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 AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ANDREW WHEELER
SARAH BORDELON
HOLLAND & HART LLP
505 Ninth Street NW,
Suite 700
Washington, DC 20004

TINA R. VAN BOCKERN
HOLLAND & HART LLP
555 Seventeenth Street,
Suite 3200
Denver, CO 80202

HADASSAH M. REIMER
Counsel of Record
HOLLAND & HART LLP
645 South Cache Street,
Suite 100
Jackson, WY 83001
(307) 734-4517
hmreimer@hollandhart.com

Counsel for Amici Curiae

117005

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF *AMICI CURIAE*[1]

A. American Petroleum Institute

The American Petroleum Institute represents all segments of America's natural gas and oil industry, which supports more than 11 million United States jobs. Its nearly 600 members produce, process, and distribute the majority of the nation's energy, and its members frequently engage in a wide variety of activities with federal permits or authorizations triggering National Environmental Policy Act (NEPA) reviews. These activities include, among others, leasing federal minerals, exploration and development of oil and gas on public lands and on the Outer Continental Shelf, construction of interstate natural gas pipelines and liquid energy and natural gas pipelines that cross federal lands or international borders, construction of liquified natural gas terminals, and carbon capture, utilization, and sequestration infrastructure.

B. National Association of Home Builders of the United States

The National Association of Home Builders of the United States strives to protect the American Dream of housing opportunities for all, while working to achieve professional success for its members who build communities, create jobs, and strengthen our economy.

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1. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* and their members made a monetary contribution to fund the preparation and submission of this brief.

The National Association of Home Builders of the United States is a Federation of more than 700 state and local associations with more than 140,000 members. Each year, its members construct about 80% of the new homes built in the U.S., both single-family and multifamily. Permitting delays at all levels of government delay housing projects and raise construction costs. Federal permits under the Endangered Species Act and Clean Water Act for housing developments trigger NEPA review, which can add years to project permitting. The Association's members are also affected by delays in infrastructure projects that are necessary to develop vibrant communities. Finally, members are negatively impacted by surging building supply costs, which are aggravated by NEPA delays for domestic production of timber, metallurgical coal (a precursor to steel), and other building materials.

C. National Association of Manufacturers

The National Association of Manufacturers is the largest manufacturing association in the U.S., representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs 13 million people, contributes more than $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The National Association of Manufacturers is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S. The National Association of Manufacturers' members are directly affected by NEPA when seeking permits to construct facilities. Overly burdensome, shifting

regulatory policies inherently affect permitting, licensing, and siting applications because they move the goalposts of compliance with federal regulations. As downstream users, the National Association of Manufacturers' members are also indirectly affected by NEPA's impacts on energy, infrastructure, and supply chains.

D. National Mining Association

The National Mining Association represents the interests of the mining industry including the producers of most of America's metals, coal, and industrial and agricultural minerals and the hundreds of thousands of workers it employs. The National Mining Association has more than 250 members, including companies and organizations involved in every aspect of U.S. mining. America's mining industry supplies the essential materials necessary for nearly every sector of our economy. Because coal, hard rock, and other mining operations routinely require federal authorizations that trigger NEPA review, National Mining Association members spend tens of millions of dollars annually on environmental analyses, paying NEPA third-party contractors and subcontractors, and reimbursing agencies for their costs in implementing NEPA.

E. National Rural Electric Cooperative Association

The National Rural Electric Cooperative Association is the national association for nearly 900 not-for-profit electric cooperatives and public power districts that provide electric service to roughly one in eight Americans, covering 56% of the nation's landmass. Rural electric cooperatives serve millions of businesses, homes, schools,

farms, irrigation systems, and other establishments in 2,500 of the nation's over 3,100 counties, including 92% of the nation's persistent poverty counties. Members own and maintain 2.7 million miles, or 42%, of the nation's electric distribution lines and serve large expanses of the U.S. that are primarily residential and typically sparsely populated. Electric cooperatives are often subject to the NEPA process for projects that require federal permits, rights-of-way, and other approvals such as building and modernizing electric and broadband infrastructure, bringing cleaner energy to the grid, reducing wildfire risk, and adding capacity as electricity demand increases. Many electric co-ops also receive federal loans and grants that trigger NEPA reviews. Overinclusive NEPA processes inevitably delay projects and undermine electric co-ops' provision of affordable, reliable, and safe electricity, which negatively affects the communities they serve.

INTRODUCTION AND SUMMARY OF ARGUMENT

The practical import of this NEPA case cannot be overstated: requiring an agency to study environmental effects beyond those proximately caused by the action over which the agency has regulatory authority increases litigation risk and impedes federal agency permitting across the economic spectrum—from upstream energy, mineral, and material production to manufacturing, processing, and construction, and the pipelines, railroads, transmission lines, and highways in between. *See* 169 Cong. Rec. H2681, H2704 (daily ed. May 31, 2023) (2023 NEPA amendments—the Builder Act—proposed and ultimately adopted as part of the Fiscal Responsibility Act, Pub. L. No. 118-5, 137 Stat. 10, were intended to

"narrow the scope" of NEPA review). NEPA reaches all of these vital industries making its proper implementation critical to economic prosperity and national security.

But NEPA is not functioning properly, and *amici curiae* and their members bear the brunt of the dysfunction. Twenty years ago, the Court unanimously held in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), that an agency's NEPA obligation ends at the limits of its jurisdiction—after all, NEPA's purpose to promote informed decisionmaking is meaningless where the agency "lacks discretion" to prevent the environmental effects of actions outside its purview. *Id.* at 756, 767-68. Despite this clear ruling, lower courts increasingly flout *Public Citizen*'s reasonable limits on NEPA—invalidating agencies' analyses for failure to consider environmental effects over which the agency had no regulatory authority, often with disastrous results for *amici curiae* and their members. For instance, as described in more detail in this brief:

- The future of a coal mine in Montana hangs in the balance after its federal mine plan was vacated and the Office of Surface Mining Reclamation and Enforcement (Office of Surface Mining)—charged with permitting coal mine operations—was ordered to analyze in greater detail the effects of coal combustion in Asia, and coal transportation by rail, activity regulated by another federal agency, including the outside risk of train derailment, along hundreds of miles of possible rail routes.

- Another Montana mine operates under threat of vacatur after the Office of Surface Mining was forced

to consider the effects of operating an adjacent third-party power plant regulated by separate state and federal agencies, including the power plant's water use, authorized by yet another state agency, and its potential effect on endangered fish dozens of miles downstream of the water-withdrawal point.

- A 225-mile transmission line in Nebraska that has been in the permitting process for 10 years is still not built because a court invalidated the U.S. Fish and Wildlife Service's Endangered Species Act "incidental take" permit for a beetle species and instructed the agency to consider the effects of separately proposed and permitted upstream wind projects that may utilize the new line, despite the wildlife agency's lack of jurisdiction to either site the transmission line or regulate wind power development.

- Oil and gas leases have been set aside and development has been delayed where the Bureau of Land Management and the Bureau of Ocean Energy Management, obligated to lease and manage federal oil and gas reserves for development, were required to analyze the effects of leasing decisions on foreign oil consumption and global climate change caused by countless third-party actors and over which the agencies have zero control, requiring, in one case, an act of Congress to remedy the district court's overreach.

Cases like these require agencies on remand—and encourage agencies preemptively—to prepare expansive, lengthier, and duplicative analyses in futile attempts to insulate NEPA reviews from future litigation risk.

But doing so fails to serve NEPA's purpose of informed decisionmaking where that analysis exceeds the bounds of the agency's authority.

Worse, the seemingly limitless litigation risk threatens the very core of American ingenuity and economic vitality. The cost of doing business in America continues to soar, with NEPA documents taking longer and growing in length regardless of the utility to the federal decisionmaker. Permit applicants must foot the bill, either directly through payment for NEPA contractors or indirectly through project delays—or both. Once the NEPA analysis is complete, many projects must then survive scrutiny in the federal courts and frequently suffer further delays. The more significant the project and the more capital invested, the higher the risk of litigation and the greater the stakes if the court finds fault with the agency's review. It is no wonder that when choosing where to invest capital, companies heavily weigh the costs and uncertainty of both getting a permit and its ultimate durability. For *amici curiae* and their members, which are the drivers of a substantial portion of the U.S. economy, the stakes could not be higher.

In the end, NEPA's purpose to promote informed agency decisions can be achieved without requiring agencies to amass environmental treatises on effects over which they lack any control or ability to mitigate. This Court already detailed the limiting principles required to achieve this result in *Public Citizen*, and *amici curiae* respectfully request that it reaffirm them now and reverse the D.C. Circuit.

ARGUMENT

I. NEPA Analyses of Actions and Effects Outside an Agency's Authority to Control or Mitigate Stray From NEPA's Purpose to Promote Informed Decisions.

Courts in the Ninth, Tenth, and D.C. Circuits ignore *Public Citizen*'s direction to focus on effects for which agency action is the proximate cause and over which the agency has regulatory control. The following examples in several industries highlight the extreme reaches to which courts have pushed federal agencies to consider actions and effects far beyond their ability to regulate, control, or mitigate—where the federal approval is just one "but for" link in the long causal chain.

Mining. The Office of Surface Mining—the federal agency that issues mining permits for federal coal under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201, *et seq.*—issued permits to two Montana mines to develop pre-existing federal coal leases. When considering a permit application, the agency must consider, among other things, whether the mine plan will achieve the "maximum economic recovery" of the coal resource, 30 U.S.C. § 201(a)(3)(C); 30 C.F.R. §§ 746.11(b), 816.59. While the Office of Surface Mining has discretion regarding *how* the coal should be mined, it cannot deny the lessee the right to mine. *See Mobil Oil Expl. & Producing Se. v. United States*, 530 U.S. 604, 607 (2000) (U.S. must honor contracts).

One mine, which ships coal by rail and then barge to power plants in Asia, has had its 2015 permit to mine

federal coal remanded three times for ever-broader NEPA reviews. First, the District of Montana held that the Office of Surface Mining violated NEPA because the agency failed to adequately analyze impacts of railroad traffic transporting the coal along hundreds of miles of existing rail lines from Montana to a Pacific port. *Mont. Env't Info. Ctr. (MEIC) v. U.S. Off. of Surface Mining (OSM)*, 274 F. Supp. 3d 1074, 1092 (D. Mont. 2017). After the agency prepared a detailed railroad transportation impact analysis in a *second* NEPA document on remand, the district court again faulted the agency, this time for failing to adequately consider the risk of train derailment even though neither the Office of Surface Mining nor the applicant had any control over the railroad, including the route or speed of travel, which are regulated by the Surface Transportation Board. *350 Mont. v. Bernhardt*, 443 F. Supp. 3d 1185, 1195 (D. Mont. 2020). Although the agency was able to remedy this issue in a *third* NEPA document, the Ninth Circuit held that the agency had not adequately considered the greenhouse gas emissions from combusting coal in Asia and the permit was remanded once again. *See generally 350 Mont. v. Haaland*, 50 F.4th 1254 (9th Cir. 2022). Today, the mine still cannot develop federal coal, is running out of non-federal coal reserves, and is at risk of closure until the Office of Surface Mining finishes the *fourth* NEPA document. *Signal Peak Energy, LLC v. Haaland*, No. 24-CV-366, Compl., ECF No. 1 (D.D.C. Feb. 7, 2024).

Another mine supplies coal to an adjacent power plant owned and operated by third parties. The District of Montana remanded the Office of Surface Mining's NEPA analysis for consideration of the power plant's operations, including the plant's water withdrawals

from the Yellowstone River, despite the agency's lack of authority over power plant operations or Montana water rights. *MEIC v. Haaland*, 2022 U.S. Dist. LEXIS 179417, *39 (D. Mont. Sept. 30, 2022) (adopting recommendation of magistrate judge); *MEIC v. Haaland*, 2022 U.S. Dist. LEXIS 128280, *24-33 (D. Mont. Feb. 11, 2022) (magistrate judge recommendations). Even though power plant operations are regulated by different state and federal agencies and the water withdrawals are exercised under long-existing water rights, the court required the Office of Surface Mining to consider how continued operation of the power plant might impact endangered pallid sturgeon dozens of miles downstream from the point of water withdrawal. *Id.* at *29-32. Under a deferred vacatur order, the mine is currently operating under threat of vacatur pending the Office of Surface Mining's NEPA analysis of this and other issues on remand, a process which has been repeatedly delayed. *MEIC v. Haaland*, No. CV 19-130, ECF No. 223 (D. Mont. Apr. 2, 2024).

In another example, the Ninth Circuit faulted the Bureau of Land Management for failing to extend its environmental review of a Nevada gold mine expansion to the air impacts of transporting and processing the ore at a separately owned facility 70 miles from the mine. *S. Fork Band of Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 725-26 (9th Cir. 2009). The court was unmoved by the facts that the Bureau's authority under the mining laws is limited to "prevent[ing] unnecessary or undue degradation of public lands," 43 C.F.R. § 3809.1, and that the Bureau has no authority to regulate the fully permitted processing facility that operates under state-issued Clean Air Act permits. *Id.* at 726. The Ninth Circuit reversed the district court's decision to deny a

preliminary injunction, effectively halting mining pending new NEPA review, *id.* at 728-29, which resumed only after supplemental NEPA analysis was complete, *see S. Fork Band of Council of W. Shoshone v. U.S. Dep't of Interior*, 2012 U.S. Dist. LEXIS 988, *4-7 (D. Nev. Jan. 3, 2012).

Oil & Gas. Disregard for *Public Citizen* in the oil and gas context is largely driven by litigation bent on halting or stalling fossil fuel development. The relative success of environmental organizations has resulted in ever-expanding NEPA review of upstream and downstream greenhouse gas emissions and their potential effects on global climate change, no matter how attenuated the causal chain and despite the regulatory agencies' lack of control to set policy on fossil fuel development or regulate greenhouse gas emissions. This case is a prime example, with the court of appeals adopting the view of environmental organizations that NEPA requires the Surface Transportation Board to engage in sweeping review of upstream oil and gas development and downstream refining and combustion before authorizing construction of a railroad caught in the middle. Pet'rs' Br. 13-15.

Other examples abound. In *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 162 (D.D.C. 2022), the D.C. District Court vacated Lease Sale 257, a Bureau of Ocean Energy Management Gulf of Mexico oil and gas lease sale held under the Outer Continental Shelf Lands Act, after confidential bids were opened and announced. Despite the Bureau's valiant attempt to anticipate and model the reasonably foreseeable effects of the lease sale on oil and gas markets, the court held that the agency had not adequately accounted for changes in foreign oil

consumption if the lease sale were *not held*, global oil and gas supply were reduced, prices were to increase in response to the lower supply, foreign markets were to use less oil given the increased price, and what all of that would mean for global greenhouse gas emissions and climate change. *Id.* at 136-37. And the D.C. District Court required this analysis even though the agency "simply lacks the discretion" under the Outer Continental Shelf Lands Act "to consider any global effects that oil and gas consumption may bring about" because "Congress has already decided that the [Outer Continental Shelf] should be used to meet the nation's need for energy." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009). Ultimately, it took an act of Congress commanding the Bureau of Ocean Energy Management to award leases to the high bidders in Lease Sale 257 to prevent the irreparable harm of vacating a sale after the sealed bids had been opened, *see* Pub. L. No. 117-169, § 50264(b).

In another pair of oil and gas leasing cases, this time for onshore development, the D.C. District Court remanded the Bureau of Land Management's leasing decisions under the Mineral Leasing Act because the agency did not quantify the greenhouse gas emissions of the downstream combustion of oil and gas that might be developed under the leases. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 2019); *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 259 (D.D.C. 2020). In the first case, the court held that the Bureau could not conclude, without quantifying downstream emissions, that the leases would represent only an incremental contribution to regional and global greenhouse gas emissions. *Zinke*, 368 F. Supp. 3d at 77. In the second, after the Bureau attempted to fix

the quantification error, the court shifted its attention to cumulative impacts, finding the Bureau failed to account for the additive effects of other reasonably foreseeable oil and gas leasing on federal lands. *Bernhardt*, 502 F. Supp. 3d at 249-51.

Transmission and Linear Infrastructure (Highways, Railroads, Pipelines, and Power Lines). Transmission and other linear infrastructure projects are almost always proposed to serve some larger societal purpose, including electric reliability, supply chain security, and freedom of movement. These projects are particularly vulnerable to NEPA creep because of their large geographic scope, often crossing thousands of miles and multiple states. As such, they often form the central link in a potentially lengthy causal chain making an improper "but for" analysis uniquely tempting.

This case is, again, a perfect example. The D.C. Circuit has instructed the Surface Transportation Board to conduct an environmental review of both upstream oil and gas development in Utah (regulated by the Bureau of Land Management and state agencies) and downstream refinery operations in Louisiana and Texas (regulated by the Environmental Protection Agency and other state agencies). *Eagle Cty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1177-80 (D.C. Cir. 2023). Not only does the Surface Transportation Board lack any say in oil and gas development and refining decisions, *see* Resp'ts' Br. in Supp. of Pet'rs 41-45, but it is also not clear whether those activities are causally connected to authorization of an 88-mile railroad when current oil and gas production can be transported out of Utah by truck. *Id.* at 1166; *see* Pet'rs' Br. 35-36. No matter, the D.C. Circuit proclaimed—the

Board should expend its limited resources on analysis of those effects despite its inability to regulate them.

The same was true of the Federal Energy Regulatory Commission in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*). Although the agency's jurisdiction was limited to conditioning pipeline operations based on an assessment of the pipeline's "public convenience and necessity," 15 U.S.C. § 717f(c)(1)(A), the court held that the indirect effects analysis must extend to "reasonably foreseeable" downstream effects, even though the agency could only affect them by denying the permit altogether. *Sabal Trail*, 867 F.3d at 1373. As Judge Brown aptly described in dissent, the Commission "has no control over whether the power plants [at the end of the pipeline] that will emit these greenhouse gases will come into existence or remain in operation," a decision reserved for the Florida Power Plant Siting Board, *id.* at 1381, and the Commission's efforts in reviewing the effects of that separate activity would be wholly wasted.

Another striking example of NEPA's extraordinary reach is illustrated in *Oregon-California Trails Association v. Walsh*, 467 F. Supp. 3d 1007 (D. Colo. 2020). In that case, the U.S. Fish and Wildlife Service was asked to issue an "incidental take" permit for an endangered (now threatened) beetle that might be affected during construction of a segment of a 225-mile transmission line on private lands in Nebraska. The Service lacked any authority to dictate the location or operation of the powerline, which was approved by the state, and could only evaluate whether the incidental take permit application satisfied the Endangered Species Act. Yet the Service's NEPA review was comprehensive, encompassing the full

suite of direct and indirect effects of building the entire length of the power line. Not even that was enough for the court, which held that the Fish and Wildlife Service should have analyzed the effects of an upstream wind project that might take advantage of the transmission line despite acknowledging that the transmission line "will be built regardless of whether wind turbines will also be built in the same region." *Id.* at 1044, 1051. The court set aside the incidental take permit. *Id.* at 1075. Now 10 years after the NEPA process began, the updated analysis for the project still has not been issued and a critical transmission line for the people of Nebraska still has not been built. 89 Fed. Reg. 9,171 (Feb. 9, 2024) (notice of availability of draft supplemental environmental impact statement).

Housing Development and Manufacturing. New housing development and manufacturing plants often require federal authorization of minor activities associated with the project, such as Clean Water Act permits for wetland fill of a small area of a much larger project or a wastewater discharge permit for a processing plant. In NEPA terms, this is often referred to as the "small handles" question. Particularly common for housing and manufacturing projects, the small handles question asks whether federal authority of a minor portion of an otherwise private project "federalizes" and requires NEPA review of the effects of the whole.

In one example, the Ninth Circuit held that the U.S. Army Corps' authority over a Section 404 permit for 26.8 acres of a 10,105-acre housing project required the Corps to analyze the effects of construction across the entire project area. *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1036, 1042 (9th Cir. 2009). Because

the housing development could not proceed according to its master plan and would be limited to "isolated clusters" without the Corps permit, the Ninth Circuit held "the entire project is within the Corps' purview." *Id.* at 1040-42. The court enjoined construction until an environmental analysis of the 10,105-acre development could be completed. *Id.* at 1042.

* * *

These examples illustrate the urgency of the NEPA issue on review—the willingness of courts to freely apply "but for" causation to expand the scope of indirect effects analysis has major implications for project permitting across many sectors of the U.S. economy. The irony is that these analyses, ranging farther afield than ever before and considerably beyond the agencies' respective jurisdictions, frustrate NEPA's informational purpose, resulting in needless analysis that fails to inform the decision before the agency.

II. *Public Citizen*, When Applied Correctly, Serves NEPA's Foundational Purpose of Informed Agency Decisionmaking.

As Petitioners aptly explain, NEPA does not mandate substantive outcomes; it is a procedural statute with two goals—informed agency decisionmaking and public participation. Pet'rs' Br. 3-6; 42 U.S.C. § 4332(2)(c); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

In fulfilling these two goals, NEPA implementation is guided by the "rule of reason." *Pub. Citizen*, 541 U.S.

at 767. Whether to prepare a NEPA document—an environmental impact statement (EIS) or an environmental assessment—and the extent of the issues covered by the analysis are "based on the usefulness of any new potential information to the decisionmaking process." *Id.*; *see also* Pet'rs' Br. 5, 42-49. NEPA's purpose is not to amass paperwork for its own sake. 40 C.F.R. § 1500.2(b).

Drawing on these principles, this Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), and *Public Citizen*, 541 U.S. at 767, circumscribed the scope of NEPA reviews, eschewing any agency obligation to consider environmental effects that it cannot prevent. Pet'rs' Br. 5, 16-23. The Court clarified that "but for" causation is not enough "to make an agency responsible for a particular effect," rather, NEPA requires a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767 (quoting *Metro. Edison*, 460 U.S. at 774).

The Eleventh Circuit's decision in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019), exemplifies the proper application of *Public Citizen*. There, the court held that the U.S. Army Corps of Engineers was not required to extend the scope of its NEPA review for a Clean Water Act Section 404 dredge and fill permit for a phosphate mine to the later effects of processing the phosphate into fertilizer at a separate facility and the eventual disposal of hazardous materials produced during processing. As the Eleventh Circuit explained, the Corps "has no jurisdiction to regulate or authorize any of that," *id.* at 1294, and "[n]o federal law empowers the Corps to protect

the environment writ large," *id.* at 1296. Relying on *Public Citizen*, the court rejected the notion that the Corps' ability to influence the mining and eventual fertilizer production "through indirect coercion" by denying a permit was enough to demand an environmental review of those separate operations. *Id.* at 1297. *See also Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (Corps was not required to analyze the effects of the entire valley fill surface mining operation that was separately regulated by a state agency pursuant to delegated authority under the Surface Mining Control and Reclamation Act).

Applying the limiting principles of *Public Citizen* correctly focuses the agency's NEPA analysis on actions and effects over which it has authority, appropriately informing its decisionmaking process.

III. An Expansive View of Indirect Effects Forces Agencies to Analyze and Make Decisions Based on Actions and Effects Outside Their Statutory Jurisdiction and Expertise, Turning Them into De Facto Environmental Policy Czars.

NEPA cannot expand an agency's jurisdiction beyond its statutory responsibility. *See S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) (quoting *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute")). Congress never intended NEPA to "confer unlimited power on the agencies," which remain constrained to take action as "set forth in [their] enabling act[s]." *Cape May*, 698 F.2d at 188.

Where Congress has defined the agency's obligation and set the parameters for consideration, the agency cannot exceed those bounds. Yet courts continue to demand consideration of effects beyond the agencies' control that can only be influenced by the "indirect coercion" of withholding the permit altogether—i.e., classic "but for" causation. *See Ctr. for Biological Diversity*, 941 F.3d at 1297. Congress never intended NEPA to make agencies into "environmental policy czars," *see id.*, each with a hand on the kill switch in the complicated web of federal permitting required for project development. But that is precisely the position in which many agencies have found themselves when the courts ignore *Public Citizen*'s limits and demand agency analysis of upstream and downstream "effects" over which the agency exercises no regulatory control.

This broad view of NEPA commands agencies to step beyond their jurisdiction and expertise and opine on matters best left to the purview of other agencies. As illustrated by the cases discussed in Section I, *supra*, the Fish and Wildlife Service, expert in the conservation of endangered and threatened species under the Endangered Species Act, 16 U.S.C. § 1531(b), is not equipped to make abstract decisions about transmission line siting or wind energy development. The Bureau of Land Management, directed by the Mineral Leasing Act to "promote the orderly development of oil and gas deposits in publicly owned lands of the U.S.," *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981), and the Bureau of Ocean Energy Management, directed by the Outer Continental Shelf Lands Act to make oil and gas resources on the Outer Continental Shelf "available for expeditious and orderly development," 43 U.S.C. § 1332(3), cannot rethink

the wisdom of fossil fuel development or dictate global climate change policy. The Federal Energy Regulatory Commission, whose purpose is "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices," *National Association for the Advancement of Colored People v. Federal Energy Regulatory Commission*, 425 U.S. 662, 670 (1976), is not equipped to analyze the climate impacts of power plant operations. And the Office of Surface Mining, required by the Surface Mining Control and Reclamation Act to consider the means and methods of coal mining, has no business dictating to the Surface Transportation Board how to run a railroad.

IV. The Real-World Implications of Ever-Expanding NEPA Review Are Staggering for Businesses and the U.S. Economy.

Lower courts' disregard of *Public Citizen*'s limitations has widespread impacts beyond the parties to the example cases described above. Project applicants and agencies must factor unmitigable litigation risks into permitting and business plans. This drives agencies to exceed common sense, regulatory, and even statutory limits on review in Sisyphean attempts to "litigation-proof" NEPA analyses. The resulting permitting delays impose an enormous burden on *amici curiae* and the economy.

A. Each Decision Distinguishing or Ignoring *Public Citizen* Increases Permitting Litigation Risk.

Most NEPA concepts develop as common law. The statute itself is short and does not define key terms such

as "environmental impact." Regulatory attempts to define statutory concepts are, by necessity for a statute applicable to all "major Federal actions," broad and abstract. Case law—judicial application of these abstract concepts to real world facts—drives the development of NEPA law and the rules that agencies apply to their analyses. *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (J. Marshall, concurring in part, dissenting in part) ("In fact, this vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA.").

In the familiar methodology of the common law, courts look to precedent to determine whether a particular effect falls within the scope of the "environmental impacts" that the statute charges agencies with considering. Each judge who distinguishes—or simply ignores—*Public Citizen*'s limiting principles and requires agencies to analyze impacts removed from the proposed action lays the groundwork for future judges to push the zone of analysis even further. There is seemingly no end to the impacts that courts can require agencies to analyze.

South Fork Band and *MEIC* demonstrate the phenomenon. The Ninth Circuit in *South Fork Band* required the Bureau of Land Management to analyze air quality impacts from transporting and processing gold at an offsite processing facility 70 miles away—but no further. 588 F.3d at 725-27. Thirteen years later, the District of Montana relying on *South Fork Band*, required the Office of Surface Mining to analyze not just impacts from the offsite power plant, but alleged impacts on fish dozens of miles downstream of the water withdrawal point for the power plant. *MEIC*, 2022 U.S. Dist. LEXIS

128280, *24-33. That both permitting authorities lacked the jurisdiction to regulate any of these distant impacts stopped neither court. And neither court articulated a principled basis for how far to trace the impacts from the respective mines. One decision set the table for the next, with no logical end point.

Another mine experienced this progression in a series of *three* legal challenges to the *same* permit. *See supra*, Section I (Mining). In back-to-back-to-back cases, the District of Montana and then the Ninth Circuit remanded the analysis to the Office of Surface Mining for ever-expanding reviews of transportation and climate change impacts, first to extend the transportation effects analysis all the way from eastern Montana to a west coast port, second to take into account possible train derailment, and finally to provide more detailed analysis of climate change effects of combusting the coal in Asia. *See MEIC*, 274 F. Supp. 3d at 1090-93; *350 Mont.*, 443 F. Supp. 3d at 1195; *350 Mont.*, 50 F.4th at 1259. Neither the district court nor the Ninth Circuit explained why the greenhouse gas analysis must extend to combustion in Asia, but the transportation analysis should stop at the Pacific port. This problem is not unique to mining cases or these courts. Most courts do not attempt to identify a limiting principle and are constrained only by the creativity of the environmental litigants' arguments.

Because federal courts in key circuits have ignored *Public Citizen*, it is impossible for agencies or applicants to be confident that a NEPA document is sufficiently expansive to satisfy whichever judge or panel will decide the case. And the penalty for failing to anticipate what a judge might think is "reasonably foreseeable" is severe.

In case after case, permits, leases, or licenses, often years in the making have been vacated or enjoined, leaving applicants in limbo.[2] *See 350 Mont.*, 50 F.4th at 1266 (vacating mine plan three years after approval); *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739, 804-05 (D. Alaska 2021) (vacating project approval); *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 162 (D.D.C. 2022) (vacating lease sale, later reinstated by Congress).

B. "Litigation-Proof" NEPA Reviews Result in Longer Documents and Permitting Timelines.

The sad reality is that NEPA review today seems more motivated by surviving litigation than informing the specific decision before the agency. Following court instruction, agencies are analyzing issues wholly outside their expertise. *See supra* Sections I, III. Often, they are charged with analyzing issues that may be undergoing (sometimes concurrent) review by other agencies. *See S. Fork Band*, 588 F.3d at 726 (requiring the Bureau of Land Management to duplicate state agency's air quality analysis because the state's analysis was not a "NEPA" document). These expansive and duplicative analyses are not required by NEPA and serve only to delay the review, increase costs, and distract from the issues within the agency's control. They also strain limited agency resources upon which industry depends, and lead to delays

2. Applicants are often left without the ability to appeal under the Ninth Circuit's administrative remand rule, *see Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004) (a remand is not appealable by the applicant except in narrow circumstances), further skewing the case law in favor of environmental litigants and broader NEPA reviews.

in agencies approving actions critical to our communities and economic success. And because project applicants are usually footing the bill, they bear the burden of cost as well as delay.

NEPA documents are getting lengthier and taking longer to prepare. In 2020, the Council on Environmental Quality found that the average time from a notice of intent to a record of decision between 2010 and 2018 was 4.5 years, with a full quarter of EISs taking almost seven years. Council on Env't Quality, *Environmental Impact Statement Timelines (2010-2018)* (June 12, 2020), https://bit.ly/3MmBbMa. This remains the case even though the Council on Environmental Quality amended its regulations four years ago to require completion of EISs within two years. 40 C.F.R. § 1501.10 (2020). Two years after the Council on Environmental Quality imposed NEPA time limits, the average time to prepare an EIS had hardly budged, sitting at 4.2 years. Nat'l Ass'n of Env't Profs., *2022 Annual NEPA Report* at 2 (July 2022), https://bit.ly/3T7hcFi.

In the summer of 2023, Congress embraced NEPA time limits (two years for EISs and one year for environmental assessments) as part of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, § 321 (the Builder Act), codified at 42 U.S.C. § 4336a(g). But at least some federal agencies seem to view even statutory time limits as mere recommendations. The Office of Surface Mining has declared to multiple courts its unwillingness or inability to comply with the statutory time limits. *See MEIC v. Haaland*, No. 19-cv-00130, Memo. in Support of Federal Defendants' Motion to Extend Deadline to Complete Corrective NEPA Analysis and Deferred Vacatur of the

EIS, ECF No. 206 (D. Mont. Jan. 10, 2024) (proposing schedule 9 months beyond two-year deadline); *Signal Peak Energy, LLC v. Haaland*, No. 24-CV-366, Signal Peak's Motion for Preliminary Injunction, ECF No. 18, *10 (D.D.C. May 9, 2024) (EIS schedule exceeds two-year deadline by 19 months and counting). And, unfortunately, at least one court suggests that a project applicant cannot enforce the statutory two-year deadline until after the agency exceeds it. *See Signal Peak Energy, LLC v. Haaland*, 2024 U.S. Dist. LEXIS 149325, at *25 (D.D.C. Aug. 21, 2024) (claim for enforcement prudentially unripe).

Other agencies are likely to extend what the Council on Environmental Quality euphemistically calls "pre-[notice of intent] activity"—the time and analysis undertaken before the agency publishes the notice of intent triggering the two-year time clock. Council on Env't Quality, *EIS Timelines (2010–2018)* at 2. The Council on Environmental Quality acknowledged that even though the notice of intent should be filed "as soon as practicable" after the decision to prepare an EIS, *see* 40 C.F.R. § 1502.4(e), in reality the "extent of preparatory work done before issuing [a notice of intent] varies significantly among agencies and even among EISs within agencies." *EIS Timelines (2010-2018)* at 2. Agencies seeking to "litigation-proof " an EIS are likely to defer publishing the notice of intent as long as possible to allow more time for expansive reviews.

Agencies have been similarly reluctant to abide by statutory and regulatory page limits. 42 U.S.C. § 4336a(e); 40 C.F.R. § 1502.7. Page limits reflect an effort to rein in NEPA excesses. They are a clear indication from Congress and the Council on Environmental Quality that agencies have lost and must regain control of the NEPA

process. Absent complex circumstances, NEPA requires an EIS be no more than 150 pages and an environmental assessment no more than 75. 42 U.S.C. § 4336a(e)(2). Yet, agencies continue to find ways to sidestep these limits. A prime example is the Bureau of Land Management's recent certification of conformance with the Builder Act's page limits where the main body of the EIS was 300 pages, maps, tables, and introductory materials totaled over 200 pages, and the appendices exceeded 630 pages. *See* BLM, *Juniper Project Final EIS, Appendix K* (May 2024), https://bit.ly/3AETiKK.

All of this game playing is contrary to NEPA, as amended. The Builder Act provided objective page and time limits, not previously present in NEPA, reflecting Congress's intent to rein in agency overreach. These limits, combined with Congress's direction that analyses be focused on "reasonably foreseeable adverse environmental effects," 42 U.S.C. § 4332 (2023), demonstrate that the NEPA of today is different than the NEPA this Court analyzed in *Public Citizen*, and the amendments only underscore the need to reinforce *Public Citizen*'s limiting principles to help agencies meet new statutory requirements.

C. Permitting Uncertainty and Litigation Risk Impose Enormous Burdens on the Economy.

NEPA review touches every sector of the economy. A reasonable and reliable regulatory process is essential to American business, which requires transparent and predictable permitting processes that result in durable decisions to enable informed investments. The current NEPA landscape of years-long, unfettered reviews,

followed by extended litigation risk deprives the American public of needed projects and infrastructure.

Billions of dollars in energy investment are waiting in the NEPA pipeline. Am. Petroleum Ins., *2023 State of American Energy* at 15, https://bit.ly/3Mp6ENP. America's energy infra-structure is aging and needs substantial upgrades to support the current economy. But permitting delays have cancelled, stalled, or blocked 10 major natural gas and oil infrastructure projects. *Id.* at 12. The challenge is not just to meet current needs, but to support the economy years in the future. *Id.* at 8. Permitting delays and judicial decisions requiring expansive global impact analyses of oil and gas leasing and development threaten the predictability of U.S. development and production.

Permitting delays for mining of all kinds, including critical minerals vital to the energy transition, are equally concerning, if not worse. A recent report calculated an average of 29 years for U.S mines to go from discovery to production—longer than any country included in the study other than Zambia. S & P Global, *Mine development times: The U.S. in Perspective* at 6 (June 2024), https://bit.ly/4dGkMya. Since 2002, only three mines have come online in the U.S., and none are on federal land. *Id.* at 7. Yet the changing economy urgently needs the essential materials new mines could provide. To meet growing electricity demands, the world will need to produce more copper in the next 12 years than it has in the previous 120 years. *Id.* at 9. U.S. consumption of so-called "battery minerals" (lithium, cobalt, and nickel) could reach compound growth rates between 20% and 30% by 2035. *Id.* Almost half of the "11 mineral-rich western states—and over 60% of

Alaska" are comprised of federal lands. *Id.* at 26. These federal minerals are critical to the energy transition, but NEPA delays may preclude their development.

Providing affordable, reliable, and safe electricity is paramount for electric cooperatives. A resilient and reliable electric grid that affordably keeps the lights on is the cornerstone of American social, economic, energy security, and national security needs. However, the U.S. is facing a number of challenges to maintaining reliable electricity, including significant increases in electricity demand[3] and a series of policy decisions and rulemakings that are forcing the premature and disorderly retirement of electricity generation assets that provide essential reliability services and balance energy reserves. The Energy and Commerce Comm., *Chairs Rodgers and Duncan Question FERC on Power Plant Retirements and Grid Reliability Issues* (Jan. 5, 2024), http://bit.ly/3Z5iswt. These obstacles can be added to significant delays and challenges with supply chains which are contributing to an unprecedented shortage of the most basic machinery and components essential to ensure the continued reliability of the electric grid, *see generally* The U.S. Gov't Accountability Office, GAO-23-106180, *ELECTRICITY GRID, DOE Could Better Support Industry Efforts for*

3. Achieving net-zero economy-wide emissions by 2050 could require a 480% increase in generation capacity compared to capacity today. Elec. Power Rsch. Inst., *LCRI Net-Zero 2050: U.S. Economy-Wide Deep Decarbonization Scenario Analysis, Executive Summary* (Mar. 9, 2023), https://bit.ly/4e37vQ9. Electrifying other sectors of the economy could require a three-fold expansion of the transmission grid and up to 170% more electricity supply by 2050. Nat'l Acads. of Sci., Eng'r, & Med., *Accelerating Decarbonization of the U.S. Energy System* at 170 (2021), https://bit.ly/3MrsNeG.

Ensure Adequate Transformer Reserves (Aug. 2023), http://bit.ly/4dYu7kS, and overly lengthy and excessively complex NEPA and permitting processes that too often are delaying or preventing infrastructure projects from moving forward, Michael Bennon & Devon Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, 53 Envtl. L. Rep. 10836, 10850 (Oct. 2, 2023).

In the construction and housing sector, unrestrained NEPA review hurts Americans' ability to afford homes. A "nationwide shortage of roughly 1.5 million housing units [makes] it increasingly difficult for American families to afford to purchase or rent a home." Nat'l Ass'n of Home Builders (NAHB), *NAHB Announces 10-Point Plan to Tame Shelter Inflation, Ease the Housing Affordability Crisis* (May 1, 2024), https://bit.ly/4dBUlK6. Delayed permits put home ownership out of reach by driving up the costs of construction. For example, NEPA reviews for federal permits required under the Clean Water Act and Endangered Species Act for housing development projects can often be delayed for years. During that time, "builders' capital is tied up and accumulating interest expenses and other carrying costs even before one shovelful of dirt is moved." NAHB, *Alleviating Permitting Roadblocks* (May 2024), https://bit.ly/4fY0hih. Further, building material prices have "spiked," driven by greater demand and tighter domestic supply chains. NAHB, *Fixing Building Material Supply Chains and Easing Costs* (May 2024), https://bit.ly/3Xra3lS. NEPA delays to federal timber and mineral material sales aggravate the shortage and increase dependance on foreign supplies. *Id.* Finally, home builders are adversely affected by delays in infrastructure projects that are necessary to develop vibrant communities.

For manufacturers, longer federal permitting times mean less reliable and affordable energy with increased costs, more supply chain disruptions, and delays in permits for new manufacturing plants. U.S. manufacturers are hampered in global competition when it takes "10 or 15 years to approve urgently needed projects" while "approval can take a fifth of that time in other countries that still adhere to high standards." Nat'l Ass'n of Mfrs., *Energy Permitting Reform Act Will Help Unlock the Full Potential of Manufacturing Industry, Is Critical for Competing with China* (July 31, 2024), https://bit.ly/4fWANBI.

In short, unfettered agency NEPA reviews and unchecked litigation threaten all of the U.S. economy, including traditional and renewable energy projects; pipelines for traditional energy, hydrogen, and carbon capture and storage; critical mineral mines and processing facilities; semiconductor and battery manufacturing labs; interstate transmission lines; hydroelectric and nuclear power plants; highways and railroads; housing and urban development projects; and manufacturing.

When attempting NEPA regulatory reform in 2020, the Council on Environmental Quality quoted: "Perhaps surprisingly, there have been thousands of NEPA suits. It might seem strange that NEPA's seemingly innocuous requirement of preparing an EIS has led to more lawsuits than any other environmental statute." 85 Fed. Reg. 43,304, 43,310 n.40 (July 16, 2020). And yet there is nothing surprising about this at all. Where federal courts in key circuits are unwilling to adhere to limits on NEPA review, a lawsuit alleging an agency's failure to consider far flung impacts up and down the causal chain

and outside of the agency's authority to regulate, control, or mitigate, is well worth the project opponents' efforts. And because agencies know they face this litigation risk, they will continue to expand the scope, time, and length of reviews in a futile effort to "litigation-proof" their NEPA documents, regardless of the American public's urgent need for timely and predictable federal decisionmaking.

CONCLUSION

Lack of guardrails on NEPA presents one of the most pressing problems for American businesses today. The circuits that hear the most NEPA cases have endorsed an interpretation of *Public Citizen* that reads any meaningful limit out of the decision. This interpretation transforms NEPA from an informational tool to a permitting roadblock rendering it nearly impossible for an agency to anticipate and analyze every conceivable impact that may occur "but for" the agency's decision. The Court should resolve this misinterpretation of its precedent and clarify that an agency's obligation to analyze impacts under NEPA ends at the limit of its regulatory authority.

Respectfully submitted,

Andrew Wheeler
Sarah Bordelon
Holland & Hart LLP
505 Ninth Street NW,
Suite 700
Washington, DC 20004

Tina R. Van Bockern
Holland & Hart LLP
555 Seventeenth Street,
Suite 3200
Denver, CO 80202

Hadassah M. Reimer
Counsel of Record
Holland & Hart LLP
645 South Cache Street,
Suite 100
Jackson, WY 83001
(307) 734-4517
hmreimer@hollandhart.com

Counsel for Amici Curiae

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