not doing it.

11   JUSTICE JACKSON: Fine.

12   MR. CLEMENT: And -- and the second --

13   the second thing --

14   JUSTICE JACKSON: But you -- your test

15   suggests they can't or they shouldn't or they --

16   MR. CLEMENT: No, no.

17   JUSTICE JACKSON: -- they're not

18   allowed to.

19   MR. CLEMENT: We -- we tried to say

20   both in our briefs and here, if the agency wants

21   to go beyond the -- what's necessary, I mean,

22   have at it. You know, try to be brief --

23   JUSTICE JACKSON: But I guess what I'm

24   asking is, why isn't what's necessary anything

25   that would reasonably affect its own decision

1   about whether or not to approve its piece? And

2   that might be things outside of exactly what the

3   environmental impact of its piece is.

4   That's where you're saying you got to

5   cut it off there. And I'm just suggesting that

6   if we focus everyone's attention on what an

7   agency should reasonably be taking into account

8   with respect to its own approval of this 88

9   miles, whether it's the 88 miles themselves or

10   the other environmental impacts downstream or

11   whatever, I -- I don't understand why it can't

12   be broader if we focus everyone's attention on

13   the standard being what Public Citizen says, the

14   EIS based on the usefulness of any new potential

15   information to the decision-making process.

16   MR. CLEMENT: So the reason I think

17   you shouldn't go down that route is because I

18   think that takes you to a world where an agency

19   that maybe has effectively a veto over a project

20   can consider everything under the sun and

21   essentially use NEPA to be almost like a -- a --

22   a veto and take into account everything that the

23   project is the but-for cause of.

24   JUSTICE JACKSON: I appreciate that,

25   but that's not this case. In fact, you agree

 1   with the agency in this case, and we don't have

 2   a -- a situation in which the agency has not

 3   taken into account. You -- it's the D.C.

 4   Circuit, I thought you said, was the problem

 5   here.

 6   MR. CLEMENT: Yeah. The -- the D.C.

 7   Circuit is the problem here to be sure, but the

 8   agency obviously was reacting in part to what

 9   the D.C. Circuit has required and where the

10   litigation would be. And if you just think how

11   far outside their mandate is, because, you know,

12   you've talked about, you know, they're really

13   about these tracks, but they not only are bound

14   by but enforce a common carriage requirement.

15   And if you think about this project,

16   almost none of the problems with this project

17   have anything to do with the trains. They have

18   to do with the cargo. But the irony of this is

19   the one thing this agency couldn't do as a

20   mitigating measure is say don't -- don't carry

21   any of that waxy crude on your trains. That

22   would clearly violate the statutory mandate.

23   So I think, rather than focus on every

24   environmental thing that might happen if the

25   agency went with the no action alternative, I

 1   think, if instead they focus on, look, what's

 2   going to make a difference between the

 3   reasonable alternatives that actually accomplish

 4   what this project is about and what mitigation

 5   measures can we put on those reasonable

 6   alternatives, whichever one we pick, to make

 7   this project more environmentally friendly, I

 8   think that accomplishes a lot.

 9   It doesn't make NEPA the end all and

10   be all of all environmental policy, but that's

11   actually as it was intended and, certainly, I

12   think, what Congress was getting at in the

13   BUILDER Act.

14   JUSTICE JACKSON: Thank you.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Mr. Kneedler.

18   ORAL ARGUMENT OF EDWIN S. KNEEDLER

19   ON BEHALF OF THE FEDERAL RESPONDENTS,

20   SUPPORTING THE PETITIONERS

21   MR. KNEEDLER: Mr. -- Mr. Chief

22   Justice, and may it please the Court:

23   This Court's NEPA decisions over the

24   last 50 years have announced principles that are

25   designed to enable an agency to concentrate its

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 1    environmental review on environmental issues

 2    that the agency considers most useful to -- in

 3    its evaluation of the project.  What that --

 4    that decision is reviewed, as has been said,

 5    under the arbitrary and capricious standards,

 6    but there are particular reasons under NEPA for

 7    that deference.

 8         And there are -- there are two more in

 9    particular.  One is that this Court's discussion

10    of NEPA constantly refers to reasonableness,

11    reasonable, rule of reason, reasonably

12    foreseeable content, actions, and reasonable

13    cause, is it a reasonable cause of the action.

14         When an agency is charged with acting

15    under a statute that calls for reasonableness,

16    that in itself suggests a broad amount of

17    discretion for the agency to focus on what is

18    actually going to affect the outcome.

19         And the last point, with respect to

20    the procedural nature of NEPA, Vermont Yankee is

21    very instructive on that.  It says that an -- a

22    court is not supposed to impose procedures on an

23    agency that go beyond the APA or, in this case,

24    to the extent NEPA has a -- a substantive

25    element, it should not be imposing on the agency
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1   outside measures of what should be considered.

2   With respect to the substance of NEPA

3   review, it might be helpful to think of it in

4   two steps. The first step is the court's review

5   has to be grounded in the first instance in the

6   action agency's organic statute. What does it

7   permit it to do, and, secondly, what is the

8   particular issue before the agency?

9   Here, that -- answering that question

10   is almost dispositive because of the unique

11   nature of this program. The -- the STB is --

12   regulates railroad -- railroad transportation --

13   under a common carrier mandate. It does not

14   regulate oil. It doesn't regulate the commodity

15   on any train. It does not regulate oil and gas

16   development. And at the other end, after the

17   oil is offloaded, it does not regulate refining

18   or any other particular use of -- of the -- of

19   the product.

20   So, in this case, the NEPA review

21   is -- is concentrated or -- or guard-railed, if

22   you will, by the -- by the very nature of the

23   statutory provision. In other places, that may

24   not be true, where -- where you don't have

25   that -- that barrier.

1   The next thing is I think you can

2   condense all of the various tests or phrasing

3   that the Court has used into the one, is it --

4   is there a reasonably close causal connection?

5   And looking at that question, there are certain

6   formulations or ideas or notions that coalesce

7   into that -- that final point. Is it reasonably

8   close in -- in time or distance?

9   I think common sense suggests, if --

10   if it's not, that that's not a reasonably close

11   causal connection. And -- and, here, the -- the

12   oil development in the basin or the emissions

13   from refineries down the road are not going to

14   happen for quite some time because that will

15   depend on individual decisions by lessees of

16   land in the basin about where they're going to

17   drill. And that -- those are individual

18   decisions, and they're also -- correspondingly,

19   those decisions are subject to the review of

20   other agencies, state, local, the -- the lessor.

21   And then downstream, the -- the oil is not going

22   to arrive there until after the -- the drilling

23   occurs and it's loaded on the trains. That's in

24   the distant -- in the -- in the future.

25   STB can't control where trains go.

 1   Individual decisions of the purchaser of the oil

 2   and other things will direct where it goes,

 3   and -- and it may go to different refineries at

 4   different time. So you have both the -- the

 5   distance there and the fact that it's subject to

 6   other -- other regulation.

 7   And -- and it's -- and it's wrapped up

 8   in this or instructive that STB can't do

 9   anything. It can't prohibit any of the things I

10   just discussed. And also, it will happen so

11   much in the future that -- that the agency can't

12   mitigate whatever consequences there may be.

13   I welcome the Court's questions.

14   JUSTICE THOMAS: Mr. Kneedler,

15   Mr. Clement said that there was some difference

16   between the government's argument and his, and

17   he didn't articulate fully what that difference

18   was.

19   Would you spend a few minutes on that?

20   MR. KNEEDLER: Yes. I -- I think the

21   principal difference is I -- I think he

22   primarily wants hard-and-fast rules, rigid

23   rules. And I understand the instinct, and --

24   and as you know, the department defends a lot of

25   lawsuits challenging NEPA decisions by agencies,

 1   and -- and we wish that the courts would give

 2   more deference along the lines that I just

 3   described.

 4   Having said that, I think it's not

 5   really right to say there should be absolute

 6   rules. The -- the -- the -- the mix of the

 7   factors that I mentioned may push you in one

 8   direction or another, or, in some cases, the

 9   statutory mandate that the agency has will be

10   virtually dispositive, but you can't just

11   focus -- in this case, you can focus on the 88

12   miles because that's really all the Board could

13   do.

14   But, in other situations, it's been

15   settled for a long time that -- that a court --

16   or, excuse me, an agency should take into

17   account indirect effects too, which are not just

18   the immediate effects of the project.

19   JUSTICE KAGAN: Well, so could you put

20   some flesh on the bones of that?

21   Just, you know, thinking concretely

22   about Mr. Clement's test, which is this remote

23   in time and space and within the ambit of some

24   other regulatory authority, what are the

25   circumstances in which you would worry about

1   that kind of test?

2   MR. KNEEDLER: Well, I think, I

3   mean --

4   JUSTICE KAGAN: Or what -- you know,

5   what are the circumstances in which you think

6   that kind of test would be terrific and would

7   help everybody out?

8   MR. KNEEDLER: Yeah, no -- and --

9   and -- and I think both can -- both can be true.

10   You could have a situation where another agency

11   could regulate something, but there's no -- no

12   petition before it or there's no action before

13   it, and the -- the -- the federal agency might

14   think that it will have external consequences.

15   It should consult with that other agency.

16   But that doesn't absolve the -- not in

17   this case, but another case, where the agency

18   isn't so confined, it -- that can't absolve the

19   agency from taking some account of -- of -- of

20   what's going to happen.

21   And, you know, one example is like

22   in -- in highways. The Federal Highway

23   Administration, in a funding decision, will look

24   not just at the highway but what development is

25   likely to occur if it's close in time. But, if

 1   the highway is going to facilitate something

 2   that may be five years down the road or 10 years

 3   down the road, then maybe not.

 4   So, I -- you know, I think it does --

 5   or -- or in the Corps of Engineers permitting

 6   situation that Mr. Clement mentioned, where the

 7   Corps of Engineers has a -- a minor role in

 8   regulating the -- the -- the discharge, it

 9   shouldn't have to get into what other agencies

10   are -- are requiring.

11   JUSTICE KAGAN: So I think I'm not

12   getting where you would think, oh, that's --

13   that test is not getting to the core of the

14   problem.

15   MR. KNEEDLER: Well, if -- if you --

16   there are other situation -- we're focusing here

17   on infrastructure projects because that's what's

18   before us.

19   But you could have -- you could have

20   land use decisions by a federal agency, where

21   there's a lot -- a lot more is within the ambit

22   of the federal agency to control. And maybe

23   when you cut timber, there -- there could be

24   some emissions that would go off -- off site or

25   something like that that another agency may take

1   account of or maybe not.

2   But the -- it wouldn't be wrong for

3   the landowner to say, in deciding whether to

4   approve a project: I'm going to consider the

5   emissions, I'm going to consider those other

6   things because of -- I -- I feel like I have a

7   special responsibility or a broader ambit

8   because I'm leasing my own land.

9   And, yes, maybe another agency could

10   step in, but -- but the agency would still feel

11   some responsibility.

12   JUSTICE BARRETT: But isn't that --

13   CHIEF JUSTICE ROBERTS: And then to --

14   JUSTICE BARRETT: -- overlapping

15   jurisdiction? I had understood Mr. Clement's

16   test to be if it's in the jurisdiction of

17   another agency, and so there's nothing that,

18   here, you know, the STB could do about it.

19   But what you're describing is -- maybe

20   I'm misunderstanding what you're saying. But is

21   what you're describing when there's overlapping

22   jurisdiction so that the agency, like the STB or

23   whatever, the Federal Highway Administration,

24   could consider it, but so could another agency?

25   MR. KNEEDLER: Or they both -- or they

1   both -- they both should consider it. If --

2   within their -- within -- if there's overlapping

3   regulatory jurisdiction, they both -- both

4   should consider it.

5   But there are also situations where

6   another agency has great insight in -- in -- in

7   what -- what might happen, technical expertise

8   or something that the action agency could

9   consult with.

10   Now, here -- here, as I said, there's

11   pretty stark separation for what the STB does or

12   what its responsibility --

13   JUSTICE BARRETT: But how is that

14   different from Mr. Clement's test, is I guess

15   what I'm getting at.

16   I mean, is the situation you're

17   talking about when another agency has insight

18   that it can offer? Are you envisioning a

19   situation in which there's not overlapping

20   jurisdiction, or are you -- or it is overlapping

21   jurisdiction?

22   MR. KNEEDLER: Well, here, there is

23   really not --

24   JUSTICE BARRETT: Well, I -- I know,

25   but I --

1   JUSTICE JACKSON: Mr. Kneedler, isn't

2   the answer it's not overlapping regulatory

3   jurisdiction, but the -- the landowner with the

4   timber has to decide under NEPA what informs

5   their decision as to whether to chop down the

6   timber?

7   And so, even though they may not have

8   jurisdiction over the area in which the

9   emissions would fall, you would still expect

10   that they would take into account, that they

11   would look at, that they would study, in making

12   their own determination about whether or not to

13   cut down the trees on their land?

14   MR. KNEEDLER: Right. And in -- in

15   some situations even on federal land, there may

16   be situations where another agency would also

17   have jurisdiction but that for pollution --

18   JUSTICE BARRETT: I -- I -- I

19   understand -- I understand that. I'm not really

20   disputing Justice Jackson's point here.

21   I guess what I'm just trying to

22   understand is nailing down the difference. I'm

23   not hearing a ton of difference between

24   Mr. Clement's test and yours --

25   MR. KNEEDLER: Yeah -- I think --

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 1              JUSTICE BARRETT:  -- on the

 2    jurisdictional point.

 3              MR. KNEEDLER:  Yeah.  I -- I -- I

 4    don't think there is.  As --

 5              JUSTICE BARRETT:  Okay.

 6              MR. KNEEDLER:  -- as he said, I think

 7    I -- I -- I -- we agree that -- that some --

 8    sometimes the principles he's announcing will be

 9    dispositive or close to it, close to a rule.

10    But we think it -- we think the Court should

11    preserve the -- the -- the possibility or -- or

12    the likelihood in some cases, but --

13              JUSTICE ALITO:  Well, maybe this is --

14    maybe this is unfair, but can you -- so far,

15    in what you -- you've been talking about the --

16    the relevance of the agency's jurisdiction.

17    But, if you add in the other element to the

18    standard that he mentioned, remote in time and

19    space, can you think of situations -- past cases

20    or situations that you can anticipate where both

21    of those factors are present where you think

22    that his proposal would go too far?

23              MR. KNEEDLER:  Well, I guess it

24    depends what you mean by "remote in time and

25    place."  I mean, one of -- one of the -- one of
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1   the -- differences that -- that I -- I think I

2   have on -- on the way Mr. Clement was

3   articulating it is he said -- he was saying

4   focus only on the 88 miles. But NEPA has long

5   been understood to require assessment of some

6   indirect effects. Direct effects are -- are

7   normally what is right -- what -- in this case,

8   what is happening on the 88 miles.

9   JUSTICE KAGAN: So that's what I think

10   I'm -- we're trying to get at, is where? I

11   mean, in what contexts would it be wrong to

12   focus so clearly on just the 88 miles or just

13   the area around whatever the project was?

14   MR. KNEEDLER: Well, I -- I think

15   where the agency is setting in motion something

16   that -- that is going to have effects, you know,

17   off the property or -- or -- or out driving cars

18   or -- or -- or future actions that might be

19   taken because of the -- the -- the development

20   that I mentioned.

21   And the Robertson decision from this

22   Court sort of instructive on that. There was a

23   question of whether the agency should grant a

24   permit to build a ski resort in the mountains.

25   And then there was the -- it was foreseen that

 1   there would be a -- hotels and -- and whatnot

 2   next to it. And the agency properly considered

 3   not just what was going to happen on the federal

 4   land that was being leased but what -- what

 5   private development would -- would happen.

 6   And --

 7   JUSTICE BARRETT: That's not --

 8   MR. KNEEDLER: -- if it's right next

 9   door, that's close -- that's close in distance.

10   Maybe it would take a while to build the

11   project. And so that's a matter of the agency's

12   judgment, is: But what should be taken into

13   account?

14   JUSTICE BARRETT: But that's not

15   remote in time and place, right? I mean,

16   that's -- that's close in place. So is that --

17   MR. KNEEDLER: Right. No, I was -- I

18   was responding to the point that sometimes an

19   agency should take account of something that

20   isn't directly -- it's not just the place, it's

21   not just the ski lifts. It's --

22   JUSTICE BARRETT: I -- I agree. I

23   agree. It just seems like that's not -- I mean,

24   so I think, like, the 88 miles, just focusing on

25   the track itself, might be too narrow a focus.

 1   But, if it's something kind of alongside either

 2   in your hypothetical, it's something that seems

 3   to me pretty close in space.

 4   MR. KNEEDLER: Right. No, and that --

 5   that -- that was my point about indirect

 6   effects. Some -- it -- it's not the ski

 7   resort -- it -- it -- it's not the ski lifts

 8   itself. It's the -- it's what -- what indirect

 9   consequences that will have by building the ski

10   resort there or maybe a mile away. So it's a

11   question --

12   JUSTICE KAGAN: Right. I guess what

13   Justice Barrett is saying is, you know, it

14   depends how you define the term "remote." But I

15   wouldn't think of that as remote. So I would

16   think of that as passing Mr. Clement's test.

17   Is there -- is there anything that

18   you're worried about that's not, like, just

19   around there but really is further away, that

20   the agency should really take a look at because

21   it could influence their decision-making?

22   MR. KNEEDLER: Well, I -- I think

23   the -- the Corps of Engineers, in issuing a

24   permit for a -- a deposit, is not just going to

25   look at -- or shouldn't just look at the

1   immediate place where there might be fill put in

2   the river but -- but should be concerned if

3   the -- if whatever pollutant is being added,

4   what -- what's its effect downstream going to

5   be. Is it -- is it poisonous? Would it affect

6   drinking water downstream?

7   JUSTICE SOTOMAYOR: That goes to the

8   issue of the nature of what the impact is,

9   correct?

10   MR. KNEEDLER: Yeah, yes.

11   JUSTICE SOTOMAYOR: And some impacts

12   can be more localized, and some impacts might

13   not be.

14   MR. KNEEDLER: Right.

15   JUSTICE SOTOMAYOR: A smokesnack might

16   be blown because of the winds in a particular

17   area to five states.

18   MR. KNEEDLER: Right.

19   JUSTICE SOTOMAYOR: In another, it

20   might be blown to two. And the same thing --

21   you just mentioned that if it's affecting the

22   water, you can't just look at the little pond

23   that's there; you have to look at where it

24   travels when it leaves the pond, correct?

25   MR. KNEEDLER: Right.

1   JUSTICE SOTOMAYOR: And it could go a

2   very far distance in some situations, correct?

3   MR. KNEEDLER: Right.

4   JUSTICE SOTOMAYOR: I mean, you can

5   have downhill motion that could take something

6   miles away.

7   MR. KNEEDLER: Yes.

8   JUSTICE SOTOMAYOR: So that's why a

9   test that just -- speaks about the local impact

10   is not enough if that's all you're saying.

11   MR. KNEEDLER: Right. No, I -- I

12   think that's right. And -- and Mr. Clement was

13   concerned about context-specific analysis. To

14   some extent, that's inevitable, but -- mean --

15   what I think we mean by context-specific is

16   looking at the statute that the agency's acting

17   on, what -- what is it supposed to be focusing

18   on, and enabling the agency to focus on that and

19   the particular decision that is being made.

20   Sometimes that focus will be informed

21   by the fact that another agency is also going to

22   look at this. Another agency will be concerned

23   about the downstream effects.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

1   You obviously focused on a lot more --

2   I don't know whether they were adjectives or

3   nouns, but it -- particularly in your opening,

4   to determine what exactly is available here, and

5   then I think a lot of the questions were

6   pressing along the same direction.

7   In light of all that, I think the most

8   important question is going to be whether or not

9   the agency will entertain motions for extension

10 of the 150-page limit.

11   (Laughter.)

12   CHIEF JUSTICE ROBERTS: How in the

13 world -- how in the world -- putting aside

14 whether -- the question for the people who have

15 to -- and the agencies have to fill this in, how

16 in the world is somebody going to know -- how

17 they should use a very, very limited, in terms

18 of government work, page limit -- I -- and --

19 and -- and, at -- at -- each turn, knowing that

20 failure to address a particular item could

21 result in -- in the project being either delayed

22 or -- or denied?

23   And -- and yet then -- and you sort of

24 gave yourself this safety valve: Well, in this

25 case, it's very clear, and in this case, that.

 1   But, in other cases, you've left an -- a lot of

 2   uncertainty both for the agency and the people

 3   appearing before it.

 4   MR. KNEEDLER: Well, I -- two

 5   responses to that, and there may be more.

 6   The -- the first is that the page

 7   limit, I -- I think, should be a statutory

 8   affirmation that the agency shouldn't have to go

 9   to the ends of the earth to focus -- or to

10   decide the environmental issue. It should focus

11   on what are the -- what are the core concerns,

12   identifying what the core concerns are so that

13   the agency will have that in mind, and then

14   decide how deeply it needs to go into that. So

15   I think -- I think enabling -- as this Court's

16   decisions have sought to do, enabling the agency

17   to focus closely on what it regards as most

18   material to its decision.

19   The second point is -- is the -- the

20   other, I think, problem that comes up in

21   judicial review is the fly-specking, which

22   really isn't present here but is more present in

23   the other aspect of this case in terms of

24   downline effects, where the track is going

25   through another state. Courts review these very

 1   intensely and said, oh, you should have done

 2   another study or you've got -- you've got this

 3   problem over here that you could have talked

 4   about more.

 5   And I think -- and -- it's not really

 6   present in this case, but I think -- I think the

 7   courts need to be reminded -- and, again, this

 8   comes in with the reasonableness review and

 9   Vermont Yankee and arbitrary and capricious --

10   need to be reminded that the agency gets to

11   decide in the first instance, with great

12   deference, how deeply it needs to go into

13   something. And if somebody comes in with a --

14   saying, well, you know, you didn't -- there's

15   another study you could have looked at, at -- at

16   some point, this just has to be cut off,

17   particularly given the page limits and given

18   the -- what NEPA was about was focusing on the

19   things that are most important, which may

20   include, does include, some indirect effects.

21   CHIEF JUSTICE ROBERTS: Thank -- thank

22   you, counsel.

23   Justice Thomas?

24   Justice Alito?

25   Justice Sotomayor?

1   JUSTICE SOTOMAYOR: What do you

2   understand to be -- the issue before us? There

3   were a lot of decisions by the court below, at

4   least five that I'm aware of. One was on

5   sending it back for the railroad to consider the

6   additional oil production in the basin and the

7   other that the railroad would spur oil refining

8   in Texas and Louisiana. Our -- and the -- your

9   brief was limited to those two issues.

10   MR. KNEEDLER: That -- that's what we

11   focused on because we didn't understand the

12   question presented to cover the -- the

13   downline effects.

14   JUSTICE SOTOMAYOR: Neither did I when

15   I read the cert petition.

16   But, having said that, because they

17   don't mention the other things, the -- the --

18   the wildfires, the railroad accidents, or the

19   Colorado River impact, you don't think those

20   issues are before us?

21   MR. KNEEDLER: I -- I -- I don't

22   think -- no, I don't think that they are before

23   you. And the precise issue, I think, before the

24   Court with respect to both the oil and gas

25   development and the -- and the refineries is

1   whether what the -- was it arbitrary and

2   capricious for the agency not to have done more?

3   On both ends of that, it identified

4   the aggregate. It identified a low and high

5   range of how much oil would be produced based on

6   the capacity of -- of the rail line and -- and

7   the aggregate amount of -- of emissions that

8   would happen in Louisiana.

9   JUSTICE SOTOMAYOR: So just so I'm

10   clear, the other items, the wildfires, the

11   accidents, and Colorado River, were not

12   mentioned in the cert petition?

13   MR. KNEEDLER: I -- I -- no, I

14   don't -- I -- I don't believe -- and -- but, no,

15   the agency obviously did evaluate those along

16   the 88 miles. The question is whether it --

17   whether had -- and it did evaluate those things

18   downline. This is an example of -- of

19   fly-specking because the Respondents said, well,

20   they should have done a little more. They

21   should have done a little more.

22   JUSTICE SOTOMAYOR: Thank you,

23   counsel.

24   CHIEF JUSTICE ROBERTS: Justice Kagan?

25   Justice Kavanaugh?

 1   JUSTICE KAVANAUGH: I want to pick up

 2   on what you were saying to the Chief Justice

 3   because -- and in some of the colloquy you were

 4   having earlier because I think there's an

 5   important distinction to be made between what an

 6   agency can do or maybe should do as a matter of

 7   good government and what the role of the courts

 8   is in reviewing what the agencies do.

 9   And we start with the deference on

10   the -- arbitrary and capricious standard, but

11   given the uncertain lines that were reflected in

12   your answers to Justice Barrett and Justice

13   Kagan and Justice Jackson about how far to go,

14   it seems to me the deference of the courts has

15   to be huge with respect to how the agencies

16   think about the scope of what they're going to

17   consider.

18   And it seems to me the problem that

19   has crept in is conflating what the agency can

20   do and should do from what the role of the

21   courts is here. And by the courts taking an

22   overly aggressive role, it's in turn created an

23   incentive for the agencies to -- to do

24   3,000-page EI -- you know, environmental impact

25   statements that's --

          1   MR. KNEEDLER: I think that's
          2   absolutely correct, and it's -- it's no
          3   coincidence that all the -- almost all of
          4   these -- this Court's cases about NEPA have been
          5   where a court has required the agency to do more
          6   than the agency concluded in its own judgment
          7   was necessary.
          8   And so I -- I think the -- the Court
          9   could accomplish a lot in terms of NEPA
         10   litigation by emphasizing the points that you
         11   just did against -- again, it's not
         12   manufactured -- this Court has said
         13   reasonableness is the -- you know, is the
         14   standard in measuring how far an agency should
         15   go. And who better than the agency in the first
         16   instance, say this is the decision that's before
         17   us, this is what I need or what I think I need
         18   to -- to consider that, to have considered
         19   environmental issues enough to go forward with a
         20   decision.
         21   JUSTICE KAVANAUGH: Yeah.
         22   MR. KNEEDLER: One other point about
         23   the arbitrary and capricious. Sometimes
         24   agencies treat the EIS as if it's agency action
         25   that they should independently review. The

1   ultimate question is whether the agency action

2   should be set aside because of some defect in

3   the -- EIS in the end. Analytically, the EIS is

4   not its own agency action. It's part of the

5   record on which the agency is acting.

6   So, if -- if the court finds some

7   defect in some detail of the -- of the

8   environmental impact statement, not only does

9   that not render the whole EIS invalid, but it --

10   but you -- you have to ask a further question,

11   should we be setting aside the agency's decision

12   on the basis of -- of something in a document?

13   It's a very important document, but, it -- it --

14   again, it -- it shows in judicial review some

15   attenuation between what the EIS does and what

16   the agency's substantive decision is.

17   JUSTICE KAVANAUGH: And just to

18   underscore something that I think you're going

19   to agree with, the new Act makes it impossible

20   for the agency to -- to do the kind of detail

21   that some courts have demanded. So --

22   MR. KNEEDLER: Yeah -- it does --

23   JUSTICE KAVANAUGH: -- the deference,

24   it's going to be like deference squared with the

25   new Act, it seems to me, but --

1   MR. KNEEDLER: Well, it does -- it --

2   it does exempt appendices from that.

3   (Laughter.)

4   MR. KNEEDLER: I know. I -- you know,

5   I --

6   JUSTICE KAVANAUGH: Yeah.

7   MR. KNEEDLER: Yes. But -- but I --

8   but I -- but I think it's like --

9   JUSTICE KAVANAUGH: Don't try that

10   here.

11   (Laughter.)

12   MR. KNEEDLER: I -- I think it's like

13   saying we'll get around -- get around the word

14   limit by put putting it in the -- but an agency

15   has to be able to -- an agency has to be able to

16   document technically some of its judgments. So

17   the E -- but I -- but I -- I do think that that

18   would ease the task of judicial review because

19   it necessarily will focus the -- the -- the

20   decision in -- in readable, understandable forms

21   and force the agency to give the -- to give its

22   most important reasons. And a further detail

23   for, you know, some hydrological studies and

24   whatnot, that can be dealt with in the appendix.

25   So I think it -- it can be a useful

         1   separation of the agency's explication of its

         2   reasons and -- and what should -- what should be

         3   the primary focus of the court.

         4   JUSTICE KAVANAUGH: A last -- last

         5   quick thing. What do you think we should say

         6   about Sabal Trail?

         7   MR. KNEEDLER: I think it's a close

         8   question, frankly. I mean, we -- we -- the

         9   government argued that -- that FERC was not

        10   required to evaluate the emissions at the -- at

        11   the other end. There is a difference between

        12   this case and -- and FERC pipelines because, in

        13   this case, once -- you know, the STB doesn't

        14   control where trains are going to go. That's

        15   all left up to private decision-making.

        16   When you have a pipeline, FERC is

        17   authorizing the pipeline to take gas from here

        18   to here. And so, if you had -- if you had the

        19   power plant right, you know, at the end of the

        20   pipeline, it would be sort of hard to say

        21   that -- that that's not a -- a -- a indirect

        22   effect at least of -- of the pipeline.

        23   But we are very concerned, as Mr.

        24   Clement is -- once you start expanding that

        25   to -- in -- in Sabal Trail, there were five

1   refineries it could go to. And so the -- the

2   courts tend to look that -- at that as a factual

3   question. If you could figure out where it's

4   actually going to go, you should investigate it.

5   I don't think that's the right way to look at it

6   or not -- not the full way to look at it --

7   JUSTICE KAVANAUGH: Okay.

8   MR. KNEEDLER: -- because legal

9   responsibility, they're not responsible for

10   which particular refinery it's --

11   JUSTICE KAVANAUGH: Thank you.

12   MR. KNEEDLER: -- it's going to go to.

13   CHIEF JUSTICE ROBERTS: Justice

14   Barrett?

15   JUSTICE BARRETT: Just one quick

16   follow-up on that because that was my question

17   too about Sabal Trail. You know, Mr. Clement

18   said, well, at least what Sabal Trail has come

19   to stand for.

20   And would the government agree that

21   even if Sabal Trail itself was correct for some

22   of the reasons that you say, that what courts

23   have interpreted Sabal Trail to mean is too

24   aggressive?

25   MR. KNEEDLER: Yes. No, that -- and

1   that's -- that's what I was -- was trying to

2   convey because that gets you into thing -- that

3   gets you into speculation. It gets you into

4   other agency responsible. It gets you into

5   individual decision-makers and -- and all that.

6   CHIEF JUSTICE ROBERTS: Justice

7   Jackson?

8   JUSTICE JACKSON: Yes. So I'm

9   reflecting on your conversation with Justices

10   Kagan and Barrett, and maybe I don't understand

11   how Mr. Clement's test works, but I thought that

12   each element operated independently to narrow

13   the circumstances in which further study would

14   be required.

15   So right next door but within the

16   regulatory jurisdiction of another agency, I

17   thought, would not pass Mr. Clement's test

18   because he had a separate element about it has

19   to be in your own jurisdiction.

20   Is that how you understand?

21   MR. KNEEDLER: Yep. I -- I think it

22   could be understood that way. I'm not -- I'm

23   not sure he -- he means the hardest form of

24   that.

25   JUSTICE JACKSON: But maybe -- maybe

 1   he can respond on rebuttal --

 2   MR. KNEEDLER: Yeah, yes --

 3   JUSTICE JACKSON: -- but that's how I

 4   thought -- I thought --

 5   MR. KNEEDLER: But that -- but that

 6   sort of -- that sort of highlights a -- a --

 7   a --

 8   JUSTICE JACKSON: Highlights the

 9   concern, right?

10   MR. KNEEDLER: Right. Yes.

11   JUSTICE JACKSON: Because it could be

12   next door. It could be clearly a foreseeable

13   impact. But he -- I thought, wanted a line that

14   had everybody looking at what is in your own

15   regulatory jurisdiction. So it's not an

16   overlapping jurisdiction scenario.

17   MR. KNEEDLER: Right.

18   JUSTICE JACKSON: He posits to begin

19   with that different agencies have different

20   purviews. And if this thing at step one is

21   outside your purview, you don't have to study

22   it.

23   MR. KNEEDLER: Right. And that's like

24   putting blinders on to -- something that --

25   that -- that may happen.

 1   JUSTICE JACKSON: And instead, your

 2   test, which seems to, I think, reflect what the

 3   Court has said about deference to agencies

 4   and -- and what Justice Kavanaugh was pointing

 5   out about the arbitrary and capricious standard,

 6   you said in your beginning that we're supposed

 7   to start with the organic statute.

 8   And I hear that as sort of the step

 9   one court question is, has the agency properly

10   identified its own purview under the statute?

11   Once the agency does that, then the agency makes

12   a determination about what it needs to study to

13   inform its decision.

14   And then you said at step two, the

15   court asks once the agency makes that

16   determination, is there a reasonably close

17   causal connection in time and distance to the

18   thing that the challenger is saying the agency

19   is supposed to study versus what the agency

20   itself has said given its organic statute.

21   Do I sort of have your framework right

22   as to what courts are supposed to be doing?

23   MR. KNEEDLER: On the -- on the second

24   step --

25   JUSTICE JACKSON: Yes.

1   MR. KNEEDLER: -- I would add one

2   modification.

3   JUSTICE JACKSON: Yes.

4   MR. KNEEDLER: It would be was the

5   agency arbitrary and capricious in concluding

6   that anything further than that was not a --

7   should not be regarded as a reasonably close

8   causal connection. I don't think that's a test

9   for the Court to decide in it -- in its own --

10   JUSTICE JACKSON: In its own -- its --

11   filter that through the arbitrary and

12   capricious?

13   MR. KNEEDLER: Right.

14   JUSTICE JACKSON: Yeah.

15   MR. KNEEDLER: Because it -- it --

16   it's one aspect of the agency's decision. It's

17   both the organic statute and NEPA, how do they

18   fit together, and given that, did the agency

19   make a reasonable -- was it arbitrary and

20   capricious in making the judgment it did that

21   going further than that was not --

22   JUSTICE JACKSON: So, in the

23   government's position, if we were to articulate

24   something like that, do you think that would

25   be -- that meaning these two steps that this is

 1   the way the Court is supposed to be looking at

 2   this in these situations, would that be helpful?

 3   MR. KNEEDLER: Yes. I think it would

 4   be very helpful and I -- for the -- for the NEPA

 5   litigation that -- that we do see and then

 6   identifying the factors that can reasonably go

 7   into what's a reasonably for -- a reasonably

 8   close causal connection. And this is what the

 9   agency is looking at and was it on -- on those,

10   you know, sort of factors, was it arbitrary and

11   capricious.

12   JUSTICE JACKSON: Thank you.

13   CHIEF JUSTICE ROBERTS: Thank you,

14   counsel.

15   Mr. Jay.

16   ORAL ARGUMENT OF WILLIAM M. JAY

17   ON BEHALF OF RESPONDENTS EAGLE COUNTY, ET AL.

18   MR. JAY: Mr. Chief -- Mr. Chief

19   Justice, and may it please the Court:

20   Petitioners' argument and this case

21   have shifted somewhat from the cert stage, as

22   Justice Sotomayor's colloquy with my friend

23   brought out, and I'd just like to focus on two

24   of those at the threshold. One is about the 88

25   miles and one is about the outside the agency's

1   jurisdiction point, that the agency itself did

2   not take this outside the 88 miles view. The

3   agency reviewed and found foreseeable the

4   downline impacts.

5   We obviously don't think those are

6   within the question presented, but it's striking

7   that Petitioners are taking a -- a view of what

8   the agency should have studied that is

9   considerably narrower than the agency itself.

10   And the second is about the agency's

11   jurisdiction. This -- this case came to this

12   Court as a case in which the D.C. Circuit had

13   recognized that the agency had jurisdiction

14   to -- and authority to consider the effects that

15   were being studied.

16   So, as Petitioners' position has

17   shifted, I think it's also lost any grounding in

18   the text of NEPA. So I think it would be -- it

19   would be good to -- to step back there.

20   The impacts at issue here are

21   reasonably foreseeable consequences of this $2

22   billion railway project whose entire rationale

23   is to transport crude oil. Reasonable

24   foreseeability is the test that Congress -- that

25   has been in NEPA since the beginning and that

 1 Congress has recently reaffirmed in the BUILDER

 2 Act.

 3   In that -- in that statute, as in

 4 agency practice leading up to it, when an effect

 5 is within the scope of reasonable foreseeability

 6 and within the agency's authority to consider,

 7 Congress doesn't direct agencies to pass the

 8 buck to someone else. It directs all federal

 9 agencies to cooperate on, where possible, a

10 single environmental review so that in --

11 federal decision-making at -- from the threshold

12 is informed by these environmental

13 considerations.

14   Congress also addressed these

15 policy -- concerns that Mr. Clement has

16 emphasized quite vigorously by adopting the page

17 limits, the time limits, and also some scope

18 limits that   haven't -- haven't come up this

19 morning.

20   We agree with a -- a number of the

21 things that the government said in its brief.

22 With -- in particular, points B1 and B3 of its

23 brief, I think you'll find more agreement with

24 what I've said than Mr. Kneedler was able to get

25 to today.   There's no --

 1   CHIEF JUSTICE ROBERTS: Thank you,

 2   counsel. Thank you.

 3   MR. JAY: Thank you, Your Honor. I

 4   welcome the Court's questions.

 5   JUSTICE THOMAS: Would you just spend

 6   a -- articulate what you think the close

 7   connection is with the Gulf Coast communities?

 8   MR. JAY: So the reason -- that the

 9   effects -- the refining effects are reasonably

10   foreseeable in this case and I think probably

11   would not be in some others is that the very

12   purpose of this project is not only to bring a

13   specific type of crude oil to the National Rail

14   Network but to transport it for refining, and

15   there are only a few places that have the

16   capacity to do that.

17   I think the -- that's why the agency

18   itself was able to identify the limited number

19   of places where this oil could go. And, again,

20   the whole raison d'être of this project is to

21   transport one commodity and one commodity only.

22   That -- that won't be the -- that

23   won't be the case in many other railroad

24   projects, but I do think it's a -- it -- it's a

25   little bit misleading for Mr. Clement to suggest

1   this is an 88-mile railroad, as if the train

2   just went back and forth for 88 miles. It's a

3   connection to the National Rail Network, whose

4   entire purpose was to bring this crude oil to

5   the market.

6   JUSTICE SOTOMAYOR: Do you think as a

7   common carrier that this agency could say we

8   don't like oil refining, and, hence, because it

9   creates pollution, I'm not going to build this

10   railroad because the crude oil will lead to oil

11   refining that will pollute the environment?

12   MR. JAY: So I -- I think -- so let me

13   just say as a prefatory matter, I think that

14   would be a question about the agency's organic

15   statute and not about NEPA. I -- I suspect that

16   it probably could not because of the common

17   carrier --

18   JUSTICE SOTOMAYOR: Right. So, if

19   it --

20   MR. JAY: -- mandate.

21   JUSTICE SOTOMAYOR: -- can't, which is

22   what I assume because the statute doesn't permit

23   it to discriminate in that way -- it says you

24   have to carry all products and person -- cargo

25   and persons -- then why is it within their

 1   purview to say or determine what the increase of

 2   refining will be and whether it'll be damaging

 3   when there's another agency that has the power

 4   to control that? It can't -- it has no power to

 5   say don't refine the oil. Another agency might

 6   do that.

 7   MR. JAY: So the -- the purpose of the

 8   NEPA review of this -- on this point, I -- I'd

 9   like to make three points.

10   So one is that the Board is weighing

11   the transportation merits of this project,

12   whether to authorize this project as -- as a

13   substantive matter, against the environmental

14   consequences. That's the test that the Board

15   applies under its organic statute. And so, when

16   the Board -- concludes that a railway project

17   is --

18   JUSTICE SOTOMAYOR: But it's not the

19   carrying that causes the pollution; it's the

20   refining that causes the pollution, and the

21   railroad can't control that refining because it

22   can't prohibit it.

23   MR. JAY: It --

24   JUSTICE SOTOMAYOR: You know, it could

25   stop it by not permitting the shipment, but it's

1   not entitled to make those choices. It's a

2   common carrier. It has to carry the goods.

3   MR. JAY: I think that as a matter of

4   its organic statute, it might well take that

5   approach. Now, in -- but --

6   JUSTICE SOTOMAYOR: Isn't that what it

7   did here?

8   MR. JAY: No, I don't think so. I --

9   I -- I think that it's closer -- what it did

10   here is closer to something that you said a

11   moment ago, which is to say, essentially, we --

12   we, this agency, don't regulate the refineries,

13   and, therefore, we need not look at the -- at

14   the consequences.

15   And I think that that's inconsistent

16   with what the agency -- with what NEPA requires

17   because --

18   JUSTICE SOTOMAYOR: Thank you,

19   counsel.

20   JUSTICE JACKSON: But why is -- why

21   is --

22   JUSTICE KAGAN: Why don't you complete

23   your answer.

24   JUSTICE JACKSON: Yeah.

25   MR. JAY: Just -- just very briefly,

1   the -- NEPA requires agencies to look at even

2   harms that they cannot mitigate and harms that

3   they do not regulate directly precisely because

4   they provide a springboard for public comment to

5   the agencies. So, even if the agency doesn't

6   think that it would out -- conclude that the

7   environmental harms outweigh the transportation

8   merits, it allows the public to participate in

9   the process, and it also allows those local air

10   pollution regulators that you referred to, Your

11   Honor, to essentially be aware of the

12   consequence coming downstream from this --

13   JUSTICE KAGAN: So that --

14   MR. JAY: -- central decision.

15   JUSTICE KAGAN: -- if I understand you

16   correctly, Mr. Jay, that takes NEPA outside of

17   the things that are reasonable to inform agency

18   decision-making and says, even if this thing

19   wouldn't reasonably inform agency

20   decision-making, couldn't reasonably inform

21   agency decision-making, still NEPA might impose

22   an obligation, has an interest in public airing

23   of that matter.

24   And that's -- that seems to go beyond

25   what I thought the statute was all about.

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1           MR. JAY:  So that is not our position,
2    Justice Kagan.  We're not -- we're not saying
3    that -- that -- that NEPA requires the agency to
4    conclude -- to conduct environmental review that
5    wouldn't inform its decision-making.
6           And that -- that's an important aspect
7    of where I began, that the D.C. Circuit
8    concluded, and as the government pointed out in
9    Footnote 7 of its principal brief, nobody sought
10   cert on the question whether these effects are
11   with -- were within the -- the agency's
12   authority to regulate.  So Public Citizen is an
13   excellent -- excellent example of the point that
14   the agency is not required to study what it has
15   no authority to -- to act on, as a --
16           JUSTICE JACKSON:  But Public Citizen
17   is different.  I mean, it's -- it -- it -- it
18   has the authority, the Board here has the
19   authority --
20           MR. JAY:  Yes.
21           JUSTICE JACKSON:  -- to decide whether
22   or not this 88-mile track is approved, right?
23           MR. JAY:  Yes.
24           JUSTICE JACKSON:  And the question is,
25   I think, that Justice Kagan is asking, to what
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 1   extent does information about what happens in

 2   the refining process inform this Board's

 3   determination with respect to exercising that

 4   authority.

 5   I don't understand why it matters if,

 6   as Justice Sotomayor pointed out, they're a

 7   common carrier, they have a -- they're --

 8   they're not allowed to discriminate as to what

 9   gets carried on the tracks. So, if they can't

10   say what gets carried, then what difference does

11   it make that the refinery is putting -- you

12   know, putting out environmental effects to their

13   decision as to whether or not to approve this?

14   MR. JAY: So it matters because it is

15   a reasonably foreseeable consequence of this

16   railway project because of what these trains

17   will carry and because one of the things that

18   NEPA requires agencies to do is to look at the

19   foreseeable consequences even when they cannot

20   be mitigated.

21   I mean, that's in Section 4332(C)(ii)

22   of the statute. Any reasonably foreseeable

23   adverse environmental effects which cannot be

24   avoided if the proposal should be implemented.

25   That's part of the study.

 1   And so, in other words, for the agency

 2 to say, well, we don't have authority to

 3 mitigate these effects and, therefore, we won't

 4 look at them at all, that is ignoring a category

 5 of consequences just like --

 6   JUSTICE JACKSON: Don't you have to

 7 have an argument that their study -- let's say

 8 they do study them, and they determine they have

 9 great impact. Don't we -- doesn't someone have

10 to make the determination that those impacts

11 should really matter with respect to whether or

12 not this project gets approved?

13   I mean, they're so far down the line.

14 They're really -- they depend on a bunch of

15 other people's actions. All the things they

16 say. Don't you have to show that there's some

17 pretty close connection or tie between those

18 impacts and this decision?

19   MR. JAY: So I want -- I want to

20 distinguish between two points. One is the

21 far-down-the-line point, and I think the

22 foreseeability standard deals with that. And

23 the second is the thrust of your question, which

24 is, would the agency look at it? And there

25 certainly are cases where agencies either don't

 1   take environmental considerations into -- into

 2   account or they -- or they don't take certain

 3   environmental considerations into account.

 4   But the effects in this case -- and

 5   we've been talking a lot about refining, but

 6   there are obviously multiple categories of

 7   effects in this case -- these are the types of

 8   effects that the Board, in conducting this broad

 9   weighing between transportation merits and

10   environmental consequences, does take into

11   account.

12   I mean, take the downline

13   consequences. The Board has an entire

14   regulation about the environmental consequences

15   of permitting a new railway which will then have

16   trains go onto the National Rail Network and

17   go -- go onto other tracks. Has an

18   environmental -- an entire regulation directing

19   applicants to explain -- the environmental

20   consequences for other areas, for things like

21   air pollution.

22   Obviously, the Board doesn't regulate

23   air pollution, but it absolutely does take into

24   account the -- the consequences on other rail

25   lines of adding new rail traffic. The downline

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 1      impacts in this case, which -- which the Board

 2      studied but made basic APA errors on --

 3              JUSTICE JACKSON:  But you don't

 4      appreciate --

 5              MR. JAY:  -- are an example of that.

 6              JUSTICE JACKSON:  -- you don't

 7      appreciate a difference between the downline

 8      impacts of having more train traffic in certain

 9      areas versus what is being carried on those

10      trains and what then happens to that cargo?

11              MR. JAY:  So the -- I think the

12      standard is foreseeability for both, but I do

13      think that it will be much more rare for the

14      trains to be carrying a single commodity for

15      refining in a single -- for consumption in -- in

16      a single location.  That, I think, is what makes

17      this case a -- you know, a -- a particularly

18      unrepresentative example of the -- of the

19      foreseeability standard because, in many cases,

20      as the D.C. Circuit acknowledged, the --

21      whatever the commodity is, whether it's on a

22      train or in a pipeline, it will go into some

23      national distribution network and no one will

24      know where it will go, what  will -- how it will

25      be consumed, whether it will displace other
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1   goods. And I think the -- the D.C. Circuit

2   made -- made that point in distinguishing one of

3   its own precedents involving natural gas.

4   But, in this case, the -- the entire

5   purpose of the project is to carry -- waxy crude

6   oil, and the record before the agency shows that

7   every train that leaves the Uinta Basin is going

8   to be carrying waxy crude oil, every one. And

9   the Board was able to quantify both the amount

10   of oil that would be necessary to make the

11   project financially viable and to identify where

12   it would go.

13   So, if the Board has essentially

14   tracked the oil out of the basin onto the trains

15   and to the refineries, the -- what the D.C.

16   Circuit pointed out is that since the agency was

17   also assuming that all of the oil would be

18   refined, it needs to -- it needs to taut up the

19   environmental consequences at the refinery.

20   In many cases, that will not be the

21   case, but that's -- that's why the reasonable

22   foreseeability standard is met here. And the --

23   JUSTICE KAGAN: Do -- do -- do you

24   think that the agency could turn down the

25   project on that basis? I mean, I'm -- I take it

 1   you must, because you were assuming that the

 2   agency couldn't mitigate the harms by saying you

 3   can't carry this particular product.

 4   Do you think that the agency can turn

 5   down the product? Is that the sort of

 6   assumption that's underlying what you're saying?

 7   MR. JAY: So I -- I think that is the

 8   assumption on which the D.C. Circuit decided the

 9   case. But that's not a NEPA question obviously.

10   It is a question of the -- the authority under

11   the ICCTA.

12   JUSTICE KAGAN: I mean, it seems

13   related to a NEPA question because, if the

14   agency can't mitigate the harm and it can't turn

15   down the entire project, one wonders what all

16   this fuss and bother is about.

17   MR. JAY: Right. I think the D.C.

18   Circuit understood that these were the types

19   of -- the types of considerations and certainly

20   the downline impacts, I -- I -- I think probably

21   the up -- upstream impacts as well, were the

22   kinds of considerations that -- I mean, they did

23   motivate at least one member of the Board to

24   dissent from -- to -- to dissent from the

25   decision.

 1   So, as the case came to the Court and

 2   as the question presented is framed for you,

 3   like, that -- that is not the question. That --

 4   that's -- that's taken as a given.

 5   JUSTICE KAGAN: Can --

 6   MR. JAY: And I think --

 7   JUSTICE KAGAN: -- can I ask about

 8   foreseeability? Because I -- I -- I mean,

 9   foreseeability is certainly part of the inquiry,

10   but I'm having -- you're -- you're -- you're

11   seeming to make it the entire thing.

12   And if it were the entire thing,

13   Public Citizen couldn't have come out the way it

14   came out, where it was perfectly foreseeable

15   what environmental effects were going to flow

16   from those trucks.

17   So I guess I'm wondering, it's got to

18   be more than that, right, Mr. Jay?

19   MR. JAY: It is more than that. So

20   the government has this mantra in its brief

21   about attenuated, speculative, contingent, or

22   otherwise insufficiently material.

23   We actually agree with a lot of that,

24   that -- that things that are too attenuated or

25   speculative for the agency to -- to look at,

1   those are excluded by the foreseeability

2   standard.

3   And then setting it even separate and

4   apart from the foreseeability standard, this is

5   almost sort of the -- the flip side of -- of

6   Mr. Clement's position. Mr. Clement seems to be

7   saying that if somebody else has authority to

8   look at it, this agency shouldn't. So our --

9   our position is, if the -- if this agency

10   doesn't have authority to look at it -- it is

11   not required to.

12   And then the third point is that they

13   obviously have to be environmental in nature.

14   That was the thrust of Metropolitan Edison, that

15   some things are not environmental consequences

16   at all because they don't bear -- there's no

17   causal relationship between the -- the agency

18   action and the effect on the physical

19   environment.

20   So I -- I think each of those is -- is

21   part of the analysis, but quite a -- quite a bit

22   of it is accomplished by the reasonable

23   foreseeability standard. And I -- I -- I think

24   that there -- there -- it's important to

25   distinguish between two questions. One is how

         1   much process should NEPA -- should the agency

         2   give the things that are within what NEPA tells

         3   it to look at? And much of Mr. Kneedler's

         4   presentation focused on that.

         5   And we agree a hundred percent that

         6   agencies have a lot of discretion to say we're

         7   going to prioritize these effects over others.

         8   And we think that's the necessary concomitant of

         9   the -- of the BUILDER Act and the 150-page limit

        10   and the time limit, that agencies are going to

        11   have to prioritize some effects over others.

        12   They will get deference if they explain briefly

        13   what their reasoning is for doing so. That

        14   could have to do with their statutory mission.

        15   It could have to do with their expertise.

        16   But what Congress did not do is say

        17   that it was going to attack this -- the problem

        18   of NEPA being too -- having too broad a compass

        19   by saying -- by changing the reasonable

        20   foreseeability standard.

        21   And that's the problem with what

        22   Mr. Clement is proposing, is that he's saying

        23   that even where the agency finds something

        24   reasonably foreseeable and says, we should study

        25   that, and in that study, it makes a basic AP

1   error -- APA error, like the one that the

2   district court -- sorry, that the court of

3   appeals in this case found to be utterly

4   unreasoned.

5   Mr. Clement says: No problem,

6   harmless error, because NEPA didn't require you

7   to study that at all.

8   And that, we think, is the wrong way

9   to -- to attack the problem because the

10   reasonable foreseeability standard is in the

11   statute, and -- and this sort of alternative

12   "not my problem" standard is not.

13   If anything, the text of -- as Justice

14   Sotomayor brought out at the very beginning of

15   the argument, the text of the statute directs

16   agencies not to ask do I have the -- the

17   statutory authority to -- to mitigate this

18   issue? It -- it directs the federal government

19   together to -- to bring together all agencies

20   that have jurisdiction by law or special

21   expertise with respect to any environmental

22   impact involved.

23   And so -- Congress built on that in

24   the BUILDER Act by specifying that, where

25   possible, there should be one environmental

 1   review precisely because that -- that is how

 2   environmental review is better streamlined,

 3   rather than fragmenting environmental review.

 4   JUSTICE JACKSON: Why do you say that

 5   the agency here didn't do anything? I thought

 6   there were 50 pages of their EIS that was

 7   dedicated to the environmental consequences of

 8   new oil and gas drilling and refining.

 9   MR. JAY: So the -- the -- the

10   upstream development, I -- I -- I -- I think

11   it's -- it's a curious case, Justice Jackson,

12   because the -- as you say, the agency took quite

13   a bit of time looking at certain aspects of

14   upstream development. And in those 50 pages,

15   they indulged the project sponsor's assumption

16   that the railroad would be viable because there

17   would be enough oil developed to -- for it to --

18   to -- to be carried to market and make the --

19   make the railway a -- a financially viable going

20   concern.

21   But then what -- with respect to a

22   couple of categories of impacts, what the agency

23   said was: Well, these are not within our

24   authority to mitigate. We don't regulate oil

25   and -- we don't regulate oil and gas. So we're

1   only -- we're going to look at it, but we're

2   only going to look at it where it's near the

3   rail line.

4   And what the D.C. Circuit said was

5   that that distinction -- is based on, one,

6   something that's not driven by NEPA, this --

7   this point that we've been discussing about

8   whether agencies should look at environmental

9   effects that they don't regulate directly, and,

10   two, just whether it made any sense as a matter

11   of the APA.

12   And so should -- the agency did look

13   at an -- at upstream development and as a

14   factual matter agreed with the predicate that

15   had been laid for looking at all those things,

16   such as how many -- about how many wells will be

17   needed to generate about this much waxy crude

18   oil.

19   We're not ask -- we are not in this

20   case asking that the agency look at things that

21   it can't know -- can't look at without knowing

22   where individual wells would be. That

23   obviously, as the -- as the agency said, that

24   would be speculative. But that's not what's at

25   issue.

1   What's at issue is the foreseeable

2   consequences of oil development at that scale.

3   And recall that the agency, elsewhere in its

4   EIS, assumes that all of the oil shipped out on

5   the rail line would be new oil development. So,

6   in other words, it's not substituting for oil

7   that's currently being developed and shipped out

8   by truck.

9   When you make those assumptions, then

10   it follows that the agency should be -- should

11   be looking at the -- at least the basin-wide

12   effects of -- of the oil development because

13   they're reasonably foreseeable. And that --

14   that is the applicable standard.

15   The -- the agency's response to the

16   comments basically just -- stopped based on

17   this -- on this notion that those aren't things

18   that it regulates directly.

19   I'd like to turn for a moment to

20   Mr. Clement's allusion to the idea of -- of

21   prejudicial error. And I think that that --

22   that certainly is a standard in the APA.

23   But this case, I think, illustrates

24   why that would be of -- of grave concern,

25   that -- I think it's a bedrock principle under

1   the APA that -- when an agency tackles an issue,

2   it's supposed to -- respond to it in a way that

3   is not arbitrary and capricious. That obviously

4   is a deferential standard, but it requires

5   intelligible reasoning that -- that is subject

6   to appropriate judicial review.

7   And what Mr. Clement is proposing in

8   this case is to say that no matter the utterly

9   unreasoned nature of, for example, the -- the

10   agency's handling of the downline impacts, and

11   no matter the fact that the agency did not read

12   this to be outside the scope of NEPA because

13   it's not within the 88 miles or for any of the

14   other reasons that -- that Mr. Clement was --

15   was offering, that the courts should decide that

16   as a matter of substantive NEPA law, I guess,

17   they -- they -- those errors are per se

18   harmless.

19   And I think there's -- there's both a

20   NEPA problem and a Chenery problem with -- with

21   doing that.

22   The -- the NEPA problem is that the --

23   it doesn't apply the actual foreseeability

24   standard in the statute and that where the

25   agency has concluded that -- that effects are

1   foreseeable and that it should or indeed must

2   tackle them, that to have the courts come in and

3   say, no, that's -- that's not what's required, I

4   think, should require a higher standard and not

5   a lesser one.

6   And the second is -- is a principle

7   about Chenery, which is that this is

8   essentially -- like, not even the government is

9   here defending the -- the agency's rationale.

10   To have Mr. Clement defend it on a rationale

11   that the agency did not itself adopt I think

12   is -- is a further problem.

13   The -- we've talked a little bit

14   about -- about the basic thrust of NEPA. And I

15   want to get back to a question that Justice

16   Kavanaugh asked early on, which is: What is

17   NEPA adding in this -- in this suite of

18   environmental statutes?

19   Because, as you -- as you observed,

20   NEPA was the first of a great many environmental

21   statutes. It was adopted in 1970, before a

22   number of the agencies that we now know existed.

23   And -- Mr. Clement seemed to be

24   suggesting that, well, its importance has eroded

25   over time.

1   But what hasn't eroded is the text,

2   right? And the -- the text sets out a

3   requirement that, to the fullest extent

4   possible, all agencies are to follow these

5   basic -- these basic NEPA procedures.

6   One of those NEPA procedures is to

7   take environmental considerations into account

8   in deciding on major federal actions. And there

9   obviously are limits on what is a major federal

10   action. But what -- what NEPA requires is that

11   they follow the -- that sub -- that -- sorry,

12   procedural guide to making better decisions and

13   precisely because, at the time NEPA was adopted,

14   a number of agencies might well have said, not

15   my problem, I'm just a highway agency, I'm just

16   a railroad regulator, and not taken

17   environmental considerations into account, when

18   they might well have been able to mitigate or

19   avoid environmental problems had they done the

20   proper degree of study.

21   Sometimes -- and this goes back,

22   Justice Kagan, to our colloquy a -- a few

23   minutes ago. Sometimes that might lead the

24   agency to say we're not going to approve the

25   project at all because the environmental

 1   consequences are too great, and it is consistent

 2   with our mission to -- to turn the project down

 3   on that basis.

 4   More often, we think, the -- the study

 5   of environmental consequences is going to lead

 6   to public comment, informed decision-making,

 7   and, where possible, consideration of

 8   mitigation. That's -- that's exactly what NEPA

 9   sought -- sought to get at and what I --

10   JUSTICE KAVANAUGH: I think that the

11   concern raised, though, is when the agency has

12   said -- has approved the project and a court

13   comes in and says -- in this new, as you say,

14   suite of statutes era, and says even though the

15   agency approved the project, even though the

16   project and all the effects comply with all the

17   substantive environmental laws that have been

18   passed over the years, which regulate very

19   extensively, obviously, we, court, are going to

20   come in and second-guess.

21   So I -- I don't think your answer

22   focused on that particular problem and the

23   deference given that -- maybe it's just extra

24   deference given the -- the overall situation

25   now. Maybe "extra" is the wrong word but

 1   just -- just appropriate deference.

 2   MR. JAY: So I think that where an

 3   agency recognizes that there is an environmental

 4   issue and that it will be dealt with in the

 5   mitigation process -- or, I'm sorry, in the

 6   review process by other agencies, which could be

 7   state or federal agencies, that rationale might

 8   well be -- be sufficient all by itself to -- to

 9   satisfy NEPA review, but what we're -- what

10   we're discussing here -- is a different

11   question, which is whether the ring fence around

12   NEPA should be drawn so tightly that the agency

13   doesn't have to ask that question at all.

14   I mean, as -- as I said a moment ago

15   and I think this really is one of the most

16   important pieces of this case, that how much the

17   agency has to do under NEPA is different from

18   saying that certain effects are beyond the scope

19   of NEPA so that Mr. Clement's aggressive view of

20   harmless error can come in and over -- and fix

21   an agency's flawed decision-making on grounds

22   that the agency itself did not give.

23   That -- that, I think, is -- is the

24   core of the point, that even -- even where some

25   agency -- some other agency has responsibility,

1   the -- that agency is going to be at the table

2   in the NEPA review. The first agency may well

3   be able to rely on the -- on the agency with

4   expertise in the NEPA review, and the flip side

5   of that -- and this is made explicit in the 2023

6   amendments -- is that where the first NEPA

7   review answers these questions, the second

8   agency can look back to the first NEPA review

9   and say we're all done here.

10   JUSTICE JACKSON: Mr. Jay --

11   MR. JAY: We don't need another one.

12   JUSTICE JACKSON: Mr. Jay, can I just

13   give you a chance to answer what I think is the

14   hardest part for you? And that is, if -- if the

15   environmental impacts come from the cargo that

16   is to be carried on these trains and the Board

17   cannot, because of the common carrier mandate,

18   really consider the cargo or discriminate on the

19   basis of the cargo, then how is it that these

20   environmental impacts are useful to the Board's

21   decision-making in the way that NEPA requires?

22   MR. JAY: So there -- as we -- as

23   we've been discussing, there are three sets

24   of -- three general sets of impacts. And I

25   don't think that, for example, the wildfire --

 1   set of impacts on the -- along the downline

 2   stretch, I don't think that's driven by the

 3   cargo, so let's bracket that for the moment.

 4   I think that in many cases, where

 5   you're building a railroad and the railroad will

 6   carry whatever -- whatever all comers want,

 7   whether it's passengers or -- or freight, then

 8   the Board would be justified in saying this is

 9   a -- you know, this is a common carrier line.

10   It would be totally speculative to ask what

11   cargo it will carry.

12   In this case, it's not speculative at

13   all because the entire purpose is to carry one

14   set of cargo. And if you look at the -- at the

15   record, you will see that --

16   JUSTICE JACKSON: Would the Board be

17   justified in saying we know what this cargo is,

18   and because we can't discriminate on the basis

19   of our common carrier mandate, there's no impact

20   on our decision with respect to NEPA or

21   whatever, and so, therefore, we don't have to

22   study it?

23   MR. JAY: So I -- I think probably in

24   the context of a project like this one, where

25   the Board's mission is to weigh the

     1   transportation merits against the environmental

     2   consequences and the transportation merits are

     3   heavily weighted with the oil and -- the oil

     4   development in the basin, the economic value

     5   that it will create, and the -- the ability to

     6   unlock this important natural resource, we're --

     7   we're -- we're not saying that the Board would

     8   conclude that the environmental consequences are

     9   too grave to -- to permit the railway as a

    10   matter of law or something like that.

    11   But we are saying that what

    12   environmental consequences would result

    13   foreseeably from carrying one cargo to

    14   particular destinations in very large

    15   quantities, that's foreseeable, whereas, as the

    16   Board said about the other things that -- that

    17   might go along on this rail line, we don't know

    18   what they might be. It would be -- it would be

    19   speculative to wonder what they might be, but we

    20   do know that there will be no trains carrying

    21   anything else -- let me say that more precisely.

    22   There will be no trains carrying cargo other

    23   than oil and only cargo other than oil. Every

    24   train leaving this basin is going to be carrying

    25   waxy crude oil. There might be a little, you

1   know -- one car -- tack -- tacked on for

2   something else if there were a -- a market for

3   it.

4   And so, under those circumstances

5   where the rationale for the project is to permit

6   unlocking more waxy crude oil development and

7   where the -- where the Board's consideration of

8   the benefits of the project is tied to the --

9   that oil development, it -- it follows that the

10   Board would at least consider what the

11   environmental consequences of doing so would be.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   counsel.

14   Justice Thomas?

15   Justice Alito?

16   Justice Sotomayor?

17   JUSTICE SOTOMAYOR: I do see that

18   there are different questions here. You

19   mentioned the train accidents and the wildfire

20   or pollution. No one's ever -- I don't think

21   Petitioner has ever said the agency should not

22   study those things. Those are directly caused

23   by the train, the project.

24   MR. JAY: Mr. Clement said that this

25   morning, that it's --

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1           JUSTICE SOTOMAYOR:  Exactly.  And so,
2    really --
3           MR. JAY:  -- you know, it's 88 --
4    outside the 88 miles.
5           JUSTICE SOTOMAYOR:  -- that's a
6    different challenge as to whether they did it
7    adequately or not, which is what the D.C.
8    Circuit said, they didn't do it adequately.
9    That's the question of arbitrary and capricious,
10   purely an arbitrary and capricious standard,
11   correct?
12          MR. JAY:  It is purely arbitrary and
13   capricious.
14          JUSTICE SOTOMAYOR:  All right.  The
15   issue of whether they had to study at all the
16   increased oil -- oil refinery is the issue
17   that's before us, correct?
18          MR. JAY:  Whether the -- whether they
19   had to address the environmental consequences of
20   developing the oil in the basin --
21          JUSTICE SOTOMAYOR:  Right.
22          MR. JAY:  -- and of refining it --
23          JUSTICE SOTOMAYOR:  Okay.
24          MR. JAY:  -- at the point of delivery.
25          JUSTICE SOTOMAYOR:  All right.  Thank
```

 1   you.

 2   CHIEF JUSTICE ROBERTS: Justice Kagan?

 3   JUSTICE KAGAN: And just on that, if I

 4   could get you to focus specifically on Mr.

 5   Clement's test and say what you think is wrong

 6   with it. And, as I understood Mr. Clement's

 7   test, and he will tell me if I'm wrong, but that

 8   it's a kind of two-part test.

 9   And if it is both remote in time and

10   place, space, and another agency has regulatory

11   authority, then you can't fault the agency for

12   not looking at it. And so, again, Mr. Clement

13   will tell me if I'm making his test more

14   stringent then he would like it to be, but it's

15   two parts. If both are satisfied, you can't

16   fault the agency.

17   What's wrong with that?

18   MR. JAY: So two things. Let me start

19   with the other agency's authority piece first.

20   I -- I think Justice Barrett brought out in a --

21   in a colloquy at the beginning about -- about

22   whether agencies sometimes have concurrent

23   authority. And the answer is yes, they

24   absolutely do in a lot of cases.

25   And -- and therein, I think, lies the

 1   problem, that Mr. Clement's rule would say

 2   Agency Number 1 passed the -- passed the buck to

 3   Agency Number 2. It's not clear that Agency

 4   Number 2 would then say we're going to do the

 5   study rather than pass the buck to someone else.

 6   And I think that that's directly in

 7   the teeth of NEPA and the -- the provisions for

 8   timely and unified federal review, like the one

 9   document provision at new Section 107(b), that

10   all the agencies with expertise or jurisdiction,

11   either one, are supposed to be participating in

12   the -- in the NEPA review and to coordinate. So

13   that's one piece.

14   The second piece you asked me about is

15   the remote in time and -- and space point.

16   And -- and I think, obviously, our test

17   likewise -- the statutory test would likewise

18   rule out some things that are remote in time or

19   space, but just as foreseeability doesn't have a

20   strict geographic line -- I think Mr. Clement's

21   rule, by making it strictly geographic, that's

22   not really tied to the concept of the project.

23   Projects in our large federal

24   government, you know, especially multi --

25   multibillion-dollar projects like this one, may

1   well have effects that are felt beyond just next

2   door. And I think that the fact that Mr.

3   Clement says that the only rail line between

4   these -- between this railway and the Texas

5   refinery, so, in other words, every railcar

6   going to Texas or Louisiana, they're all going

7   to come out of this railway, they're all going

8   to turn left, and they're all going to go down

9   the Union Pacific line, Mr. Clement says, well,

10   that's -- that's too remote in time or space for

11   our test to -- to bring it in.

12   We think that the foreseeability test

13   makes that a really good example. It is very,

14   very foreseeable that the rail cars that come

15   off of Mr. Clement's 88 miles of track and turn

16   left are going to cross that rail line. And the

17   agency itself foresaw that about once a year

18   there's going to be an accident with an

19   oil-laden car and about one out of every four of

20   those is going to result in an oil spill.

21   JUSTICE KAGAN: Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Kavanaugh?

24   Justice Barrett?

25   Justice Jackson?

1 　　　　　　Thank you, counsel.

2 　　　　　　MR. JAY: Thank you, Your Honor.

3 　　　　　　CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

4 Clement?

5 　　　　REBUTTAL ARGUMENT OF PAUL D. CLEMENT

6 　　　　　ON BEHALF OF THE PETITIONERS

7 　　　　　　MR. CLEMENT: Thank you, Mr. Chief

8 Justice. Just a few points in rebuttal.

9 　　　　　　First, Justice Kagan, you understand

10 our test perfectly. And the reason it has both

11 elements is to deal with this situation of

12 concurrent jurisdiction or to deal with the

13 situation where another agency has information

14 that bears directly on the project.

15 　　　　　　And that's why, if you look at the

16 mitigation measures that were adopted, both the

17 voluntary ones and the ones imposed, they talk

18 about the other agencies that are involved.

19 　　　　　　And other agencies were directly

20 involved here. The most obvious is the -- is

21 the Forest Service that provided a right-of-way.

22 And all of that took place in the cooperation

23 and consultation process. Twenty-seven agencies

24 were consulted, and nobody's complaining about

25 that. That's why it's a -- or that's why we

         1   have to have both elements there.

         2   But, if it's remote in time and space

         3   and it's in another agency's -- you don't put

         4   them in the consultation process, and you let

         5   them deal with the process.

         6   The second point I'd like to make is

         7   just to be specific about what's wrong with

         8   Sabal Trail, in addition to its decision to

         9   disregard FERC's judgment that the EIS there was

        10   enough.

        11   I mean, first of all, it decouples

        12   reasonable foreseeability from environmental

        13   effects, and that's what the Respondents do as

        14   well. As long as it's reasonably foreseeable,

        15   it's foreseeable that it goes down the tracks

        16   500 miles, never mind that once it gets there,

        17   the safety regulation is the job of a different

        18   agency; the tracks are no longer operated by my

        19   clients; the trucks, the -- the tanker trunks on

        20   there are owned by a third party.

        21   It's got nothing to do with us. If

        22   there was an accident there, FRA would come in.

        23   They would talk to lots of people and they

        24   wouldn't talk to us because we have nothing to

        25   do with that down -- that downline accident.

          1   So that's one thing that's wrong. The

          2   other thing that's wrong is it has this formula

          3   that if you think about it even a little bit,

          4   then it's foreseeable, then you have to study it

          5   to death. That creates all the wrong

          6   incentives.

          7   The last point I would make is just

          8   about what's before you. I think the entire

          9   environmental impact statement and whether or

         10   not you have to consider effects that are not

         11   proximate and are in the jurisdiction of another

         12   agency is properly before you.

         13   The question presented doesn't

         14   distinguish between downline and downstream. I

         15   don't even know what that exactly means.

         16   There's not a stream here.

         17   So I would think you look at all of

         18   the things that -- that the -- the D.C. Circuit

         19   faulted this agency for and the downline impacts

         20   are not materially different. Indeed, both the

         21   refining in the Gulf and the extra traffic on

         22   the train tracks in Colorado depends on the idea

         23   that there's going to be more upstream

         24   development in the basin.

         25   This basin is not some small area.

1   It's as big as the State of Maryland. And all

2   of that is speculative. If a project happens

3   and there are concerns with the vegetation or

4   whatever, then either the Ute tribe or Utah can

5   make a determination, they can impose their own

6   mitigation measures.

7   Just the last thing I'll say is, if

8   you're worried about sort of trying to provide

9   some additional detail to what's remote in space

10   and time, I do think the scope of the reasonable

11   alternatives and the scope of the mitigation

12   measures provides a good guide, but this is a

13   common carrier agency.

14   The one thing it could not do is say

15   let's mitigate by saying no waxy oil in these

16   trains. It just doesn't make a lot of sense to

17   make that agency responsible for combustion in

18   the Gulf.

19   Thank you, Your Honor.

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel.

22   The case is submitted.

23   (Whereupon, at 12:01 p.m., the case

24   was submitted.)

25

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