No. 23-975

IN THE

# Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, *et al.*,

*Petitioners,*

*v.*

EAGLE COUNTY, COLORADO, *et al.*,

*Respondents.*

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

## BRIEF OF FORMER COUNCIL ON ENVIRONMENTAL QUALITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


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## INTEREST OF AMICI CURIAE[1]

In the National Environmental Policy Act of 1969 (NEPA), Congress established the Council on Environmental Quality (CEQ), an agency within the Executive Office of the President, to oversee the statute's administration and guide its implementation across the federal government. 42 U.S.C. § 4342; Pub. L. No. 91-190, 83 Stat. 852 (1970). Since 1977, CEQ has been tasked with developing regulations concerning NEPA's administration that are uniform and binding on all federal agencies. Amici are former CEQ officials who collectively served in every Presidential Administration from 1974 to 2007.

**Gary Widman** was CEQ's General Counsel during the Nixon and Ford Administrations (1974-77); **Kenneth Weiner** was CEQ counsel during the Ford and Carter Administrations (1976-78) and Deputy Executive Director during the Carter Administration (1978-80); **Gus Speth** was a Member of CEQ (1977-79) and Chair (1979-81) during the Carter Administration; **Nicholas C. Yost** was CEQ's General Counsel during the Carter Administration (1977-81); **Dinah Bear** was CEQ's Deputy General Counsel during the Reagan Administration (1981-83) and General Counsel during the Reagan and George H.W. Bush administrations (1983-93) and the Clinton and George W. Bush Administrations (1995-2007); **Lucinda Low Swartz** was CEQ's Deputy General Counsel during

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel contributed monetarily to the preparation or submission of this brief.

the Reagan and George H.W. Bush Administrations (1986-89; 1990-93); **Ray Clark** was CEQ's Associate Director for NEPA during the George H.W. Bush and Clinton Administrations (1992-99); and **George Frampton** was Chair of CEQ during the Clinton Administration (1998-2001).

Petitioners and other parties have made claims about the statute's history and meaning—including about CEQ's longstanding interpretation of which environmental effects agencies must consider in their NEPA analyses. Amici, as officials involved in CEQ's original 1978 regulation and its 1986 amendments, and having had responsibility for interpreting, implementing, and overseeing the statute within the Executive Branch, have significant experience regarding NEPA administration over time and aim to assist the Court in understanding these issues.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates questions about the scope of federal agencies' responsibility under NEPA to ascertain, consider, and disclose the effects of actions they propose. Since early on, the courts and CEQ have implemented NEPA's review provisions to require agencies to analyze not only the significant direct effects of proposed actions and reasonable alternatives but also those more remote in time and place, if still "reasonably foreseeable," 40 C.F.R. § 1508.8(b) (1979), irrespective of whether such effects may fall within another agency's regulatory authority.

That understanding flows from the statute. NEPA's environmental review process grew out of

Congress's deep and well-informed conviction by the late 1960s that national policies were critical to preventing and minimizing future environmental damage, to mitigating prior damage, and to institutionalizing a policy of environmental stewardship across all arms of the federal government. Confronting a world in which economic and technological growth had produced a range of serious threats to public health and natural resources, Congress overwhelmingly concluded that it was time to elevate environmental quality to a central consideration in national decisionmaking. The stakes were high:

> The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man's impact on his environment under informed and responsible control.... Today we have the option of channeling some of our wealth into the protection of our future. If we fail to do this in an adequate and timely manner, we may find ourselves confronted ... with an environmental catastrophe that could render our wealth meaningless and which no amount of money could ever cure.

S. Rep. No. 91-296, Comm. on Interior & Insular Affairs, on S. 1075, at 17 (July 9, 1969).

The statute Congress enacted commits the entire Executive Branch and each of its individual agencies to preventing, limiting, and undoing environmental damage. 42 U.S.C. §§ 4321, 4331(b), 4332. NEPA's primary procedural mandate is an environmental review process, whereby every federal agency proposing major federal actions with potentially significant environmental impacts must remove its mission-

oriented blinders and identify and study the full range of potential adverse and beneficial impacts and reasonable alternatives—and must inform and actively involve other agencies, state, local, and tribal governments, and the public in that process. *Id.* § 4332(2)(C). Congress emphasized the high priority of compliance by "all agencies of the Federal Government" by commanding that the environmental review provisions be carried out "to the fullest extent possible." *Id.* § 4332.

The concept of reasonable foreseeability guides the scope of that environmental review process. This understanding was articulated in early NEPA case law and CEQ's earliest guidance, then codified in the text of CEQ regulations that have been in effect since 1978. As Amici can attest, this understanding has informed Executive Branch practice across presidential Administrations over decades, guiding thousands of NEPA decisions. It continues to be consistent with courts' interpretation of the statute. And the regulation's operative all "reasonably foreseeable" effects language has been codified in the statute, 42 U.S.C. § 4332(2)(C) (2023), since this case was decided below.

Petitioners do not dispute that "reasonable foreseeability" is the standard, but, citing a litany of complaints about delays in the NEPA process, ask the Court to drastically reinterpret the well-settled, commonsense concept, effectively creating new rules exempting agencies from taking account of environmental effects that *are* reasonably foreseeable (or even certain) because those effects are outside the agency's direct regulatory control or expertise, or because they would not support damages liability in a common-law tort suit. Pet. Br. 1. Reasonable foreseeability is not—

and consistently with the statute, cannot be—freighted with the restrictive meanings petitioners ascribe to it.

As respondents explain, these various requests have reached the Court in irregular fashion: None of them was relied on by the agency below, nor was the court of appeals' remand premised on a judgment that the agency had misunderstood or misapplied the "reasonable foreseeability" principle; and most were not raised below or in the certiorari petition. Eagle County Br. 16-17, 19-21.

But in any event, each of the proposed innovations is at odds with the statute, as it has been consistently and correctly understood over decades. "Reasonably foreseeable effects" is not a license for excluding indirect or geographically distant effects; rather, it long has been recognized, and now is explicitly codified in statute, that agencies must consider all effects that a reasonable person would think germane to the decision. Likewise, contentions that agencies need only consider effects within their own authority is starkly incompatible with NEPA. Nor does the "rule of reason"—a mandate to administer and interpret NEPA sensibly, in light of its stated purposes and design—endow agencies (or courts) with authority to impose limitations that contravene the statute.

Finally, Congress's recent amendments to NEPA not only serve as a reminder of the proper forum to work out policy arguments like those which populate petitioners' brief, but point in substance directly against petitioners' arguments. While Congress enacted provisions directly addressing the length and timing of Environmental Impact Statements (EISs), it

rejected proposals to enact a test indistinguishable from what petitioners seek here—instead enacting text that explicitly confirms the reasonable foreseeability standard with more than fifty years of settled usage in NEPA law. 42 U.S.C. § 4332(2)(C)(i)-(ii). Those very recent amendments (and other measures currently under consideration in the Legislative Branch) only underline that Congress is the proper forum for the kinds of abrupt changes petitioners seek here and show their plea that the Court step into the NEPA reform business to be peculiarly ill-timed.

## ARGUMENT

### I. Reasonable Foreseeability, as Long Understood by CEQ, Guides the Range of Effects Analyzed Under NEPA.

Since shortly after NEPA's enactment, CEQ has understood its environmental-review provision to require federal agencies to consider all "reasonably foreseeable" consequences of proposed actions—including not only a project's "[d]irect effects," *e.g.*, its immediate disturbance of the surrounding environment, but also significant "[i]ndirect" consequences that "are later in time or farther removed in distance" but could ensue if the project proceeded. 40 C.F.R. § 1508.8(b) (1979) (defining "[e]ffects" to be analyzed under NEPA). This understanding is expressed in CEQ's earliest guidance and in the first judicial decisions addressing the scope of NEPA's effects analysis. And since 1978, it has been codified in CEQ regulations that have long guided Executive Branch practice. *See* 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978).

The concept of reasonable foreseeability follows from NEPA's central premise: Degradation of the Nation's environment is unlikely to be arrested if agencies act heedless of damaging environmental consequences. *See* 42 U.S.C. §§ 4321, 4331, 4332. Congress understood the challenges to its goals posed by the siloing effect of agency missions and the often incremental and cumulative character of the most serious and intractable environmental problems. The statute makes environmental protection the concern of every agency, *see id.* §§ 4332, 4333, 4335, and directs implementation of its policies "to the fullest extent possible." *Id.* § 4332. Critically, Congress recognized that the best opportunities for avoiding or at least limiting environmental harm are lost when agencies commit to a course of action without first identifying and examining alternatives that serve legitimate agency objectives at lesser environmental cost. *Id.* § 4332(2)(C)(iii).

Consistent with that statutory design, CEQ has always counseled federal agencies that an EIS must discuss significant environmental effects even if they will manifest in the future or outside the project area or will result from several interacting activities. But from the beginning, CEQ has also made clear that agencies need not venture into speculation or conjecture. Four months after NEPA was enacted, CEQ guidance explained that agencies must consider their proposed actions' "primary and secondary significant consequences for the environment." Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7,390, 7,391 (Apr. 30, 1970). And a 1972 CEQ memorandum to all agencies explained that NEPA requires each EIS to discuss the "full range of …reasonably foreseeable impacts."

Memorandum from Timothy Atkeson, General Counsel, CEQ, to Agency and General Counsel Liaison on NEPA Matters (May 16, 1972).[2]

Early judicial decisions are to the same effect. For instance, in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, the D.C. Circuit rejected the agency's contention that a nuclear reactor development "program ha[d] not yet reached th[e] stage where a NEPA statement … would be either feasible or meaningful." 481 F.2d 1079, 1086 (D.C. Cir. 1973). The court agreed that NEPA does not require an agency "to look into [a] crystal ball" or analyze events that are truly "remote and speculative." *Id.* at 1086 (internal quotations omitted). But NEPA "plainly contemplates consideration of 'both the long- and short-range implications to man, his physical and social surroundings, and to nature.'" *Id.* at 1090 (quoting CEQ, NEPA Guidelines, 36 Fed. Reg. 7,724 (Apr. 23, 1971)). NEPA, the court then explained, "is not a paper tiger, but neither is it a straightjacket," *id.* at 1091-92 (cleaned up). It did "not require the Commission to forecast the deployment and effects of [the subject] power reactors [30 years in the future] in the same detail or with the same degree of accuracy as another agency might have to forecast the increased traffic congestion likely to be caused by a proposed highway." *Id.* at 1092. If an agency were to "make[] a good faith effort … to describe the reasonably foreseeable environmental impact[s] of [its] program," and

[2] Available at https://bit.ly/3NF4Ctz.

alternatives, its analysis likely would satisfy NEPA. *Id.*[3]

In 1978, following extensive public comment and interagency consultation, CEQ's initial implementing regulations codified this settled understanding of the scope of NEPA's environmental review process. *See* 43 Fed. Reg. at 55,980, 56,004; 40 C.F.R. § 1508.8(b) (1979).[4] For decades, spanning Administrations of

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[3] *Accord Nat'l Helium Corp. v. Morton*, 486 F.2d 995, 1002 (10th Cir. 1973); *Sierra Club v. Morton*, 379 F. Supp. 1254, 1259 (D. Colo. 1974); *Louisiana Power & Light Co. v. Federal Power Comm'n*, 557 F.2d 1122, 1124 (5th Cir. 1977) (agency "must make a good faith effort to describe the reasonably foreseeable environmental impact" of plans); *Swain v. Brinegar*, 542 F.2d 364, 368 (7th Cir. 1976) ("An EIS need not review all possible environmental effects of a project. It is sufficient if it considers only those which are 'reasonably foreseeable.'") (quoting *Carolina Envtl. Study Group v. United States*, 510 F.2d 796, 798-99 (D.C. Cir. 1975)); 51 Fed. Reg. 15,617, 15,622 (Apr. 25, 1986) (describing the "long history of use" of the term "reasonably foreseeable" "to describe what kind of environmental impacts federal agencies must analyze in an EIS" and citing cases).

[4] Other amici seek to draw into question CEQ's authority to promulgate NEPA regulations implementing NEPA's procedural provisions or argue that regulations do not deserve weight in judicial analyses. *See, e.g.*, NextDecade LNG, LLC Br. 2-3, 8, 11-16. But their promulgation implemented presidential directives. 40 C.F.R. § 1500.3(a); Exec. Order No. 11991, §3(h) (1977) (order of President Carter directing CEQ to issue regulations binding on all federal agencies, including procedures to refer interagency conflicts concerning environmental impact assessment to CEQ); *see also Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (applying CEQ's regulations); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004) (CEQ was "established by NEPA with authority to issue regulations interpreting it"); Exec. Order No. 11514 (1970) (order of President Nixon directing CEQ to issue guidelines on environmental impact assessment); Exec. Order No.

different political parties, CEQ has consistently adhered to its interpretation. Other than an amendment to a single regulatory provision in 1986, 51 Fed. Reg. 15,625 (Apr. 25, 1986) (amending 40 C.F.R. § 1502.22), *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989), the 1978 regulations remained unchanged for four decades. In 2020, CEQ defined "[r]easonably foreseeable" to mean "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision," 40 C.F.R. § 1508.1(aa) (July 16, 2020). *See* 85 Fed. Reg. 43,304, 43,351 (July 16, 2020) (citing *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)); *see also infra* p. 29 (discussing other, since-withdrawn regulatory modifications from 2020). The operative regulatory language requiring consideration of reasonably foreseeable effects of proposed actions, including indirect ones, remains in effect.

That fundamental understanding of what is and is not required to be in an EIS has guided thousands of federal agency actions implementing NEPA—including Environmental Impact Statements as well as Environmental Assessments, scoping decisions, and many others. Countless judicial decisions—including this Court's decisions—have embraced and applied CEQ's understanding. *See, e.g.*, *Public*

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13807, §5(e) (2017) (order of President Trump directing that CEQ use its authority to interpret NEPA to "reduce[] unnecessary burdens and delays"); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (D.C. Cir. 2009) (agencies must consult CEQ prior to promulgating and finalizing NEPA procedures or amendments).

*Citizen*, 541 U.S. at 757, 766 (quoting and applying 40 C.F.R. § 1508.8).

Petitioners ostensibly recognize that NEPA requires agencies to "consider '*reasonably foreseeable* environmental effects of the proposed agency action,'" that this Court has affirmed that understanding, and that Congress has since codified it. Pet. Br. 8. But they nonetheless assert that the settled principle of reasonable foreseeability limits agencies' consideration to the "actual environmental effects that are … consequences of the *project itself*," *id.* at 41 (emphasis added), and *does not* extend to eminently foreseeable environmental effects that are removed in time and place or entail some intervening "non-environmental" action—such as contamination attributable to "new development [of oil drilling] in the Uinta Basin" that the project here was meant to "spur[]" or an environmentally catastrophic "rail accident[]" resulting from unsafe operation of an oil-filled train. *Id.* at 38, 41.[5]

That contention contravenes NEPA fundamentals and CEQ's understanding over decades. To begin, the phrase "reasonably foreseeable" does not suggest a distinction between direct and indirect environmental effects, let alone the exemptions petitioners urge.

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[5] Notably, despite Petitioners' myriad references (*e.g.*, Pet. Br. 30, 31, 34, 39, 41, 44, 46, 48), the nature and scope of agencies' obligations under NEPA to consider climate impacts are not at issue here. The Surface Transportation Board did quantify the greenhouse-gas emissions expected to result from the project, Pet.App.28a, and the court below upheld that analysis, *id.* 66a. The court of appeals found fault only with the agency's discharge of its separate obligations under the ICC Termination Act, Pet.App.68a. *See also* Env. Resp. Br. 16-17 & n.17.

Rather, it focuses principally on whether one should fairly expect the harmful effects (however they come about), and, in the NEPA context, how certain, substantial, and measurable the effect may be. *See Sierra Club v. Marsh*, 976 F.2d at 767-71. *Cf. Harrison v. Missouri Pac. R.R. Co.*, 372 U.S. 248, 249 (1963) (per curiam) (explaining that "intentional or criminal [third-party] misconduct" is "irrelevant" to "reasonable foreseeability"). More important, the "reasonably foreseeable" language petitioner embraces has, for decades, been associated with a CEQ regulation that by its terms addresses which *indirect* effects, *i.e.*, "remote in time and place," the statute requires agencies to study. *See, e.g., Public Citizen*, 541 U.S. at 757.

And the sorts of environmental effects that petitioners maintain the principle *excludes* have, for decades, been recognized by the Executive Branch and courts as core examples of what must be studied. Petitioners posit that the environmental effects of the "development" that the rail connection is meant to "spur"—that is, the massive increase in oil drilling enabled by providing transport for crude beyond Utah refineries—does not qualify as a "reasonably foreseeable effect." Pet. Br. 35-36. But longstanding CEQ guidance specifically addressed the question of how uncertainties about indirect effects like these should be addressed. *See* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981). The guidance made clear that an "agency has the responsibility to make an informed judgment" about the environmental consequences of development, pointing out that, "in the ordinary course of business, people do make judgments based upon reasonably foreseeable

occurrences." *Id.* at 18,031. In decisions involving disposal of federal lands, for example, "[i]t will often be possible to consider the likely purchasers and the development trends in that area" or "the likelihood that the land will be used for an energy project, shopping center, [or] subdivision." *Id.*[6] The guidance at the same time acknowledged that when there is in fact serious uncertainty about the character of future land uses, NEPA does not require the agency to "engage in speculation." 46 Fed. Reg. at 18,031.

Petitioners suggest that *Metropolitan Edison* supports their restrictive approach: "If NEPA did not require consideration of allegedly direct health consequences of the ripped-from-the-headlines risk of another nuclear meltdown [at] Three Mile Island," they argue, it does not "demand that [the] EIS here consider the risk of [environmentally devastating rail] accidents on … tracks hundreds of miles away." Pet. Br. 21-22 (citing *Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766 (1983)). But *Metropolitan Edison* did not hold that NEPA sanctioned disregarding the environmental risks of a meltdown. It recognized that those effects had already been studied, *see* 460 U.S. at 775 n.9, and held that anxiety induced by awareness of that carefully studied risk was not an environmental effect requiring analysis under NEPA. *Id.* at 775-778. If, as petitioners imply, "risks" of effects were somehow exempt under NEPA, the EIS process—which is principally concerned with potential

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[6] *See also Chelsea Neighborhood Ass'ns v. U.S. Postal Serv.,* 516 F.2d 378, 388 (2d Cir. 1975); *Sierra Club v. Sigler,* 695 F.2d 957, 979 (5th Cir. 1983).

consequences of actions not yet taken—would have scant work to do. *See Scientists' Inst.*, 481 F.2d at 109.

Nor do references to tort-style proximate cause provide a basis for erasing reasonably foreseeable indirect and cumulative effects from the statute, as petitioners posit. *See* Pet. Br. 17, 20, 27. As respondents note, what petitioners present as *Metropolitan Edison*'s holding—that "proximate cause" is coextensive with reasonable foreseeability, Pet. Br. 16-17—is in fact precisely what the opinion said it "d[id] not mean to suggest." *Metro. Edison*, 460 U.S. at 774 n.7; *see* Env. Resp. Br. 34. Indeed, NEPA's concern with informing and improving discretionary agency decisionmaking is entirely different from tort law's role in assigning legal liability and regulating conduct. The very remoteness in time or space that militates against tort liability contributes to the agency blindness that Congress sought to counteract in NEPA. *See* U.S. Br. 37-38. And even in tort law, the legal causation inquiry does not turn on temporal or geographic immediacy, and the "proximate cause" phrasing has been subject to sustained criticism for that reason. *See, e.g.,* Third Restatement of Torts ch. 6 (2010) (Special Note on Proximate Cause); *id.* § 29, Comment b. Finally, doctrinal difficulties aside, the practical consequences of importing the "proximate cause" limitation into NEPA would be grave and far-reaching. Over the course of fifty years of application and litigation, "reasonably foreseeable effects" under NEPA has acquired a coherent, stable meaning, even if there are edge cases where courts or agencies might reach different conclusions. A leap to proximate cause, in its many guises, would be profoundly disruptive, forcing agencies, project proponents, and courts to reconcile

and assimilate to the NEPA setting a sprawling body of judge-made law developed for sharply different purposes. *See* U.S. Br. 36-37.

## II. Petitioners' Various Proposals to Broadly Exempt Otherwise Reasonably Foreseeable Effects from Environmental Review Would Contravene NEPA.

### A. Limiting Environmental Review to Effects Under the Agency's Regulatory Authority Makes No Statutory Sense.

The text and structure of NEPA plainly require agencies to analyze and consider environmental effects that fall outside of their regulatory jurisdiction or "wheelhouse." *Cf.* Pet. Br. 1. Indeed, the need to do so was a central animating purpose of the statute and is a central feature of its design.

In testimony that helped catalyze NEPA's enactment, the Secretary of Interior explained that when he had pressed Tennessee Valley Authority officials about coal contracts that were destroying the hills of Eastern Kentucky, "their very blunt and direct answer was that their mission was to produce electric power as cheaply as possible … and that if this destroyed resources, rivers and hillsides, and ruined parts of the country outside the TVA area for all time, this was none of their business."[7] To address this problem of environmental harm following from siloed

[7] Joint House-Senate Colloquium to discuss a National Policy for the Environment: Hearings Before the Senate Comm. on Interior and Insular Affairs, and the House Comm. on Science and Astronautics, 90th Cong., 2d Sess. 15 (1968).

agency missions, Congress not only applied NEPA to all major actions by "all agencies of the Federal Government," 42 U.S.C. § 4332, and directed that the "public laws of the United States shall be interpreted and administered" so as to avoid unnecessary adverse environmental effects, but also expressly made NEPA responsibilities "supplementary to those set forth in existing authorizations of Federal agencies," *id.* § 4335; *accord* S. Rep. No. 91-296, Comm. on Interior & Insular Affairs, on S. 1075, at 14 (July 9, 1969) (NEPA responded to concern that "many older operating agencies of the Federal Government … do not at present have a mandate within the body of their enabling laws to allow them to give adequate attention to environmental values"); *see also* 42 U.S.C. § 4333 (directing "all agencies" to review "current policies and procedures" to assure "full compliance" with NEPA "policies and provisions").

Thus, it might have been said before NEPA's enactment that the "job" of an agency was to build dams or grant mineral leases. But NEPA "ma[de] environmental protection a part of the[ir] mandate," such that "no agency [could thereafter] be able to maintain that [it lacked authority] …to consider the environmental consequences of its actions." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (quoting NEPA's principal Senate sponsor, Henry Jackson, Hearings on S.1075, S. 237 and S. 1752 before Sen. Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969)). In other words, NEPA put environmental review under every agency's jurisdiction, save for when review would "clear[ly] conflict [with its] existing

statutory authority," Conf. Rept. 91-765 at 10 (1969); *see* 42 U.S.C. § 4336(a)(3), (4) (2023). In this case, it is undisputed that the Surface Transportation Board has both the power and the duty to consider the significant environmental effects of its approvals. *See* Pet.App.36a.

NEPA's text likewise forecloses suggestions that an agency's relative lack of environmental expertise should define and limit its duty to identify and consider the effects of its actions and available alternatives. *But see* Pet. Br. 1, 26, 47-48. Congress of course knew that, *e.g.*, the Federal Aviation Administration, tasked with ensuring that airports are constructed to make aviation safe and efficient, was not an expert in evaluating ways that competing designs might affect air or water pollution—problems whose control was assigned to other agencies. But the statute explicitly rejects "abdication" on that basis. *Calvert Cliffs*, 449 F.2d at 1122-23.

Rather, Congress directed that the acting agency retains responsibility for considering such effects and must "consult with and obtain the comments of any Federal agency which *has jurisdiction by law or special expertise* with respect to any environmental impact" to which its proposed action will contribute. 42 U.S.C. § 4332(2)(C) (emphasis added); *id.* § 7609(a)(2) (charging EPA Administrator with reviewing and publicly commenting on every EIS prepared for every "major Federal agency action" to which NEPA applies); *see also id.* § 4336a(a)(3) (2023) (authorizing agencies to "designate any Federal, State, Tribal, or local agency that has jurisdiction by law or special

expertise with respect to any environmental impacts involve[d] … as a cooperating agency").[8]

Such arrangements have been a mainstay of NEPA process for decades. Indeed, it is unusual to find an EIS process that does not include active participation by several federal, state, tribal, or local agencies. 40 C.F.R. §§ 1501.5(f), 1501.8. Here, for example, the U.S. Army Corps of Engineers, the State of Utah Public Lands Policy Coordination Office, the Forest Service, the Bureau of Indian Affairs, and the Bureau of Land Management were all cooperating agencies on the railway project EIS. JA 111-13. In such instances, cooperating or joint lead agencies may assume responsibility for preparation of analyses in their respective areas of jurisdiction or expertise.[9]

The statute's direction to the Executive Branch to approach NEPA implementation in a coordinated

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[8] Tribal governments, often overlooked before NEPA, are indispensable participants in this process. Congress also contemplated that, over time, agencies would develop expertise in assessing environmental effects and issues that arise frequently in their fields—and tasked CEQ with responsibility for advancing that objective. *See* 42 U.S.C. § 4332(2)(B).

[9] *See, e.g.*, 46 Fed. Reg. at 18,030; CEQ Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA (July, 28, 1999); CEQ Memorandum for Deputy/Assistant Heads of Federal Agencies: Identifying Non-Federal Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Sept. 25, 2000); CEQ Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, (Jan. 30, 2002) (all available at https://ceq.doe.gov/guidance/guidance.html).

manner also reflects NEPA's recognition that serious environmental problems do not respect agency boundaries and often are the result of multiple acts and/or decisions by multiple actors. *See* 40 C.F.R. § 1508.1(i)(3) (agency must consider "the incremental effects of [its] action when added to" those from other actors' "past, present, and reasonably foreseeable actions"). Because NEPA ultimately is concerned with the federal government's power to cause—and prevent—harms, *see* 42 U.S.C. § 4331(b)), CEQ regulations and guidance have long focused on *federal*, not merely *agency*, responsibility. As CEQ emphasized a quarter century ago:

> Neither NEPA nor the [CEQ] regulations … define agencies' obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur.

Memorandum from Kathleen A. McGinty, CEQ Chair, to Heads of Agencies on the Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Effects 2 (July 1, 1997).

Nor, contrary to petitioners' drumbeat assertions, does the action agency's substantive charge under another statute, *e.g.*, whether or not it has a "pro-development" mandate, determine or limit the extent of its NEPA responsibilities. Congress may, of course, exempt an agency or a particular project from environmental impact analysis. *See, e.g.*, 33 U.S.C. § 1371(c)

(exempting from NEPA review certain EPA permitting actions under the Clean Water Act); 42 U.S.C. § 5159 (exempting from NEPA review certain disaster-restoration actions of the Federal Emergency Management Agency). But such exemptions are uncommon because NEPA does not restrict or prescribe what development projects an agency may pursue and approve, but instead aims—by mandating that the agency reflect carefully on alternatives—to avoid significant environmental harms that should and can be avoided. *See id.* § 4332(2)(C)(iii). Agencies ultimately remain free to decide, after taking a hard look at the full range of alternatives and reasonably foreseeable environmental effects, to proceed with the action proposed. *See id.* § 4332.

Indeed, it was in part *because* Congress expected that certain agencies—including those responsible for undertaking and approving large-scale construction projects—would be slower to embrace their environmental review responsibilities that it (1) established CEQ as a centralized repository of expertise and government-wide presidential direction, *Andrus*, 442 U.S. at 357-58; (2) directed agencies to provide their analyses (and others' comments) to CEQ, 42 U.S.C. § 4332(2)(C); and (3) allowed agencies with environmental expertise to comment and participate in the EIS process. Indeed, 1970 legislation required that the EPA review other agencies' NEPA analyses and that any determinations that a proposed undertaking is "unsatisfactory from the standpoint of public health or welfare or environmental quality," be "publish[ed] … and the matter… referred" to CEQ. *Id.* § 7609(a), (b).

Petitioners nonetheless insist that restricting NEPA consideration would beneficially prevent the action agency from straying into the "lane" of the agency with responsibility for, *e.g.*, regulating or controlling a particular type of pollution or activity. Pet. Br. 1. But that fundamentally misunderstands the statute. NEPA provides for specialist environmental regulators to bring their expertise to bear on fellow agencies' environmental pre-decisional effects analyses. *See* 42 U.S.C. § 4332(2)(C)(v) (EIS must take account of "irreversible and irretrievable commitments of Federal resources" that proposed action would entail). And while other agencies—federal and non-federal—may have authority to address these effects, a premise of NEPA's design is that such interventions are often second-best or worse. By the time a project's effects find their way to the "lane" of an environmental regulator, that entity's options are constrained, and the fact that a different approach would have been less harmful is moot. NEPA expresses a "determination to face problems of pollution 'while they are still of manageable proportions and while alternative solutions are still available.'" *NRDC v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (quoting S. Rep. No. 91-296, 91st Cong., 1st Sess. at 5 (1969); *accord Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985) (Breyer, J.) ("later consideration would be unlikely to offer the decisionmaker a meaningful choice about whether to proceed"); *Calvert Cliffs*, 449 F.2d at 1122-23 (holding that agency policies that confined environmental review to determining whether an applicant would "observe [a pollution] regulator's standards" missed the "point" of NEPA's comprehensive, forward-looking process).

Indeed, this Court's opinion in *Robertson*, a case where the project's most significant environmental effects arose from development activities "subject to regulation by other governmental bodies," 490 U.S. at 350, identified local authorities' primary responsibility as a reason why NEPA required the *federal* agency's study: because early information about "expected [development] consequences" would afford such authorities the best "opportunity to plan and implement corrective measures." *Id.*

The Government's submission here takes a less extreme, but equally erroneous approach. After forcefully showing how petitioners' jurisdiction-based limits are at odds with the statute, U.S. Br. 31-33, the Government ultimately proposes letting the same NEPA-barred considerations in through the back door. Repeatedly, the Government includes among the "factors" that should bear on an agency's responsibility to consider effects "the nature and reach of the agency's organic statutes" and "the fact that other governmental entities authorize, fund, or carry out the specific conduct." U.S. Br. 17-18; *see also id.* at 21 ("nature and scope of the agency's substantive authority"); *id.* at 27 ("nature and requirements of the governing statutes"); *id.* at 45 (citing the Surface Transportation Board's organic statute as blessing curtailed analysis). It would have the Court create a sliding scale, whereby agencies may reduce analysis where effects' connection to the agency mission is "less robust," *id.* at 27, and would have courts defer to agency judgments on that score. *Id.* at 28.

But as we have explained—and as *the Government's brief* elsewhere explains—having action

agencies consider at the pre-decision stage environmental harms whose control would be another regulator's responsibility (and having them do so with the active input of the environmental expert) is a central feature, not a bug, of the statute Congress enacted. And statutorily improper considerations do not become appropriate when they are just one factor in a multi-factor balancing, rather than a categorical bar. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily and capriciously where it relies on "factors which Congress has not intended it to consider"). (Indeed, the latter type of rules at least have the virtue of clarity and lend themselves to consistent application.).

### B. Neither NEPA's "Rule of Reason" Nor Ad Hoc Assertions of "[Im]materiality" Entitle Agencies to Disregard Significant, Reasonably Foreseeable Environmental Effects They Would Prefer Not to Study.

Petitioners posit that if the substantive limitations they seek are unavailable under the statute's "reasonable foreseeability" test, they may still be imposed through application of a "rule of reason." *See* Pet. Br. 44 (suggesting a "direction" by this Court supports agencies' refraining from "studying increasingly remote environmental effects."). The Government, too, posits a free-floating non-textual limitation, sometimes ascribed to the "rule of reason," U.S. Br. at 21, 22, 27. This Court's and others' decisions cannot fairly be read as approving an undefined subset of environmental effects that meet the statute's reasonable

foreseeability test but need not be considered. And granting such ad hoc power to agencies would be contrary to the statute's design and sound administration.

Undeniably and unexceptionally, NEPA only requires study of remote effects that are reasonably foreseeable. No separate "rule" creates a blanket excuse from study of reasonably foreseeable effects, let alone on the basis that an agency does not want to analyze them or is not accustomed to doing so. To be sure, reason—and reasonableness—are and always have been central concepts in NEPA's administration. As the earliest decisions recognized, a statute whose sweeping "any" and "all" commands operate to "the fullest extent possible," contemplates that some—reasonable—limits will be drawn. *See, e.g.*, Env. Resp. Br. 7, 8 n.6, 23 (citing cases). But as these cases make clear, the "rule of reason" is not a freestanding basis for agencies to disregard significant environmental consequences that the statutory test requires be analyzed. Thus, the earliest decisions to reference a "rule of reason" used the phrase to describe their reasonable foreseeability holding, *i.e.*, that NEPA did not require agencies to examine harms that were "speculative," but neither did uncertainty about whether effects might occur (or the need to make probabilistic forecasts) supply an excuse for not considering them. *Scientists' Inst.*, 481 F.2d at 1091-92; *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989) (invoking the rule of reason in noting that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized").

This Court's reference to the "rule of reason" in *Public Citizen* provides no support for petitioners' sweeping statute-nullifying conception, based on effects' "remoteness." On the contrary, the Court emphasized that statutory rules of reason exist to implement statutory policies. Thus, "no rule of reason worthy of that title" would support requiring an agency to study environmental effects attributable to an already-made presidential decision it was without authority to countermand. *Public Citizen*, 541 U.S. at 767-68. Common-sense recognition that studying those effects would serve no statutory purpose under those circumstances falls far short of *carte blanche* for excluding effects the statute plainly requires to be studied, either on a wholesale basis (as petitioners maintain) or in some ad hoc, sliding-scale fashion, as the Government proposes.

Here too, the seeming restraint of the Government's approach should not obscure its fundamental incompatibility with the statutory design. Although the Government uses soft-edged language about "context-specific" judgments concerning an effect's "materiality," incorrectly attributing it to this Court, s*ee* U.S. Br. 17, 21, 27, 29, 37, its thrust, when combined with demands of near-complete judicial deference, defies important judgments that NEPA codifies. As with the rule of reason, "materiality" is descriptive—a synonym, not a substitute for the reasonable foreseeability principle, *i.e.*, an effect is sufficiently likely and knowable that a reasonable person would rely on it in reaching a decision.

Nor, for essentially the same reason, can the Court's phrase "reasonably close causal relationship"

serve as an umbrella test for all questions about when effects need be studied. *See id.* at 17-18 (citing *Public Citizen*, 541 U.S. at 767, 769). *Public Citizen* considered only whether an agency could actually change an effect, not whether an effect that it could avoid merited study. 541 U.S. at 769-70. And *Metropolitan Edison* used that lens to examine simply whether an effect was sufficiently attributable to a "change in the physical environment." 460 U.S. at 774. The Government would conflate that threshold issue of whether information could help an agency implement NEPA with the very different question of an effect's likelihood.

Unlike the settled version, the Government's approach is essentially subjective, giving practically controlling weight to *agencies*' judgments as to what is relevant to their decision-making process. As *Robertson* highlighted, NEPA's other central textual mandate is that information about environmental effects and alternatives be sought from and provided to those outside the action agency, whose distinct interests and expertise qualifies them to also play a role in the decision-making process. 490 U.S. at 349. Ensuring such entities and individuals are full, and fully informed, participants in the decision process is not, as petitioners suggest, a perfunctory box-checking exercise, but rather a linchpin of the statute's design. Development agencies are expert about what alternatives are practicable but they are unreliable judges of what is "immaterial" in that broader sense.

## III. Congress's Recent NEPA Amendments Require Agencies to Analyze All Reasonably Foreseeable Effects—Not Merely Direct Effects Within the Agency's Regulatory Jurisdiction or Traditional Expertise.

Petitioners' suggestion that Congress's 2023 amendments to NEPA *support* their position, *see* Pet. Br. 8, 27-29, is plainly incorrect. The text and history of those amendments are startlingly unhelpful to petitioners—confirming: (1) that Congress can modify NEPA to respond to policy concerns, (2) including complaints about the timing and length of EIS documents, *see id.* at 6, 7, and (3) that Congress considered—but did not enact—the very restrictions on NEPA's scope that petitioners seek to have imposed judicially.

Last year, for only the second time since NEPA's December 1969 enactment, Congress substantively amended Title I, as part of the Fiscal Responsibility Act, *see* Pub. L. No. 118-5, Div. C, tit. III, § 321(a)(3)(B), 137 Stat. 38 (2023).[10] The statute made some forty amendments to NEPA, including the addition of new provisions setting time and page limits for EISs, 42 U.S.C. §§ 4336a(e), (g), and a provision affirming that environmental effects need not be studied if the proposed action is "nondiscretionary," such that the agency lacks "authority to take [them] into

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[10] The first substantive amendment, enacted in 1975, provided that, under certain circumstances, State agencies could assume responsibility for preparing analyses required by NEPA. Pub. L. No. 94-83, 89 Stat. 424 (1975).

consideration," *id.* § 4336(a)(4). Most relevant here, Congress amended the EIS provision, inserting the term "*reasonably foreseeable*," to describe the "environmental effects" of proposed actions that agencies are required to analyze. *Id.* § 4332(2)(C)(i) (emphasis added); *see also id.* § 4332(2)(C)(ii) (inserting "reasonably foreseeable" into the provision requiring that an action's unavoidable "adverse environmental effects" be set out); *id.* § 4336(b) (using "reasonably foreseeable" in provisions addressing when an agency must or need not prepare an EIS).

Given that Congress chose to enact the precise "reasonably foreseeable" qualifier language that has appeared in CEQ regulations and governed administrative practice for decades, the natural inference would be that the statute codifies the term's widely understood, long-settled meaning. *George v. McDonough*, 596 U.S. 740, 746 (2022) (When Congress "codif[ied] and adopt[ed]" regulatory doctrine, using a "term taken from [that] source," the statutory term is presumed to "bring[] the old soil with it.") (citation omitted); *see also* 169 Cong. Rec. H2704 (daily ed. May 31, 2023) (remarks of Rep. Westerman) (Committee Chair's explanation that, "in amending NEPA to include the concept of reasonable foreseeability, Congress intends to establish in statute *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992)").

Context makes that conclusion even more difficult to resist: As Congress was aware, CEQ had in 2022, through notice-and-comment rulemaking, deleted regulatory language, added less than two years earlier, that narrowed the range of effects agencies were

required to consider.[11] (As noted, *supra* p.10, only the second time since 1978 that CEQ had revisited *any* of the operative language.) One of the short-lived amendments, *see* 85 Fed. Reg. 43,304, 43,343-44 (July 16, 2020), directed that environmental effects that are geographically or temporally "remote" and those with a "lengthy causal chain" "generally" need not be considered, and that "effects that the agency has no ability to prevent due to its limited statutory authority" "generally" need not be studied. 40 C.F.R. § 1508.1(g)(2) (2020). A second limited consideration to the subset of "reasonably foreseeable effects" which "have a reasonably close causal relationship to the proposed action." 40 C.F.R. § 1508.1(g) (2020). And another 2020 addition—one that was retained in the 2022 rulemaking, *see* 87 Fed. Reg. 23,453 (Apr. 20, 2022)—affirmed that an effect is "reasonably foreseeable" if "it is sufficiently likely to occur that a prudent person would take it into account in reaching a decision." 40 C.F.R. § 1508.1(aa) (2021).

Petitioners nonetheless maintain that "reasonably foreseeable" in the amended statute should be read as codifying substantive restrictions quite similar to those which CEQ's very recent and high-profile rulemaking had rejected (not coincidentally the same limitations they purport to locate in "this Court's decisions," Pet. Br. 28). That is a bridge too far. In the

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[11] *See, e.g.,* Letter from Members of U.S. House of Representatives, to the Honorable Brenda Mallory, CEQ Chair (Dec. 10, 2021), available at https://naturalresources.house.gov/uploadedfiles/westerman_et_al_to_mallory_re_nepa_revisions.pdf (detailing some Members' opposition to decision to revise the 2020 amendments to the NEPA regulations).

same three-year period preceding the 2023 "reasonably foreseeable" codification, Congress considered precursor versions of the enacted legislation that *would have* expressly endorsed limiting the scope of agencies' impact assessment responsibilities in the ways petitioners seek: *e.g.*, (1) by confining consideration to "reasonably foreseeable environmental effects with a reasonably close causal relationship to the proposed agency action," H.R. 8333, 116th Cong. (2020); H.R. 2515, 117th Cong. (2021), and (2) by defining "reasonably foreseeable" as "likely to occur—(A) not later than 10 years after the lead agency begins preparing the environmental document; and (B) in an area directly affected by the proposed agency action…." H.R. 1577, 118th Cong. (2023). These bills did not pass. It is hard to accept that a Congress intent on reviving limitations that CEQ had jettisoned in 2022 would have expressed that intention by rejecting proposed statutory language that would have codified them in those terms, and instead adopting the language CEQ had chosen in reinstating its longstanding test. *Cf. Metropolitan Edison*, 460 U.S. at 776 ("'We cannot attribute to Congress the intention to ... open the door to such obvious incongruities'") (citation omitted).

Against this, petitioners offer the purpose of Congress's amendment, emphasizing that "BUILDER" is "short for 'Building United States Infrastructure through Limited Delays and Efficient Reviews,'" Pet. Br. 2, 7, and urging that it would thwart Congress's "pro-development" objectives to interpret the text in ways that slow down or bulk up the EIS process. *See id.* at 29 (invoking principle that "statutory titles

provide a "permissible indicator[] of meaning").[12] But "no law 'pursues its ... purpose[s] at all costs,'" *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142, 150 (2023) (citation omitted), and that is surely true of the Fiscal Responsibility Act of which the NEPA amendments were one—indisputably important—component, and holds for the amendments themselves. When Congress actually passed legislation, it included new provisions directly responsive to the timetable and length objections, *see supra* p.27, and it declined to enact proposals that would have restricted the substantive scope of the EIS responsibility. *Cf.* 42 U.S.C. § 4332 (directing that "to the fullest extent possible," the "public laws of the United States shall be interpreted and administered in accordance with the [NEPA] policies.")[13] There is thus no warrant here for revisiting the balance Congress settled on and

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[12] Notably, it is doubtful that the principle petitioners invoke actually applies: The statute includes the term "BUILDER Act," but the repeatedly-quoted "title" from which petitioners derive the "purpose" was not enacted into law. *Cf.* Pet. Br. 2, 29.

[13] The Fiscal Responsibility Act was not Congress's only or last recent word on the subject of NEPA streamlining. Major legislation enacted in recent years has included provisions that exempted certain projects or that impose deadlines for NEPA review. *See, e.g.*, Building Chips in America Act, Pub. L. No. 118-105, § 2 (2024) (excluding or modifying NEPA's applicability to a broad swath of semiconductor projects); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 11317 (2021) (expanding exclusions to cover proposed projects that receive less than $6,000,000 of federal funding or less than a total estimated cost of $35 million). But in none of these did Congress choose to pursue efficiency by altering the provision prescribing NEPA's environmental-review mandate.

rejecting the statue that emerged through bicameralism and presentment.

There is evidence that the Fiscal Responsibility Act and other recent NEPA amendments are having their intended effect. *See* The White House, *Fact Sheet: Biden Harris Administration Takes Action to Deliver More Projects More Quickly, Accelerates Federal Permitting* (Aug. 29, 2024) (reporting significant reductions in the completion time for EIS reviews by Departments of Energy and Transportation). But if petitioners and amici believe that the measures enacted to date are insufficient and that the reasonable foreseeability principle itself needs to be reined in, their recourse is to the "political process," not the judicial one. *Metropolitan Edison*, 460 U.S. at 777.[14]

## CONCLUSION

This Court should affirm the judgment of the court of appeals.

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[14] *Cf. Hearing Memorandum, House Committee on Natural Resources* 11 (Sept. 11, 2024) (describing proposed legislation that would define "Reasonably Foreseeable" to mean that "agencies must only consider environmental effects that are likely to occur in an area directly affected by the action, are under the control or jurisdiction of the agency, and have a close relationship between a change in the environment and the proposed action").

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