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VIA E-FILE

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: *Seven County Infrastructure Coalition – Rail Construction & Operation Exemption –
In Utah, Carbon, Duchesne, And Uintah Counties, Utah*, STB Docket No. FD 36284

Dear Ms. Brown:

I have attached for e-filing Eagle County, Colorado's Reply and Cross-Motion in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Nathaniel H. Hunt

Nathaniel H. Hunt

Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36284

**SEVEN COUNTY INFRASTRUCTURE COALITION
RAIL CONSTRUCTION & OPERATION EXEMPTION
IN UTAH, CARBON, DUCHESNE, AND Uintah COUNTIES, UTAH**

**REPLY AND CROSS-MOTION FOR SUPPLEMENTAL
ENVIRONMENTAL IMPACT STATEMENT AND APPLICATION**

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Dated: January 12, 2026

This filing contains color images

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INTRODUCTION

Eagle County, Colorado opposes the Seven County Infrastructure Coalition’s (Coalition) Motion to Reaffirm Exemption Decision (Coalition Motion) filed on November 13, 2025, and moves for the Board to fully comply with the Court of Appeals for the D.C. Circuit’s ruling by (1) conducting a supplemental environmental impact statement (EIS) and (2) reversing its original exemption decision and requiring the Coalition to submit an application for the construction and operation of a new rail line in Utah’s Uinta Basin (Railway).

The Coalition Motion starts with the unfounded assertion that the Board’s “original decision was right,” and that the Board must simply reaffirm that decision on remand. Coalition Motion at 2. In doing so, the Coalition asks the Board to ignore the D.C. Circuit’s binding decision finding “significant” deficiencies and violations of multiple federal laws in the Board’s authorization of the Railway. *Eagle Cnty. v. STB*, 82 F.4th 1152, 1196 (D.C. Cir. 2023). These deficiencies include numerous violations of the National Environmental Policy Act (NEPA) for failure to consider reasonably foreseeable impacts to downline Colorado communities and resources, violations which the Supreme Court did not address in its review of *Eagle County* and which remain binding on the Board. *See id.* at 1181–85, 1196; *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 197 (2025) (Sotomayor, J., concurring). And, as the Coalition admits, the Board must address the numerous violations of the ICC Termination Act (ICCTA) and the Endangered Species Act (ESA).¹ The D.C. Circuit’s decision makes plain that this cannot be done without gathering and analyzing additional data and information regarding downline train derailments and accidents, wildfire risk, and impacts on the Colorado River.

¹ Eagle County adopts the Center for Biological Diversity’s (Center) arguments regarding the ESA in the Center’s Reply Brief.

Eagle Cnty., 82 F.4th at 1187–88, 1191–96. The Board must address its “fail[ure] at every juncture” in granting an exemption for the Railway by reversing its original exemption decision. *See id.* at 1192. The only way the Board can cure its ICCTA violations by requiring the Coalition to submit necessary, additional information required under the Board’s standard application procedures. *See id.* at 1193.

Accordingly, Eagle County opposes the Coalition Motion and requests the Board (1) complete a supplemental EIS and (2) reverse its original exemption decision and order the Coalition to file an application for construction and operation of the Railway.

BACKGROUND

This proceeding stems from the Coalition’s petition for exemption to construct and operate the Railway, an 88-mile rail line in Utah’s Uinta Basin that would result in up to nine daily oil trains traveling through Eagle County, Colorado, along an existing Union Pacific Railroad rail line (UP Line). In January 2021, the Board approved the Coalition’s petition for exemption subject to environmental review, and in December 2021, the Board granted the petition, incorporating its approval of the Final Environmental Impact Statement (Final EIS) prepared for the Railway. *Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—In Utah, Carbon, Duchesne, & Uintah Cntys., Utah*, FD 36284, (STB served Jan. 5, 2021) (Interim Decision); Final Environmental Impact Statement, *Seven Cnty. Infrastructure Coal.*, FD 36284 (STB served Sept. 15, 2021) (Final EIS); *Seven Cnty. Infrastructure Coal.*, FD 36284 (STB served Dec. 15, 2021) (Final Approval).

Eagle County and the Center sought review of the Final Approval at the D.C. Circuit. In August 2023, the Court held that the Final Approval violated NEPA, the ESA, the ICCTA, and the federal Administrative Procedure Act (APA). *Eagle Cnty.*, 82 F.4th at 1196. Among its

holdings, the D.C. Circuit held that the Board’s ICCTA violations involved a “fail[ure] at every juncture” to properly consider the relevant rail transportation policies under 49 U.S.C. § 10101 that the Board must consider in issuing an exemption for the Railway (Rail Policies). *Id.* at 1192; 49 U.S.C. § 10502(a).

The Supreme Court accepted the Coalition’s petition for certiorari of the D.C. Circuit’s decision based on the single question: “whether NEPA required the Board to study the environmental impacts of oil wells and refineries that lie outside the Board’s regulatory authority.” *Seven Cnty.*, 605 U.S. at 197 (Sotomayor, J., concurring). In May 2025, the Supreme Court reversed only this singular part of the D.C. Circuit’s decision. *Id.* at 202–03. On October 17, 2025, upon the Coalition’s request, the D.C. Circuit remanded the Final Approval to the Board without vacatur.

On remand, the Coalition attempts to rewrite the D.C. Circuit’s ruling invalidating the Final Approval. The Coalition urges the Board to reaffirm its previous conclusion that the Rail Policies support granting an exemption, *see* Coalition Motion at 19–33—which the D.C. Circuit definitively rejected—and to ignore the “numerous” violations of NEPA and the ESA identified by the D.C. Circuit that were not part of the Supreme Court’s review or decision in *Seven County*, Coalition Motion at 3–5, 11–19. *See Eagle Cnty.*, 82 F.4th at 1188, 1196.

On November 27, 2025, the Board granted Eagle County and the Center additional time to reply to the Coalition Motion. Eagle County now submits this timely Reply and Cross-Motion, requesting that the Board conduct a supplemental EIS under NEPA, reverse its original exemption decision, and require the Coalition to submit an application for the Railway under the ICCTA.

ARGUMENT

I. The Board must complete a supplemental EIS to address the D.C. Circuit’s binding NEPA holdings.

The D.C. Circuit’s holdings in *Eagle County* require the Board to conduct a supplemental EIS pursuant to NEPA to consider the particularized risk of accidents, increased wildfire risks, and the impacts on the Colorado River along the UP Line downline of the Railway (collectively, the Downline Impacts). *Eagle Cnty.*, 82 F.4th at 1181–85. Contrary to the Coalition’s interpretation of *Seven County*, the Supreme Court did not mention the D.C. Circuit’s holdings on Downline Impacts. The *Seven County* decision does not change the Board’s obligation to address the serious gaps in information and analyses identified in *Eagle County*, which is binding as the law of the case. Given the work required to comply with the D.C. Circuit decision, the new information that must be gathered, and that the Final EIS is now almost five years old, a supplemental EIS is essential.

A. All of the D.C. Circuit’s holdings remain in effect and binding on the Board except for the “one part” considered in *Seven County*.

The Coalition Motion misrepresents the Supreme Court’s ruling in *Seven County* by claiming that the Court “plainly affirmed the Board’s NEPA review,” Coalition Motion at 4. The Supreme Court did not consider, much less reverse, the D.C. Circuit’s determination that the Board violated NEPA in failing to adequately consider the Downline Impacts.

The Coalition’s argument that the Supreme Court “reversed” the D.C. Circuit’s judgment, *see id.* at 3, finds no support in the Coalition’s petition for certiorari or *Seven County* itself. Neither the petition nor the Supreme Court opinion mention any of the Railway’s Downline Impacts, including “oil spills,” “wildfire,” or “train accidents,” on the environment, the communities through which oil trains will traverse daily, and the Colorado River. *See* Coalition Pet. for Writ of Cert. at i, *Seven Cnty.*, 605 U.S. 168 (2025) (No. 23-975) (Mar. 4, 2024) (Cert.

Pet.);² *Seven Cnty.*, 605 U.S. at 168–203. Rather, the Coalition’s statement of the question presented focused exclusively on the D.C. Circuit’s order to the Board “to study the local effects of oil wells and refineries that lie outside the Board’s regulatory authority.” Cert. Pet. at i. The Board itself, which opposed the petition for certiorari, did not even address the Downline Impacts in its brief at the Supreme Court, stating that the “only aspect of the court of appeals’ decision that is properly before this Court” was the “upstream and downstream consequences of oil and gas development in its environmental impact statement.” Br. Federal Resp’ts Supp. Pet’rs at 40, *Seven Cnty.*, 605 U.S. 168 (2025) (No. 23-975) (Aug. 28, 2024).

The Supreme Court made clear its review solely focused on whether “[u]nder NEPA, the Board’s EIS did not need to address the environmental effects of upstream oil drilling or downstream oil refining.” *Seven Cnty.*, 605 U.S. at 174. The Coalition argues that the scope of this ruling somehow included the Downline Impacts, Coalition Motion at 5, none of which the Supreme Court ever mentioned, let alone addressed. Instead, as the Concurrence noted, “[p]etitioners asked [the Supreme] Court to review only *one part* of the D.C. Circuit’s decision: whether NEPA required the Board to study the environmental impacts of oil wells and refineries that lie outside the Board’s regulatory authority.” *Id.* at 197 (Sotomayor, J., concurring) (emphasis added). The Supreme Court “granted review to decide that question.” *Id.* When the Supreme Court held that “[t]he Board did not need to evaluate potential environmental impacts of the *separate upstream and downstream projects*,” it described “projects upstream” as “future oil drilling in the Basin,” and “projects downstream” as “highly regulated oil refineries along the Gulf Coast.” *Id.* at 191 (majority opinion) (emphasis added); *see also id.* at 174. The Supreme

² The *Seven County* docket can be accessed at <https://www.supremecourt.gov/docket/docketfiles/html/public/23-975.html>.

Court did not review the Board's consideration of the Downline Impacts, and therefore the D.C. Circuit's holdings on those impacts remains binding.

B. The Board must conduct a comprehensive NEPA review on remand.

The Coalition argues that the Board's NEPA review was "vindicated" by the Supreme Court in *Seven County*, but it does not demonstrate how *Seven County* would actually change the D.C. Circuit's findings on Downline Impacts. Coalition Motion at 3–5.

No doubt, the Supreme Court's decision clarifies the scope of NEPA review and the extent of deference afforded to agencies under NEPA. But applying the holding makes clear that (1) the Downline Impacts are indirect effects within the scope of *this* Railway project, as the Board itself concluded, and (2) the Board's previous Downline Impacts assessment did not reach the "broad zone of reasonableness" required to deserve substantial deference. *See Seven Cnty.*, 605 U.S. at 183. Thus, the Supreme Court's holdings do not alter the D.C. Circuit's analysis of the Downline Impacts.

The Supreme Court made clear that "the environmental *effects* of the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time." *Id.* at 187 (emphasis in original). The Supreme Court's qualification is necessary. Ignoring all environmental *effects* outside of the Railway's physical footprint would make it impossible to comply with NEPA's requirement of a detailed statement on the "reasonably foreseeable environmental effects of the proposed agency action," 42 U.S.C. § 4332(C)(i), because environmental effects are not confined to a project's physical boundaries.

Put differently, the Supreme Court's directive to "consider the environmental effects of [an] 88-mile railroad line's construction and operation," *Seven Cnty.*, 605 U.S. at 189, does not mean, as the Coalition asserts, that consideration of effects stops at mile 88 of the Railway, *see*

Coalition Motion at 4. As the Board noted in its briefing before the D.C. Circuit, “[t]he Board’s regulations require examination of the ‘indirect or down-line impacts’ in rail construction projects and establish thresholds for environmental review of such impacts.” Final Br. Resp. STB at 40, *Eagle Cnty.*, 82 F.4th 1152 (2023), ECF No. 1990826 (Mar. 20, 2023) (quoting 49 C.F.R. § 1105.7(e)(11)(v)). The Downline Impacts are effects of the Railway construction and operation, and not a separate project under the Supreme Court’s standard. The Downline Impacts are those “that could occur along *existing* rail lines as a result of increased rail traffic originating or terminating on the line to be constructed.” *Id.* Although the Board did consider some Downline Impacts, the D.C. Circuit deemed the Board’s analysis significantly incomplete and arbitrary. *See Eagle Cnty.*, 82 F.4th at 1181–85.

The Railway’s operations—which the Board attempted, but failed, to evaluate adequately—are, as the Board itself noted in previous briefing before the D.C. Circuit, “project-related rail traffic.” Final Br. Resp. STB, *supra* at 42. The Railway’s rail operations do not constitute a new “project” outside of the Board’s jurisdiction—*this* Railway will cause the Downline Impacts, even though they “extend outside the geographical territory of the project or might materialize later in time.” *Seven Cnty.*, 605 U.S. at 187. Thus, the Coalition’s broad contention that “[t]he Supreme Court’s decision in *Seven County* plainly affirmed the Board’s NEPA review” finds no support in the Supreme Court’s decision. Coalition Motion at 4.

Further, the Supreme Court’s instruction to grant agencies greater deference in drawing a “manageable line” in their NEPA review does not change the D.C. Circuit’s finding of NEPA violations in the Board’s Final EIS, *Seven Cnty.*, 605 U.S. at 182, 189–90. The Board has drawn a manageable line that includes “down-line” effects in its own environmental regulations. *See* 49 C.F.R. § 1105.7(e)(11)(v). The Board and its predecessor, the Interstate Commerce

Commission (ICC), drew the line to include consideration of downline effects decades ago and has long adhered to this scope in its environmental review. *See* Environmental Considerations; Revision of NEPA Guidelines, 45 Fed. Reg. 79810, 79814 (Dec. 2, 1980) (adopting “down-line” effects requirement in ICC rulemaking); *see, e.g., Burlington N. R.R.—Constr. & Operation Exemption—Macon & Randolph Cntys., MO*, FD 32229, 1993 ICC LEXIS 179, at *23 n.24 (ICC served Sept. 17, 1993) (“[The Commission’s Section of Energy and Environment] also considers ‘down line’ environmental impacts to existing routes that would connect with and carry the new traffic generated because of the proposed construction and operation.”); *Dakota, Minn. & E. R.R.—Constr.—Powder River Basin*, 6 S.T.B. 8, 12–13 (2002) (holding, in reviewing a rail construction project, that examining “potential environmental impacts resulting from increased rail operations” is “consistent with [the Board’s] approach in similar cases.”); *Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087, slip op. at 9 (STB served Apr. 28, 2008) (describing the scope of an EIS to “include . . . an appropriate analysis of the impacts of [the project’s] increased train traffic on the existing line”).

Although the Board “possess[es] discretion and must have broad latitude to draw a ‘manageable line’” for the scope of its NEPA review, *Seven Cnty.*, 605 U.S. at 182, the Board must ensure that its review of factors within that line, once drawn, is not arbitrary. In *Eagle County*, the D.C. Circuit reviewed the Board’s evaluation of Downline Impacts precisely in step with the substantial deference standard discussed by the Supreme Court. The D.C. Circuit stated, “while great deference is owed to the Board’s technical judgments, it still must provide a reasoned explanation for its rulings.” *Eagle Cnty.*, 82 F.4th at 1179 (cleaned up) (citation omitted). Even giving substantial deference to the “manageable line” drawn by the Board itself, *see Seven Cnty.*, 605 U.S. 182, the Board “entirely failed to consider . . . important aspect[s]” of

the downline rail traffic that the Board chose to include in its review of the Railway project, *see Cigar Ass’n of Am. v. FDA*, 132 F.4th 535, 541 (D.C. Cir. 2025) (citation omitted). Here, the Board should follow its own precedent and comprehensively evaluate the Downline Impacts that the D.C. Circuit held the Board was required to consider.

C. The deficiencies in the Board’s Final EIS require additional environmental analyses through a supplemental EIS.

The Coalition contends that the Board can comply with the D.C. Circuit’s ruling “without much work,” Coalition Motion at 6, but the Board’s failure to properly consider reasonably foreseeable downline effects of the Railway reflect a significant void of relevant, up-to-date information and analyses, and not something fixable with mere cursory explanation. The D.C. Circuit held that the Final EIS completed by the Board in August 2021—which is now over four years old—was deficient in its analysis of numerous environmental effects including a failure to consider Downline Impacts on the Colorado River. *See Eagle Cnty.*, 82 F.4th at 1184–85.

Under the Board’s regulations, the Board must prepare a supplemental EIS to address these environmental effects as “significant new and relevant circumstances or information.” 49 C.F.R. § 1105.10(a)(5). To comply with the D.C. Circuit’s ruling and ensure the Board’s decisionmaking is fully informed under NEPA, the Board must conduct a supplemental EIS to include information gathered and analyses conducted concerning the Downline Impacts that the Final EIS failed to evaluate. *See Mayo Found. v. STB*, 472 F.3d 545, 549 (8th Cir. 2006) (preparing on remand a supplemental EIS that was subject to public notice and comment).

The Coalition’s argument that there is no need to address the D.C. Circuit’s NEPA holdings, *see* Coalition Motion at 5, and that the Board “should not respond to the D.C. Circuit on its own terms,” *id.* at 10, ignores the binding effect of *Eagle County* as the law of the case. *See Wis. Dep’t of Transp.—Pet. for Declaratory Order—Common Carrier Status of Certain*

Operations in the State of Wis., Finance Docket No. 32717, slip op. at 3 n.8 (STB served Dec. 8, 1997) (applying “[t]he law of the case doctrine,” which “precludes a reexamination in subsequent judicial or administrative proceedings of issues of law decided on appeal, explicitly or by necessary implication.”); *see also Univ. of Colo. Health at Mem.l Hosp. v. Burwell*, 164 F. Supp. 3d 56, 62 (D.D.C. 2016) (“[B]y the law of the case doctrine . . . ‘where litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.’” (citation omitted)).

The D.C. Circuit unequivocally held that the Board failed to consider the Downline Impacts that would result from adding up to 9.5 daily oil trains on the UP Line. These included failures to consider particularized risk of downline accidents, increased downline wildfire risks, and the impact on the Colorado River. *Eagle Cnty.*, 82 F.4th at 1181–85. All three of these impacts would be caused by “the transport of waxy crude oil produced in the Uinta Basin,” which is undisputedly “the Railway’s predominant and expected primary purpose.” *Id.* at 1166. These Downline Impacts that the Board failed to analyze require a comprehensive analysis in a supplemental EIS on remand. The Coalition’s dismissiveness regarding any additional analysis of Downline Impacts is unconvincing.

1. The Board must fully analyze the impacts of oil trains operating downline along the Colorado River.

The Board failed to consider *any* Downline Impacts of operating oil trains within feet of the Colorado River, with the D.C. Circuit noting that the Board’s EIS “concededly fails altogether to mention the Colorado River.” *Id.* at 1184. Specifically, the D.C. Circuit found that “there is no evidence here that the Board even considered the potential impacts on water resources downline of running up to 9.5 loaded oil trains a day on the [UP] Line—about 50% of which abuts the Colorado River.” *Id.* Below is a photograph from April 2024 of train cars on

the UP Line in Colorado next to the Colorado River, reflecting how practically any accident or derailment on these segments will implicate the Colorado River.³



Colorado’s top environmental protection agency warned the Board twice that the Colorado River is a “sensitive river system,” the “most important river in the Southwest United States,” and that it “could be affected by any spills that may occur from incidents associated with the new rail traffic induced by the [Railway].” Letter from Sean Hackett, Energy Liaison, Colorado Department of Public Health & Environment, to Joshua Wayland, STB, *Seven Cnty. Infrastructure Coal.*, FD 36284, Document No. EI-26690 (Aug. 5, 2019); Director of Environmental Programs, Colorado Department of Public Health & Environment, to Joshua Wayland, STB, *Seven Cnty. Infrastructure Coal.*, FD 36284, Document No. EI-26511 (May 9, 2019). However, the Board conducted no analysis of the potential impacts to the Colorado

³ Photograph of UP Line along Colorado River. Hugh Carey, Photograph, *in* Jason Blevins, *Uinta Basin Railway Supported with U.S. Supreme Court Ruling that May Push More Crude Through Colorado*, The Colorado Sun (May 29, 2025, 10:21 AM), <https://coloradosun.com/2025/05/29/uinta-basin-railway-supreme-court-waxy-crude/>.

River. The Board’s evaluation of water resources in Utah in Section 3.3 of the Final EIS makes no reference to downline water resources such as the Colorado River, its tributaries, lakes, wetlands, and other waters, even though the record indicates the unique significance and sensitivity of the Colorado River.

The Coalition offers no new facts or evidence to fill that void. Rather, the Coalition responds by downplaying the Board’s prediction of “one downline accident each year” and by pointing to Uinta oil’s purported “candle-like” quality. Coalition Motion at 2, 8. However, the Coalition’s attempt to gloss over a huge gap in the Board’s environmental review by touting waxy oil as cleanup friendly highlights one of the many impacts to the Colorado River that was not analyzed. Importantly, the Board has concluded that the waxy crude oil, which has the consistency of shoe polish, “is toxic,” has “negative effects on the environment,” and “persist[s] in the environment for a longer time relative to other non-waxy oil,” Final EIS at 3.3-30, but did not apply or consider those findings in connection with risks to the Colorado River.

Further, in attempting to minimize the Downline Impacts by presenting Uinta Basin oil as innocuous, the Coalition does not account for the fact that the Board’s current accident statistics undercount because they do not consider that longer and heavier trains are more accident-prone. Researchers—including those cited by the Board, *id.* at App. E, E-5—have established that “train length and train weight are likely to affect derailment rate, derailment severity, and the corresponding risk in a route-specific risk analysis.” Xiang Liu et al., *Analysis of Derailments by Accident Cause: Evaluating Railroad Track Upgrades to Reduce Transportation Risk*, 2261 Transp. Rsch. Rec. 178, 182 (2011). In fact, “longer than average trains”—i.e., those comprised of 65 cars or longer on Class 3 tracks—“will have higher car mile train derailment

probabilities.” Robert T. Anderson & Christopher P.L. Barkan, *Railroad Accident Rates for Use in Transportation Risk Analysis*, 1863 Transp. Rsch. Rec. 88, 92, 96 (2004).

The reality of any accident or spill involving a Uinta oil train along the UP Line will look far different than what the Coalition attempts to portray, and will place considerable burden on local, state, and federal resources to head off the worst of potentially devastating impacts to the water source of farmers, ranchers, businesses, and millions of people.⁴ Emergency responders will need to coordinate multi-agency efforts to reach accidents and spills immediately in often difficult terrain and under difficult Rocky Mountain conditions. If a spill into the Colorado River occurs, hazmat units will need to deploy measures such as absorbent booms or other trapping mechanisms to capture spilled oil. Downstream users, including potable water intake facilities and farmers and ranchers, will need to be notified to monitor and potentially treat water or to close intakes. Recreationalists, anglers, and rafters may need to avoid affected areas, impacting the tourism industry and numerous other related industries that rely on tourism. Scientists will need to monitor and study the impact on local ecologies both in the short and long term before the full impact is known, and mitigate the impacts to riverine ecosystems, if mitigation is even possible. The Board’s supplemental EIS must analyze these Downline Impacts resulting from rail derailment as mandated by the D.C. Circuit.

The potential environmental damage and costs borne by local communities are not imaginary. On the snowy evening of December 2, 2025, a two-locomotive unit transporting five railcars loaded with coal on the UP Line derailed into a Colorado River tributary, demonstrating

⁴ See **Attachment A**, Br. of City of Glenwood Springs et al., *Eagle Cnty.*, 82 F.4th 1152 (2023), ECF No. 1971132 (Oct. 28, 2022), which is the Amicus Brief filed at the D.C. Circuit by downline communities in Colorado. The Amicus Brief highlights in detail the potential risks and impacts to downline communities the Railway presents.

the costs and impact of even “minor” derailments predicted to regularly occur because of the Railway.⁵ This accident involved a small fraction of the railcars of a proposed Uinta oil train,⁶ yet weeks later only a tenth of fuel spilled into the river had been recovered.⁷



⁵ Stephanie Butzer, *After Train Derails Into Gunnison River, Denver7 Is Following Up on Possible Impacts to Aquatic Wildlife*, KOAA News (Dec. 7, 2025 9:38 AM), <https://www.koaa.com/news/environment/after-train-derails-into-gunnison-river-denver7-is-following-up-on-possible-impacts-to-aquatic-wildlife>.

⁶ Photograph of the incident described. Photograph, Grand Junction Fire Department, in Stephanie Butzer, *After Train Derails Into Gunnison River, Denver7 Is Following Up on Possible Impacts to Aquatic Wildlife*, KOAA News (Dec. 7, 2025 9:38 AM), <https://www.koaa.com/news/environment/after-train-derails-into-gunnison-river-denver7-is-following-up-on-possible-impacts-to-aquatic-wildlife> (last visited Jan. 7, 2026).

⁷ Christa Swanson, *Cleanup continues in Colorado after train derails into Gunnison River, spills over 8,000 gallons of fuel*, CBS Colorado (Dec. 20, 2025 6:56 PM), <https://www.cbsnews.com/colorado/news/fuel-spill-cleanup-train-derails-gunnison-river-colorado/>.

The conditions of an accident like this one belie the idea that only “a smaller amount [of crude will] enter[] the river,” or that “floating chunks” could be “easily removed by hand and with assistance from a boom.” Coalition Motion at 9. In reality, cleaning up tens or even hundreds of thousands of gallons of shoe polish-like substance—let alone if it is spilled in a remote stretch of the fast-flowing Colorado River in the middle of a winter night—will be like un-ringing a bell.

The Board cannot ignore the facts and turn a blind eye to the consequences of oil contamination of the Colorado River headwaters simply because the Railway can technically serve any type of shipper. *Cf.* Coalition Motion at 9–10. The Board’s Office of Environmental Analysis already concluded that there are no “reasonably foreseeable” plans to ship commodities other than oil and frac sand on the Railway. Final EIS at 3.13-13. Indeed, in other matters, the Board *has* considered the likelihood of accidents based on the particular context of the proposed project, including the type of commodity transported by rail. *See* Draft Environmental Impact Statement, App. D, D-1, *San Jacinto Rail Ltd.—Constr, Exemption—Build-Out to the Bayport Loop Near Houston, Harris Cnty, TX*, FD 34079 (STB served Dec. 6, 2002) (evaluating “the potential impacts associated with hazardous materials transportation by identifying the types of hazardous materials transported by rail in the project area, calculating the likelihood of a release, and examining the potential consequences of a release.”).⁸

⁸ A railroad’s common carrier obligation “has nothing to do with the Board’s authority to license rail construction and its obligation to consider environmental impacts when doing so.” Final Approval, slip op. at 33 n.17 (Bd. Member Oberman, dissenting) (emphasis in original). *Cf.* Coalition Motion at 9. Under the ICCTA, the Board must consider a railway project’s environmental impacts as part the “environmental” Rail Policies, including the policies to protect “public health and safety” and promote “energy conservation” (discussed below). *See Eagle Cnty.*, 82 F.4th at 1191 (citing 49 U.S.C. § 10101(8), (11), (14)); 49 U.S.C. § 10502(a)(1).

2. The Board must further evaluate the risks of rail accidents on the UP Line and consider updated information.

The Board failed to take the necessary “hard look” at the significant increase in rail accidents along the UP Line, given the increased rail traffic the Railway will cause. *Eagle Cnty.*, 82 F.4th at 1181–82. The Coalition argues that the Board need not consider the enhanced risks that miles-long loaded oil trains traveling through mountainous terrain create, *see* Coalition Motion at 7, but this is precisely what the D.C. Circuit faulted the Board for not considering or explaining, *Eagle Cnty.*, 82 F.4th at 1182. Specifically, the D.C. Circuit identifies “specific record evidence noting that there is increased risk from loaded, miles-long oil trains traveling through difficult mountainous terrain . . . , evidence [the Board] effectively ignored in the Final EIS.” *Id.* The Board must address this evidence and other input from consulting agencies and the public in the supplemental EIS process.

The Coalition seeks to deflect from the D.C. Circuit’s holding by contending that the Council on Environmental Quality’s (CEQ) NEPA regulation requiring explanation why certain accident rates were unavailable has been repealed. Coalition Motion at 7 (citing NEPA regulation, 40 C.F.R. § 1502.22). However, the Coalition’s argument fails because the Coalition filed the exemption for the Railway in 2019, and the regulations that were in effect at that time are the regulations that apply. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998) (observing generally that “administrative rules will not be construed to have retroactive effect unless their language requires this result”); 5 U.S.C. § 551(4) (defining agency “rule” as having “future effect”). The CEQ made clear that “removing the CEQ’s regulations does not constitute a retroactive change.” Removal of NEPA Implementing Regulations, 90 Fed. Reg. 10610, 10614 (interim rule Feb. 25, 2025). CEQ’s final revocation NEPA regulations does not retroactively invalidate reliance on those regulations for ongoing matters that were previously

subject to them. *See* Removal of Implementing Regulations, 91 Fed. Reg. 618, 625 (Jan. 8, 2025) (referring to interim rule’s explanation).

Regardless of which regulations apply, the Board must still address, in a supplemental EIS, the administrative record evidence showing increased accidents involving long oil trains traveling through difficult mountainous terrain. *See* Final EIS at App. E, E-2. It also must consider any new evidence and information compiled in the past six years since the Board completed its rail accident analysis in 2020. *Friends of Animals v. U.S. BLM*, 514 F. Supp. 3d 290, 303 (D.D.C. 2021) (“The length of time that passes between an agency’s conduct of a NEPA analysis and the contemplated action may bear on the adequacy of that analysis, particularly if conditions have changed in material respects.” (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373–74 (1989)); *Stand Up for Cal! v. U.S. Dep’t of Int.* 410 F. Supp. 3d 39, 59 (D.D.C. 2019) (observing that its prior decision in *Lemon v. McHugh*, 668 F. Supp. 2d 133 (D.D.C. 2009) requiring a supplemental EIS was reasonable, where the final EIS “came six years before the plan was ultimately approved” and was a “stale review”). That analysis should include data compiled by the Federal Railroad Administration through the end of 2025 that provides extensive details on rail accidents including type of accident, cause of accident, and the county in which each accident occurs, which would include Eagle County and counties across Colorado that the Railway’s oil trains will traverse.⁹

⁹ *See* Federal Railroad Administration Office of Safety Analysis, Safety Data, <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/query/TrainAccidentsFYCYWithRates.aspx>.

3. The Board must conduct a comprehensive review of wildfire risks downline with additional input from downline communities in Colorado.

The Board failed to consider downline wildfire risks, a failure the D.C. Circuit described as “utterly unreasoned.” *Eagle Cnty.*, 82 F.4th at 1183–84. The Coalition attributes the Board’s conclusion that additional oil-laden trains do not constitute a “new ignition source” to “just poor phrasing,” Coalition at 7–8, but the Coalition does not address the D.C. Circuit’s holding that “historic data relied upon purportedly showing that train-induced wildfire has a low probability is not dispositive, especially given the concededly “low volume of rail traffic” on the UP Line currently. *Eagle Cnty.*, 82 F.4th at 1184.

The Board must conduct a sufficient analysis of wildfire risks to downline communities with input from those communities to comply with the D.C. Circuit’s holding, including consideration of the local communities’ capacity to respond to a wildfire caused by an oil train. Failure to conduct this analysis would not only violate NEPA but it would also undermine the Board’s obligation to consider public health and safety in regulating the interstate rail network. *See* 49 U.S.C. § 10101(8).

II. Compliance with application requirements is necessary to ensure adequate consideration of the Rail Policies under the ICCTA.

To comply with the D.C. Circuit’s finding that the Board “failed at every juncture” to “properly consider and apply the relevant Rail Policies in its determination on the Coalition’s exemption petition,” *Eagle Cnty.*, 82 F.4th at 1192 (cleaned up), the Board must reverse its exemption decision for the Railway. Rather than exempting the Railway, the Board must require that the Coalition pursue the authorization of the Railway pursuant to the ICCTA’s application procedure. The Board cannot cure the flaws in its previous exemption determination based on the incomplete record or on the new assertions made in the Coalition Motion. The Board’s

application procedure, with full analysis by the Board, is essential to ensure the Rail Policies are not undermined and the previous proceeding's failures are not repeated. *See id.*

A. The Coalition mischaracterizes the binding nature of the D.C. Circuit's holdings, to which the Board must adhere under the law of the case doctrine.

The D.C. Circuit's holdings are binding on the Board and the Coalition's request that the "Board should explicitly reject" those holdings is without legal merit. Coalition Motion at 24.

The D.C. Circuit's decision is the law of the case, and its holdings left untouched by *Seven County*, including its ICCTA holdings, are binding on the Board. *See Wis. Dep't of Transp.*, FD 32717, slip op. at 3 n.8; *Burwell*, 164 F. Supp. 3d at 62. The Supreme Court's ruling regarding one specific aspect of the D.C. Circuit's decision does not affect the D.C. Circuit's other holdings with which the Board must comply. *See United States v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997) ("[T]he scope of the 'law of the case' doctrine is limited to issues that were decided either explicitly or by necessary implication—the mere fact that an issue could have been decided is not sufficient to foreclose the issue on remand." (cleaned up) (citation omitted)).

The Coalition could have sought review of the D.C. Circuit's ICCTA's holdings before the Supreme Court, as it did with one other holding, if it wished to contest them. It did not, and the Board should reject the Coalition's request to ignore the binding D.C. Circuit ruling.

B. The Board must regulate where necessary to fulfill the Rail Policies and the public convenience and necessity, notwithstanding the presumption in favor of rail construction.

The Coalition asks the Board to ignore the D.C. Circuit's holding that the Board failed to adequately address the fourth, fifth, eighth, eleventh, and fourteenth statutory Rail Policies because of the presumption favoring rail construction and exemptions. *Eagle Cnty.* 82 F.4th at 1192–96; Coalition Motion at 19–20. The Board should reject the Coalition's argument because

any such presumption does not negate the Board’s statutory obligation to ensure the Railway is consistent overall with the Rail Policies.

First, the Coalition’s reliance on a presumption in favor of construction is misplaced here where the proposed construction is not a run-of-the-mill construction project, but one that raises “serious” and “significant” questions about its alignment with the Rail Policies. *Eagle Cnty.* 82 F.4th at 1192–95. Under the APA’s standard of review, the D.C. Circuit held that the Board’s “consideration of the [Railway’s] impacts and benefits was cursory at best,” that the Board “failed to fulfill its obligation [to consider environmental impacts] under the ICCT Act,” and that the Board “failed to ‘supply an acceptable rationale’ as to its consideration of the relevant Rail Policies.” *Id.* at 1194–96 (citations omitted). These legal errors rendered the Board’s weighing of the Railway’s benefits and impacts inherently flawed, even given the presumption in favor of rail construction. *See* 49 U.S.C. § 10901(c). The presumption in Section 10901(c) neither cures nor trumps the numerous legal errors in the Final Approval, including the Board’s failure to address relevant Rail Policies.

Second, the Coalition’s focus on the presumption misses the whole point of the Board’s existence and authority over new rail construction. The Board and its predecessor, the Interstate Commerce Commission (ICC), have always served to regulate the railroad industry in the public interest, or as the ICC’s primary architect put it, “the [now Board] will be regarded as the people’s attorneys.” 36 Cong. Rec. 3477 (1886) (statement of Sen. Shelby Collum).¹⁰ From the ICC’s establishment in 1887, concerns about “overbuilding and misbuilding” of railroads, *id.* at 3476, and the “the construction of unnecessary railroads for speculative purposes,” S. Rep. No.

¹⁰ Available at <https://www.congress.gov/49/crecb/1886/04/14/GPO-CRECB-1886-pt4-v17-6.pdf>.

49-46, at 49 (1886),¹¹ animated the federal public interest considerations concerning railroad regulation. Congress granted the ICC the authority to approve railroad construction based on the premise “that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public.” *Tex. & Pac. Rail Co. v. Gulf, Colo. & Santa Fe Ry. Co.*, 270 U.S. 266, 277 (1926) (identifying a basis for passage of the Transportation Act, 1920). This obligation is embedded in the Board’s statutory authority that was passed down from the ICC, including through the continued authority over construction and in the statutory rail transportation policy, which guide Board decisions. 49 U.S.C. §§ 10101, 10502(a)(1); *Coal Exps. Ass’n of the U.S., Inc. v. United States*, 745 F.2d 76, 94 n.22 (D.C. Cir. 1984) (“The national transportation policy must guide the [Board] in all its decisions.” (citation omitted)); *see also* 49 U.S.C. §§ 10901(c) (requiring new construction applications to satisfy the public convenience and necessity), 11101(a) (imposing the common carrier obligation on railroads).

While subsequent federal legislative amendments over the past 50 years to deregulate the railroad industry have eased the burden of demonstrating the need to regulate railroad construction, they have not, as the Coalition’s arguments suggest, abrogated the Board’s responsibilities to consider the public interest in the Board’s decisionmaking. *See* Coalition Motion at 20. Indeed, the Board’s legal obligations require scrutiny of new construction and, where necessary, require additional regulation or even denial of a request. *See e.g., Ozark Mountain R.R.—Const. Exemption*, FD 32204, 1994 ICC LEXIS 271, at *11 (ICC served Dec. 15, 1994) (denying request to construct and operate a new rail line because it “warrants more detailed scrutiny than would be afforded under an exemption” based on “significant opposition” from affected property owners who raised questions about the line’s financial viability and

¹¹ Available at https://www.govinfo.gov/app/details/SERIALSET-02357_00_00-002-0046-0002.

environmental impacts), *reopening denied* (ICC served Sept. 25, 1995); *see also Great Lakes Basin Transp., Inc.—Rail Constr. & Operation—in Rock Cnty., Wis.*, FD 35952, slip op. at 4 (STB served Aug. 31, 2017) (rejecting construction application where “[t]he financial information submitted by [the applicant] . . . cannot reasonably be relied upon by the Board to determine the financial condition of the applicant under the statutory criteria.”); *see also Tex. Cent. R.R. & Infrastructure, Inc.—Pet. for Exemption—Passenger R. Line Between Dallas and Houston, Tex.*, FD 36025 slip op. at 14 (STB served July 16, 2020) (denying petition for exemption and requiring an application for construction of a new rail line where “[c]ommenters . . . have raised significant questions surrounding the financial feasibility of the proposed rail project.”).

The D.C. Circuit’s holding that the Railway raised “significant” and “serious” questions regarding the application of the five Rail Policies cannot be brushed aside by reliance on a presumption in favor of new rail construction, as the Coalition urges. *Eagle Cnty.*, 82 F.4th at 1192–95; Coalition Motion at 19–20. The presumption in favor of rail construction is overcome here, as it has been in similar contexts. *See, e.g., Tex. Cent.*, FD 36025, slip op. at 14.

C. The deficiencies in the Board’s previous consideration of the Rail Policies require denial of the exemption and that the Coalition seek an application.

Under the D.C. Circuit’s ruling, the Board is required to subject the Railway to the full application process to fulfill the Board’s duties under the Rail Policies. The Coalition itself admits, as it must, that exemption is appropriate only “so long as the application of § 10901 is not necessary to carry out the rail transportation policy.” Coalition Motion at 20 (quoting *Cal. High-Speed R. Auth.—Constr. Exemption—Merced, Madera & Fresno Cntys., Cal.*, FD 35724, slip op. at 18 (STB served June 13, 2013)); *see also* 49 U.S.C. § 10502(a)(1). Otherwise, an application is required. 49 U.S.C. § 10502(a)(1). Here, the D.C. Circuit rejected the Board’s

explanation for why it did not require an application in light of the Board's precedent as "unavailing" "[g]iven the record evidence identified by Petitioners." *Eagle Cnty.*, 82 F.4th at 1193. This holding precludes the Board from making the same finding again, requires reversal of the Board's exemption decision, and requires the Board to process the Railway pursuant to its application procedures.

The Coalition asserts that "[t]he Board does not ignore the rail transportation policy when it uses an exemption," *see* Coalition Motion at 21, but in *this* case the D.C. Circuit held that the Board "failed to fulfill its obligation under the [ICCTA]" and "ignore[d] Congress's command that it make expert and reasoned judgments that 'properly consider[] and appl[y]' the relevant Rail Policies prior to granting an exemption from its full application requirements." *Eagle Cnty.*, 82 F.4th at 1195 (citation omitted). Thus, the Coalition's contention that the D.C. Circuit does not "hint that more process is 'necessary,'" to carry out the Rail Policies, Coalition Motion at 22, is refuted by the D.C. Circuit's holding that the Board failed to consider numerous issues relevant to the Rail Policies. Those issues include: available economic information questioning the Railway's viability that would be produced with an application, *Eagle Cnty.*, 82 F.4th at 1192; 49 C.F.R. § 1150.6; the particular attributes of loaded oil trains in causing downline rail accidents; the potential resulting risk of increased fire in wildfire-prone territory; and adverse impacts on the Colorado River, *Eagle Cnty.*, 82 F.4th at 1181–85. The multiple ways in which the Railway undermines relevant Rail Policies based on the existing record demands the Board's reversal of its exemption decision and additional regulation by the Board pursuant to Rail Policy requirements in 49 U.S.C. § 10502.

D. Application of the Rail Policies to the Railway demonstrates an application is necessary.

1. Pervasive questions about the publicly subsidized Railway’s financial viability require additional scrutiny and regulation through the Board’s application process.

The Railway constitutes a massive, environmentally disruptive undertaking that is now projected to cost at least \$2.4 billion, most of which appears likely to be publicly subsidized through tax-free private activity bonds. *See* Coalition Motion at 26. The project will now cost the equivalent of all the federal funding directly provided in 2024 to 122 freight rail improvement projects in 41 states and Washington, D.C. through the federal government’s Consolidated Rail Infrastructure and Safety Improvements (CRISI) Program.¹² Thus, the Railway represents an outsized investment that warrants consideration of its viability both because of its size and because of clear signs that the Railway is a risky investment that may fail. The Board should require the Coalition to submit an application to allow an assessment of whether the Railway will ensure development of a sound rail system.

The Board is statutorily obligated to deny an exemption if regulation is necessary to carry out the Rail Policies, 49 U.S.C. § 10502, including “to ensure the development and continuation of a sound rail transportation system” and “to foster sound economic conditions in transportation.” 49 U.S.C. §§ 10101(4), (5). The D.C. Circuit held the Board did not “provide adequate attention to comments questioning the financial viability of the Railway,” in considering the fourth and fifth Rail Policies, including the Coalition’s own economic study of

¹² Press Release, U.S. Dep’t of Transp., Investing in America: Biden-Harris Administration Announces \$2.4 Billion in New Rail Projects to Improve Safety, Strengthen Supply Chains and Grow America’s Freight and Passenger Rail Networks (Oct. 29, 2024), <https://www.transportation.gov/briefing-room/investing-america-biden-harris-administration-announces-24-billion-new-rail-projects>.

the Railway (Economic Study). *Eagle Cnty.*, 82 F.4th at 1192 (internal quotations omitted). And the D.C. Circuit rejected the Board’s contention that there was no need for the Board to assess financial viability as “run[ning] counter to the fourth and fifth Rail Policies relied on” by the Board in its approval of the Railway. *Id.* For these reasons alone, the Board must reverse its exemption decision.

On remand, the Coalition argues that the D.C. Circuit’s “skepticism does not fit the rail policy’s text,” but the Coalition’s argument is based on selectively paraphrasing the text of the ICCTA to create an unwritten “policy favoring ‘development’ of the rail system—including construction of new rail lines—[which] must favor an uncertain new project that would bring ‘effective competition’ over no project at all. 49 U.S.C. § 10101(4).” Coalition Motion at 24. Notably, the Coalition skips over language of Section 10101(4) making clear Congress does not approve just any rail line. The ICCTA provides that it is federal policy to “ensure the development and continuation of a *sound* rail transportation system,” not a blindly unrestrained one. 49 U.S.C. § 10101(4) (emphasis added). Thus, the D.C. Circuit’s holding does not “raise[] the bar for approving new rail construction,” as the Coalition contends. Coalition Motion at 23–24. That bar is set by the ICCTA, and the D.C. Circuit was correct not just in interpreting the Board’s statutory obligations but also following the Board’s own precedent in arriving at this conclusion. *See Eagle Cnty.*, 82 F.4th at 1192–93 (citing *Great Lakes Basin Transp.*, FD 35952 and *Tex. Cent.*, FD 36025).

The Coalition seeks without avail to distinguish the precedent identified by the D.C. Circuit in which the Board has considered financial issues in approving an exemption. Coalition Motion at 25–26. The D.C. Circuit held the Board’s discounting of the Economic Study ran contrary to its own precedent, pointing to the Board’s decision in *Texas Central* and stating that

“the Board cannot ignore and, in the past, has not ignored serious concerns about financial viability in determining the transportation merits of a project.” *Eagle Cnty.*, 82 F.4th at 1192. The Coalition’s argument that “*Texas Central* led to a different result because [of] the applicant’s [questionable] transparency in disclosing ‘increased costs and funding sources,’” Coalition Motion at 24, is refuted by the Board’s *Texas Central* decision, which cannot be meaningfully distinguished from this case.

The Board in *Texas Central* held that “[c]ommenters here have raised significant questions surrounding the financial feasibility of the proposed rail project, namely the increasing projected cost of the project and the funding sources for these costs.” *Tex. Cent.*, FD 36035, slip op. at 14. The Board concluded that “scrutiny under the application process here is appropriate given the magnitude of the project, the questions about increased costs and funding sources, the substantial public interest, and the potential impact on numerous landowners.” *Id.* at 15. Although the Coalition argues that “[t]he facts in *Texas Central* led to a different result,” Coalition Motion at 25, the Railway raises the same issues that were addressed in *Texas Central*, as correctly recognized by the D.C. Circuit. *See Eagle Cnty.*, 82 F.4th at 1193.

First, the Coalition’s Economic Study raised questions about the feasibility of the Railway, *even before* the costs nearly doubled from over \$1 billion to current cost of at least \$2.4 billion. *Compare* Final Approval, slip op. at 30 (Bd. Member Oberman, dissenting) *with* Coalition Motion at 26. The Coalition’s indication that it will seek publicly subsidized private activity bonds up to \$2.4 billion also raises questions about the source of that funding, just as the “potential pursuit of public financing” in *Texas Central* raised questions. *Tex. Cent.*, FD 36025, slip op. at 13; *see also Cal. High-Speed R. Auth.*, FD 35724, slip op. at 29 (Vice Chairman

Begeman, dissenting) (arguing that a rail line funded with nearly \$3.5 billion in federal money “clearly merits our robust scrutiny in this case”).

Second, there is substantial public interest in these proceedings, as indicated by the multiple local, state, and national representatives that have weighed in on the proceedings. *See Tex. Cent.*, FD 36025, slip op. at 13. *Third*, the potential to affect communities, numerous downline property owners, and millions of residents is enormous. Communities who depend on the Colorado River—including water suppliers, ranchers, farmers, and recreational outfitters—would likely be affected by a spill in the Colorado River, which the UP Line abuts. *Fourth*, the Railway is an order of magnitude greater than the average freight rail construction project.¹³

Additionally, the Coalition’s suggestion that the D.C. Circuit’s conclusion was somehow “[c]ontrary” to *Texas Central*’s consideration of market factors is belied by the Board’s decision to require an application of Texas Central even while recognizing the role of the market. Coalition Motion at 24–25; *Tex. Cent.*, FD 36025, slip op. at 15. The D.C. Circuit ruling was consistent with *Texas Central* in noting that the Board cannot completely abdicate its responsibility to “market forces” because “[a]t bottom, a project that is in doubt of ever materializing or continuing to operate cannot accomplish any of the transportation merits identified by the Board.” *Eagle Cnty.*, 82 F.4th at 1193.

The Coalition coaxes the Board to make “sure the D.C. Circuit understands the Board’s precedent” by “mak[ing] clear that a project’s financial viability is properly left in the hands of the financial markets,” Coalition Motion at 25, but the D.C. Circuit ruled that the Board diverted

¹³ *See supra* note 9 (citing 2024 federal CRISI funding to rail projects). The CRISI program provides \$2.4 billion in funding to be used for 122 rail projects, including a project to reconstruct 69 miles of track in North Carolina, to lay new track in Georgia and Michigan, and numerous other projects across the country.

from its precedent, and rejected its reason for doing so, *Eagle Cnty.*, 82 F.4th at 1193. The D.C. Circuit rejected the Coalition’s argument as “run[ning] counter to the fourth and fifth Rail Policies.” *Id.* at 1192. The Board is not “free” to adopt a new rule that runs contrary to the ICCTA and Board precedent, or the law of the case here, as the Coalition argues. Coalition Motion at 26; *see Wis. Dep’t of Transp.*, FD 32717, slip op. at 3 n.8.

The D.C. Circuit’s determination that the Board must engage with evidence of the Railway’s financial viability, including the findings of the Economic Study, some of which the Coalition redacted, *see Eagle Cnty.*, 82 F.4th at 1192, requires a comprehensive analysis of that information, not just more explanation as the Coalition suggests. *See* Coalition Motion at 23. And on remand, there is good reason to further scrutinize the financial soundness of the Railway in the record. The Economic Study, which the Coalition received in 2018 but never submitted to the Board with its petition or in reply, revealed a highly attenuated financial outlook for the Railway that was overwhelmingly reliant on the highly volatile and largely unknown market for Uinta waxy crude oil. *See* Interim Decision, slip op. at 14–15 (Bd. Member Oberman, dissenting).

The Economic Study reflected that non-oil commodities on the Railway “would be insignificant in comparison to oil,” *id.* at *28–29, slip op. at 15, contradicting the Coalition’s apparent attempt to broaden the beneficiaries of the Railway to “include[e] farmers, ranchers, [and] manufacturers.” Coalition Motion at 32. And the Coalition has represented to the public that the Railway will *not* replace existing oil truck traffic, undercutting the Coalition’s assertions to the contrary in the Coalition Motion. *Compare* Coalition Motion at 26, *with* Argyle Wilderness Preservation Alliance Reply in Opp’n to Pet. for Exemption at App. 1, at 7, *Seven Cnty. Infrastructure Coal.*, FD 36284 (filed July 7, 2020). These contradictions require the

Board to further investigate the Railway under up-to-date economic conditions, including a complete reassessment of the Economic Study that is now over seven years old.

Although the Coalition touts an authorization of \$2.4 billion in taxpayer-subsidized “private activity bonds to fund construction of the project,” Coalition Motion at 26, the heavy reliance on public subsidy “raise[s] significant questions surrounding the financial feasibility of the proposed rail project, namely the increasing projected cost of the project and the funding sources for these costs,” *Tex. Cent.*, FD 36025, slip op. at 14. Nothing in the Coalition’s new factual assertions suggest that Uinta waxy crude is less susceptible to the volatility that plagues oil markets. The Coalition’s observation that new capacity has been accommodated through increased truck traffic and transload terminals, Coalition Motion at 26, which have significantly increased capacity in the last several years,¹⁴ undermines rather than reinforces any need for the Railway. The appropriate context for the Coalition to submit such evidence is through the Board’s application procedure.

Given the financial questions raised, an application is the proper process under which the Railway may be properly assessed. The Board’s application requirements include disclosures that would facilitate the Board’s and the public’s understanding of how the Railway will be financed and would address serious questions raised by the Coalition’s Economic Study. *See* 49 C.F.R. §§ 1150.6 (requiring information regarding the proposed financing for construction, balance sheet, full costs of the proposal, and projected net income), 1150.3(d), (f), (g) (requiring information on stock ownership and ownership relation to the served industry), 1150.4(b), (g)

¹⁴ U.S. Dep’t of Int., Environmental Assessment, at App. B-2, Wildcat Loadout Facility Right-of-Way Amendment, DOI-BLM-UT-2025-0015-EA (July 2025), https://eplanning.blm.gov/public_projects/2039088/200657441/20137832/251037812/Final%20Final%20Wildcat%20EA%207.3.25.pdf.

(requiring a description of the amount of traffic and general description of the commodities and industries served), 1150.5 (requiring an operating plan, including traffic projection studies).

With the proper application process in place, the Board can readily address the questions of financial viability through a more established process tailor-made to assess this very question.

2. The Railway undermines Rail Policies related to public health and safety and safe working conditions.

The D.C. Circuit held that the Railway raises “incredibly significant environmental effects” that undermine Rail Policies related to public health and safety. *Eagle Cnty.*, 82 F.4th at 1194. These include increased risks of rail accidents downline, increased wildfires, and adverse impacts to the Colorado River serving millions of people, all of which the D.C. Circuit held the Board failed to properly factor in its consideration under the ICCTA. *Id.* at 1181–85, 1194. Even with the Board’s currently incomplete data and analysis on impacts of projected accidents, it is clear that a train derailment, oil spill in the Colorado River, or wildfire from an errant spark will negatively impact downline communities. *See generally Attachment A* (Amicus Brief by downline communities). The D.C. Circuit’s binding decision requires the Board to meaningfully factor these impacts into its consideration of the Rail Policies.

Fixated with the “environmental” label, the Coalition attempts to relitigate the D.C. Circuit’s holding by arguing that the statutory language of Rail Policies eight and eleven do not implicate impacts caused by Uinta oil train accidents and spills. *See Coalition Motion* at 28–29. However, the Board’s own interpretation of the plain language of the statute and the D.C. Circuit’s holding reject that argument.

First, the Coalition’s interpretation of the Rail Policies contradicts the Board’s application of Rail Policies eight and eleven. The Board itself stated to the D.C. Circuit, “[t]he 15 broad Rail Transportation Policy factors clearly overlap with environmental issues, in

particular §§ 10101(8) (public health and safety) and 10101(11) (safe working conditions).”

Final Br. Resp. STB, *supra* at 74–75. This has been the Board’s approach in these very proceedings. For instance, in the Interim Decision, where addressing “environmental” concerns implicating public health and safety, the Board stated that “[t]he Board takes important concerns such as these seriously, and they will be examined as part of OEA’s environmental review and further examined by the Board in a subsequent decision considering the environmental impacts of the project.” Interim Decision, slip op. at 9–10. In the Final Approval, the Board stated that “as discussed below and in the Final EIS, nothing in the environmental record raises significant concerns regarding § 10101(8) and (11).” Final Approval, slip op. at 5; *see also id.*, slip op. at 24–25 (referring to the record and the Final EIS in evaluating Rail Policies eight and eleven).

The Board’s consideration of the Railway’s environmental impacts in the Rail Policies is consistent with other proceedings, where the Board has considered impacts such as surface and groundwater contamination to be relevant to its Rail Policy analysis. *Brookhaven Rail LLC—Constr. & Operation Exemption—In Suffolk County, N.Y.*, FD 36398 et al., slip op. at 6 (STB served Oct. 23, 2020) (denying an exemption and requiring an application for construction of a railroad facility transferring waste based on Rail Policy eight).

The precedent that the Coalition cites in support of its narrow reading of Rail Policies to exclude consideration of issues that can be labeled “environmental” is inapposite. *See* Coalition Motion at 28 (citing *Am. Rocky Mountaineer, LLC—Pet. for Exemption from 49 U.S.C. Subtitle IV*, Docket No. FD 36468 (STB served May 28, 2021); *Middletown & N.J. R.R., LLC—Lease & Operation Exemption—Norfolk S. Ry.*, FD 35412 (STB served Sept. 23, 2011); *Ken Tenn Reg’l Rail Partners, Inc.—Constr. & Operation Exemption—In Fulton Cnty., Ky & Obion Cnty., Tenn.*, Docket No. FD 36328 (STB served July 23, 2021)). The relevant factor in *American*

Rocky Mountaineer, which considered arguments under Rail Policies eight and eleven, was the “vague and speculative safety concerns” that a labor organization raised about the exemption of an excursion passenger rail operator on a common carrier rail line. *Am. Rocky Mountaineer*, FD 35412, slip op. at 2, 4–5. The Board’s consideration had nothing to do with whether Rail Policy eleven implicated issues that might also be considered “environmental.”

In another decision cited by the Coalition, *Middletown*, the Board rejected concerns raised about a Class III railroad operating on a line shared with Metro-North’s passenger commuter rail operations and did not address or even mention exclusion of “environmental” issues from consideration of the Rail Policies. *Middletown*, FD 35412, slip op. at 11–12. And in *Ken Tenn*, the Board found claims dissimilar to those here—that “the Line is redundant and unnecessary”—did not raise public health and safety concerns. *Ken Tenn*, FD 36328, slip op. at 6. In fact, the Board acknowledged the relevance of issues identified in its environmental review to its assessment of the Rail Policies—noting that its conclusions regarding applicability of the Rail Policies was “subject to the completion of environmental review.” *Id.*

Second, the D.C. Circuit’s decision—binding on the Board—holds that the “environmental policies” implicated impacts identified in the Final EIS, including risks like wildfire caused by oil train accidents, that the Board failed to properly evaluate in its consideration of the Rail Policies. *Eagle Cnty.*, 82 F.4th at 1192, 1194. To hear the Coalition tell it, the D.C. Circuit made the “environmental policy” designation out of whole cloth, Coalition Motion at 28–30, yet the Coalition did not raise this issue during the appeal. In reality, the D.C. Circuit merely used this label for shorthand to describe the Board’s own position and approach, which included “rel[ying] solely on its EIS” to consider Rail Policies eight, eleven, and fourteen. *Eagle Cnty.*, 82 F.4th at 1194. The D.C. Circuit found fault with *not* sufficiently

considering effects implicating both the environmental and public health and safety in its consideration of the Rail Policies. *Id.*

Accordingly, the Board should reject the Coalition’s contention that the risk of downline rail accidents, wildfires, and adverse impacts to the Colorado River do not implicate the Rail Policies. *See* Coalition Motion at 28–30. Instead, the reasonably foreseeable loaded oil trains traversing the fire-prone Rocky Mountains for hundreds of miles along the Colorado River is precisely what implicates public health and safety concerns that are the focus of Rail Policies eight and eleven.¹⁵

Under the D.C. Circuit’s ruling, the Board must adequately evaluate these impacts and their implications on public health and safety and worker safety after the impacts are fully analyzed. *See Brookhaven*, FD 36398, slip op. at 6. The Coalition relies on a self-serving verified statement by the Coalition’s Executive Director of three years, who asserts no expertise or background in railroad operations, railroad safety, railroad economics, or any other field, to support claims about the benefits of the Railway that contradict the Board’s own EIS and findings. *See* Coalition Motion at 27 (citing V.S. Heaton ¶¶ 11–12). Even assuming these assertions have some merit, it would be improper for the Board to accept them without proper vetting using the procedural tools that the Board has developed over decades to assess rail

¹⁵ The Coalition cites caselaw supposedly supporting its position that derailments and train accidents do not implicate Rail Policies eight and eleven, but the cited case is not analogous. *See* Coalition Motion at 28 (discussing *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 117–18 (2022)). Unlike the country-wide vaccine mandate that the Supreme Court held did not fit within the mandate of the Occupational Safety Health Administration in *National Federation*, avoidance of unsound operational conditions such as derailments and train accidents *is* within the Board’s “wheelhouse” as the Coalition has acknowledged. *See* Coalition Motion at 33. The Board, not any other agency, has exclusive jurisdiction over the interstate rail network, 49 U.S.C. § 10501, including approval of the Railway, *id.* § 10901, and it must consider the impacts of its authorization on public health and safety, *id.* §§ 10502, 10101(8), 10101(14). *National Federation* is therefore inapplicable.

projects. Based on the Board’s practice of combining consideration of Rail Policies concerning public health and safety with its environmental review, this would require conducting a supplemental EIS. Requiring the Coalition to submit an application and demonstrate the public convenience and necessity, along with providing a formal public comment opportunity, will better inform the Board about the public health and safety impacts of the Railway. *See* 49 C.F.R. §§ 1150.4(c), 1150.8, 1150.9, 1150.10(e)–(h).

3. The Board must consider the implications of building an oil train on the promotion of energy conservation.

Rail Policy fourteen requires consideration of federal policy “to encourage and promote energy conservation.” 49 U.S.C. § 10101(14). The D.C. Circuit held the Board “completely ignore[d]” the energy conservation policy. *Eagle Cnty.*, 82 F.4th at 1195. Thus, on remand, the Board must address how construction of the Railway, which is dedicated to extracting oil, encourages and promotes energy conservation.

Although the Coalition argues that the “simple” “fix” for the Board’s lack of consideration of Rail Policy fourteen is to merely consider diverted trucks, Coalition Motion at 27, the ICCTA’s broad statutory language does not support the Coalition’s restricted view of the Board’s authority to consider energy conservation policy, 49 U.S.C. § 10101(14). And even if the Board were to assume a narrow view that the energy conservation Rail Policy is reduced to truck diversions, changed circumstances reflects that the Railway *will not* divert trucks, because producers have made new investments that double down on trucking oil out of the Uinta Basin.¹⁶

¹⁶ *See supra* n. 14 (discussing approval of new truck-to-rail transloading facility along the UP Line). In the Final EIS, the Board determined that “overall” truck traffic would not be reduced by the Railway. Final EIS at 3.13.-12.

To the extent these assumptions have changed, they should be presented as part of an application that can be properly assessed by the Board and the public.

Nothing in Rail Policy fourteen restricts the Board's analysis of energy conservation to *how* the Railway is facilitating energy extraction while excluding the effect of *what* the Railway is facilitating, as the Coalition contends. Coalition Motion at 27. Here, the *what* the Railway is facilitating is germane to considering energy conservation because the *what* is all about energy, and the Board needs to take that into account. The Coalition argues that the energy conservation Rail Policy does not include "consideration of the product or commodity that the Uinta Basin Railway will carry," because "railroads 'cannot decline to provide "common carrier" transport based on the product or commodity to be carried.'" *Id.* n.5. This ignores the distinction between a *rail carrier's* common carrier obligation, 49 U.S.C. § 11101(a), and the *Board's* obligation to consider whether the "public convenience and necessity" of construction applications warrant approval, *id.* § 10901(c), and whether regulation is required to carry out the Rail Policies in issuing exemptions, *id.* § 10502(a)(1).

Moreover, the Board cannot ignore the Railway's purpose because it has direct bearing on the Rail Policies. This is reflected in other Board decisions where it factored what is being transported in its consideration of Rail Policies. *See e.g., Cal. High-Speed R. Auth.*, FD 35724, slip op. at 23 (factoring in transportation of passengers in assessing energy conservation Rail Policy); *see also Brookhaven*, FD 36398, slip op. at 6 (factoring transportation of waste in Rail Policies regarding approval of a rail facility).

Here, the entire purpose of the Railway is to increase production, transportation, refining, and consumption of a finite energy resource. *See Eagle Cnty.*, 82 F.4th at 1166, 1180.¹⁷ Under the ICCTA and the D.C. Circuit’s ruling, the Board must consider the impact of the Railway on energy conservation. *Ill. Com. Comm’n. v. ICC*, 787 F.2d 616, 629 (D.C. Cir. 1986) (faulting the ICC for failure to support a finding regarding Rail Policy fourteen, stating that “[a] finding utterly lacking in record support is arbitrary.”). To do so, the Board must rely on additional information that should be developed through a supplemental EIS and the Board’s application procedures, which require the applicant to support this analysis. *See* 49 C.F.R. § 1150.7.

E. The Board cannot properly weigh the Railway’s merits without compliance with the Board’s application requirements.

Only after the Board has filled in the gaps in the record regarding the economic risks and relevant Downline Impacts of the Railway and evaluated these under the ICCTA’s public interest mandate, can the Board weigh the Railway’s transportation merits and environmental impacts in issuing a decision on the Railway. *See Eagle County*, 82 F.4th at 1180. The D.C. Circuit held that the Board’s “paltry discussion” weighing the Railway’s impacts against the transportation merits failed to “compare both sides of the ledger.” *Id.* at 1195. Without further analyzing the questions of financial viability of the Railway raised by the Coalition’s Economic Study, and without an accurate understanding of the risks associated with hauling loaded oil trains hundreds of miles through the Rocky Mountains mere feet from the Colorado River, complying with the D.C. Circuit’s holding will not be possible. *See id.*

¹⁷ The Coalition’s assertion that much of the Uinta waxy crude oil would not be burned, Coalition Motion at 32 n.6, is unsupported in its own submissions to the Board and the Board’s previous analysis, and fails to take into account the fact that waxy Uinta oil could be blended with the light sweet oil produced in most of the rest of the country. *See* Seven Cnty. Infrastructure, *Uinta Basin Oil Pipeline Study*, at 11, 13–14 (Sept. 2017), <https://scic-utah.org/wp-content/uploads/2020/08/Uinta-Pipeline-Summary-Report.pdf>.

Requiring the Coalition to submit an application will enable the Board to properly weigh the transportation merits and environmental impacts and will enable the Board to analyze the Coalition's new claims that the Railway allegedly will benefit ranchers, farmers, and other industries beyond the waxy crude oil industry. *See* Coalition Motion at 32; 49 C.F.R. §§ 1150.3(d), (f), (g), 1150.4(b), (g). Only through the application process can the Board assess the Coalition's new claim that the waxy crude oil that the Railway will transport will not harm the downline environment and communities, including Eagle County. *See* Coalition Motion at 15; 49 C.F.R. § 1150.5. The requirements that the Railway meets the public convenience and necessity will allow the Board to weigh whether the "numerous" serious public health and safety and environmental issues support approval of a project with questionable financial viability. *See* 49 C.F.R. §§ 1150.4(c), 1150.8. Given the broad regional interests affected by the Railway, the Board's analysis would also benefit from the formal public notice and input afforded under the application process, *see* 49 C.F.R. §§ 1150.9, 1150.10(e)–(h), in contrast to the previous exemption process that provided *no* formal public comment period.

The Coalition urges the Board to ignore the D.C. Circuit's holding and eliminate consideration of its NEPA findings in weighing the Railway's transportation merits and environmental impacts, but this invitation is contrary to the Board's statutory obligations, precedent, and its own position in this case. As the D.C. Circuit held, "[t]he Board concededly has exclusive jurisdiction over the construction and operation of the railway, including authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." *Eagle Cnty.*, 82 F.4th at 1180. Environmental impacts, while identified through the Board's NEPA process, are ultimately considered under the Board's discreet authority to license and exempt railroads under the ICCTA. *Id.* at 1180, 1195 (discussing "[t]he

limited weighing of . . . environmental policies”). The D.C. Circuit’s holding on this matter is binding on the Board, not “wrong,” and cannot be “correct[ed]” by the Board as the Coalition urges. Coalition Motion at 30; *Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087 (Sub-No. 8), slip op. at 15 n.69 (STB served Nov. 8, 2012) (“[Petitioner] may not attempt to revisit the law of the case as established in the court’s decision by making again the same argument that was unsuccessful in court.”).

The Board itself agrees that weighing the Railway’s environmental impacts and benefits is an exercise of its statutory authority, including its obligation to consider the Rail Policies, “which include environmental considerations.” See Resp’t STB Resp. to Pet. For Reh’g at 16, *Eagle Cnty.*, 82 F.4th 1152 (2023), ECF No. 2026260 (Nov. 9, 2023). This is also reflected in the Board’s reliance on its Final EIS to consider certain Rail Policies. See Interim Decision, slip op. at 9–10; see also Final Approval, slip op. at 5, 24.

The Coalition previously agreed that “the Board could decline the project if the environmental harm caused by the railway outweighed its transportation benefits,” Cert. Pet. at 23 (cleaned up), yet now suggests that there is “no part” of the Rail Policies that implicate the Railway’s serious environmental consequences, Coalition Motion at 31. On remand, the Coalition now disputes the Board’s consideration of environmental impacts identified under its NEPA process into its weighing of approval of the Railway, distinguishing between “the Board’s NEPA role and its consideration of the transportation merits” because NEPA does not “require the agency to weigh environmental consequences in any particular way.” Coalition Motion at 30. But the Coalition confuses the roles of the two statutory regimes.

A fundamental purpose of the Board’s NEPA process is to assist it in executing its statutory decisionmaking authority and its discretion under the Rail Policies, including

considering environmental impacts affecting public health and safety, safe working conditions, energy conservation, and a sound transportation system. *See Seven Cnty.*, 605 U.S. at 173 (“[A]n agency may weigh environmental consequences as the agency reasonably sees fit *under its governing statute*.” (emphasis added)). Train accidents and their effects on the public and railway workers have bearing on the “operat[ion of] transportation facilities and equipment without detriment to the public health and safety,” 49 U.S.C. § 10101(8), as well as “safe and suitable working conditions,” 49 U.S.C. § 10101(11), that ultimately the Board must weigh. Contrary to the Coalition’s argument, the Board’s NEPA analysis is a critical component of the Board’s substantive decisionmaking under ICCTA and its analysis of the Rail Policies. *See Eagle Cnty.*, 82 F.4th at 1194.

CONCLUSION

The D.C. Circuit mandates the Board engage in further factfinding and analyses through a supplemental EIS and requires the Coalition to comply with application procedures to allow for an appropriate vetting of the questionable financials of the Railway. Accordingly, Eagle County opposes the Coalition Motion and cross-moves for the Board to (1) prepare a supplemental EIS and (2) reverse the original exemption decision and require the Coalition to submit an application for the Railway.

Respectfully submitted on January 12, 2026.

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CERTIFICATE OF SERVICE

I certify that on January 12, 2026, I caused a copy of the foregoing document to be served upon all parties of record in this proceeding by email.

/s/ Nathaniel H. Hunt

Nathaniel H. Hunt

Dated: January 12, 2026

ATTACHMENT A

**BRIEF OF AMICI CURIAE CITY OF GLENWOOD SPRINGS, TOWN OF MINTURN,
TOWN OF AVON, TOWN OF RED CLIFF, TOWN OF VAIL, ROUTT COUNTY,
BOULDER COUNTY, CHAFFEE COUNTY, LAKE COUNTY, AND PITKIN COUNTY
IN SUPPORT OF PETITIONERS**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Case Nos. 22-1019 & 22-1020 (*consolidated*)

EAGLE COUNTY, COLORADO,
Petitioner,
CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Petitioner

v.

SURFACE TRANSPORTATION BOARD, et al.,
Respondents,
SEVEN COUNTY INFRASTRUCTURE COALITION, et al.
Intervenors.

On Petitions for Review of Decisions of the Surface Transportation Board

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MINTURN, TOWN OF AVON, TOWN OF RED CLIFF, TOWN OF VAIL,
ROUTT COUNTY, BOULDER COUNTY, CHAFFEE COUNTY, LAKE
COUNTY, AND PITKIN COUNTY IN SUPPORT OF PETITIONERS**

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Parties. Except for the Amici Curiae filing this brief, all parties, intervenors, and amici appearing before this Court are listed in the petitions for review filed by Eagle County and the Center for Biological Diversity, et al. (“Center”).

Rulings Under Review. References to the rulings at issue appear in the petitions for review filed by Eagle County and the Center.

Related Cases. The two consolidated petitions for review under consideration here have not previously been before this Court or any other court. Amici Curiae are unaware of any other cases pending which involve substantially the same issues as this consolidated proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Amici Curiae City of Glenwood Springs, Colorado; Town of Minturn, Colorado; Town of Avon, Colorado; Town of Red Cliff, Colorado; Town of Vail, Colorado; Routt County, Colorado; Boulder County, Colorado; Chaffee County, Colorado; Lake County, Colorado; and Pitkin County, Colorado certify that none has a parent corporation or has issued stock of which 10% is owned by a publicly held corporation.

RULE 29 STATEMENT

Pursuant to D.C. Circuit Rule 29(b) and Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief, provided it does not exceed 5,500 words.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici Curiae certify that: (i) no party or party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person—other than Amici Curiae—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29 CERTIFICATE

Pursuant to D.C. Circuit Rule 29(d), counsel for Amici Curiae City of Glenwood Springs, Colorado; Town of Minturn, Colorado; Town of Avon, Colorado; Town of Red Cliff, Colorado; Town of Vail, Colorado; Routt County, Colorado; Boulder County, Colorado; Chaffee County, Colorado; Lake County, Colorado; and Pitkin County, Colorado certifies that it is not aware of any other amicus brief filed in support of Petitioners Eagle County, Colorado or the Center for Biological Diversity, et al.

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GLOSSARY OF TERMS

Amici	Amici Curiae City of Glenwood Springs, Colorado; Town of Minturn, Colorado; Town of Avon, Colorado; Town of Red Cliff, Colorado; Town of Vail, Colorado; Routt County, Colorado; Boulder County, Colorado; Chaffee County, Colorado; Lake County, Colorado; and Pitkin County, Colorado
Board	Surface Transportation Board
CEQ	Council on Environmental Quality
Decision	Surface Transportation Board's December 15, 2021 Decision Approving the Railway
FEIS	Final Environmental Impact Statement
I-70	Interstate 70
NEPA	National Environmental Policy Act
Railway	Uinta Basin Railway

IDENTITY AND INTERESTS OF THE AMICI CURIAE

Amici Curiae (“Amici”) are Colorado communities located on or near Interstate 70 (“I-70”), which runs alongside the Union Pacific Line. This places them in what the Surface Transportation Board (“Board”) characterizes as the “downline study area” for the environmental analysis challenged in this case.

Glenwood Springs, Colorado is a home-rule municipality of roughly 10,000 residents in Garfield County. It sits in Glenwood Canyon at the confluence of the Roaring Fork and Colorado rivers. Surrounded by steep, rugged topography, Glenwood Canyon represents a natural mountain pass for both I-70 and the Union Pacific Line.

Glenwood Springs was established as a respite for visitors to the Rockies. Annually, 1.5 million people visit Glenwood Springs to enjoy the world’s largest mineral hot springs, whitewater rafting, kayaking, flyfishing, hiking, and skiing. The nearby White River National Forest sees “more than 10 million visitors per year” and “is the most-visited recreation forest in the country.” *About the Forest*, U.S. FOREST SERV., <https://bit.ly/3yQIeXa> (last visited Oct. 14, 2022). Glenwood Springs’ economy is heavily dependent on tourism. Nearly 40% of residents are employed in the leisure, hospitality, and retail sectors, which is double the national average.

Glenwood Springs has witnessed a marked rise in wildfires due to extreme drought conditions that are fast becoming the norm. In August 2020, a fire ignited one mile east of Glenwood Springs that burned for 130 days and consumed 32,631 acres. That fire—known as the Grizzly Creek Fire—caused severe upheaval, including area-wide evacuations, long-term closures of I-70, food and supply shortages, and substantial property damage. *See* Dan Boyce, *Colorado's Grizzly Creek Fire Shows Climate Change's Threat to Transport Routes*, NPR (Sept. 29, 2020), <https://n.pr/3DaUXqw>. It also cost the city “tens of millions of dollars” in lost tourism revenue. *Id.* (“[T]he two-week-long highway closure wreaked havoc on the Glenwood Springs economy during a tourism season already wounded by the pandemic,” with some businesses losing “two-thirds” of their revenue “once travelers were cut off from the area by the fire.”).

Containment of the fire did not end its devastation. After it stripped Glenwood Canyon's steep slopes of vegetation, rainstorms triggered landslides and debris flows, depositing burnt sediment and toxic ash into the Colorado and Roaring Fork rivers. Those “debris flows have had enormous impacts on the citizens of Colorado,” *id.*, including by threatening critical drinking water supplies. In turn, Glenwood Springs has diverted millions of dollars to protect its residents' water. CITY OF GLENWOOD SPRINGS, GLENWOOD SPRINGS WATER AND RESILIENCY AFTER THE GRIZZLY CREEK FIRE at 2, 6 (2021), <https://bit.ly/3ETpvOK> (outlining

turbidity monitoring, solids collection system, and other improvements made after the debris flows).

Debris flows caused repeated closures of I-70, which exacerbated the economic harm to local businesses. In fact, in 2021, “[n]early every strong storm triggered debris flows that carr[ied] mud, rocks, and woody material from steep side drainage basins into Glenwood Canyon,” damaging “portions of [I-70], as well as the Union Pacific [Line].” *Glenwood Canyon and Debris Flows*, U.S. GEOLOGICAL SURV. (Dec. 16, 2021), <https://on.doi.gov/3CJ8cx1>. The following photographs show the repeated annihilation of I-70 and the Union Pacific Line by post-fire debris flows in Glenwood Canyon.



(Fig. 1: Debris Flow Covering Eastbound Lanes of I-70 in Glenwood Canyon)¹

¹ *July 3, 2021: Grizzly Creek Flooding and Debris Flows*, U.S. GEOLOGICAL SURV. (Aug. 24, 2021), <https://bit.ly/3yTRqdA>.



(Fig. 2: Debris Flow Covering Westbound Lane of I-70)²

Later investigations concluded that the fire was “human-caused,” likely from a single ignition-point on I-70. *Wildfires in Glenwood Springs*, VISIT GLENWOOD SPRINGS, <https://bit.ly/3CIRi1E> (last visited Oct. 27, 2022). Consequently, communities in this extremely fire-prone region have become vigilant about potential ignition sources in the Canyon, including the Union Pacific Line. Of course, increasing the number of trains traveling along this line necessarily increases the risk of large-scale wildfires. *See infra* at 14, 22.

² *June 26 and 27, 2021: Grizzly Creek Flooding and Debris Flows*, U.S. GEOLOGICAL SURV. (Aug. 24, 2021), <https://bit.ly/3ETuAXd>.

Minturn, Colorado is a home-rule municipality of 1,100 residents, located two miles south of I-70 in Colorado's Vail Valley, near the Vail and Beaver Creek ski resorts, White River National Forest, and Holy Cross Wilderness. It was established as a strategic railroad town where workers "installed extra engines in railroad cars for more power over [the] steep mountain passes" characteristic of the Union Pacific Line. *Town Statistics and History*, TOWN OF MINTURN, <https://bit.ly/3COWWPE> (last visited Oct. 27, 2022). Today, however, Minturn relies heavily on travelers to keep local businesses and the town as a whole viable and vibrant. Indeed, Minturn suffered considerable harm to its economy as a result of the Grizzly Creek Fire, the ensuing debris slides, and the closures of I-70.

Avon, Colorado is a home-rule municipality located on I-70. It sits adjacent to Beaver Creek and eight miles west of the Vail Valley. It has a year-round population of 6,072, which increases significantly during the ski season. Avon is also a popular tourist destination for hiking, horseback riding, bicycling, kayaking, and rafting. Year-round tourism and winter recreation-related businesses account for a significant portion of the employment and earned income of area residents. As such, it remains vigilant about wildfires and river contamination that may detract from the area's appeal. Avon, for example, now spends roughly \$40,000 per year on a wildfire fuel source removal program.

Red Cliff, Colorado is a town of 300 residents nestled between Beaver Creek and Vail. It sits along the Colorado Scenic Byway (Highway 24), ten miles south of I-70. Residents and tourists alike enjoy mountain biking, cross-country skiing, snowmobiling, kayaking, fly fishing, rock climbing, and hiking with fantastic wildflower viewing, all within and around Red Cliff. Like nearby towns, a single wildfire and its effects—including drinking water impacts, landslides, debris flows, and road closures—can cripple Red Cliff’s tourism-based economy for years.

Vail, Colorado is a home-rule municipality located on I-70 with a year-round population of 4,835 that is largely employed in the outdoor recreation and tourism economy. It hosts the eponymous Vail Ski Resort, one of the busiest and highest-ranked ski resorts in the United States. The town has taken an active role in preserving open space and protecting water quality, as many residents and visitors alike travel to areas on the Union Pacific mainline to raft, fish, and sightsee.

Even without the added risk of oil-laden trains, high-elevation communities, like Vail and its fellow Amici, have seen “a near *tripling* of fire activity” in their region. *Fund Your Free Five*, TOWN OF VAIL, <https://bit.ly/3Dieu70> (last visited Oct. 27, 2022) (emphasis added). Given that it already has a “significant exposure to the risks of wildfire,” *id.*, any incident caused by the Uinta Basin trains would have devastating consequences for Vail’s local economy and citizens.

Routt County, Colorado has over 25,000 residents and extends north from Eagle County to the Wyoming border. The county seat is the City of Steamboat Springs, which shares its name with the world-renown ski resort located there. The resort is an outdoor-recreation and tourism hub, serving the public while providing significant economic benefit. The county's southern boundary lies within a couple of miles of the Union Pacific Central Corridor and any impacts from a fire or spill nearby would most certainly accrue to the county and its economy. While I-70 lies outside of Routt County, the recommended detour during all Glenwood Canyon closures (Highway 40) traverses the entirety of the county and has led to significant impacts to county infrastructure and to the health, safety, and welfare of its residents.

Boulder County, Colorado has 330,758 residents and lies in north-central Colorado on the eastern slopes of the Rocky Mountains. It contains forests, mountains, and canyons, which hold creeks that supply water to the cities, high plains, grasslands, and farmlands in the eastern part of the county. Boulder County's extensive efforts to protect the environment have attracted farming, business, recreation, and tourism revenue.

Since 1989, Boulder County has experienced at least nine major wildfires, including the 2021 Marshall Fire—the most destructive in Colorado history—which decimated more than 1,000 homes and over 30 commercial structures.

Although Boulder County is not on the I-70 corridor, part of the Union Pacific Line travels through it beyond the eastern entrance of the Moffat Tunnel.

Chaffee County, Colorado has 20,074 residents and is located south of the I-70 corridor in the Arkansas River Valley. Its residents rely heavily on the I-70 corridor to access recreational opportunities and critical medical services. Tourism is the largest job sector in Chaffee County and is crucial to its viability. Closures of I-70 cause severe negative impacts on Chaffee County's residents; the Grizzly Creek Fire rerouted a substantial portion of I-70 traffic through the much smaller Highways 50 and 285 traversing Chaffee County. This caused immense traffic delays, higher emergency-response costs, safety burdens, and tourism-related impacts to the county.

Lake County, Colorado has a population of 7,407 and is located just south of I-70. Its economy is deeply entwined with that of Eagle County and the Colorado River corridor, with over 70% of its workforce commuting to jobs in the region. Impacts from the Uinta Basin trains will be felt deeply in Lake County; any oil spill would likely undo decades of river-restoration work that has created Gold Medal trout fishing, and is the centerpiece of Lake County's increasingly recreation-and-tourism-based economy. Lake County will also be impacted by increased risks of wildfire, increased emergency-services training and response

costs, costs of upgrading and maintaining rail crossings on county roads, and general noise impacts.

Pitkin County, Colorado is located in Colorado's Central Mountains. It has a population of 17,548 that swells during peak tourism seasons. Home to the famed Aspen-Snowmass ski resorts, it attracts summer and winter visitors for skiing, fishing, hiking, rafting, and other outdoor pursuits. Many Pitkin County visitors enter or exit the area through the Union Pacific Central Corridor and the county values keeping those areas scenic and healthy. It was severely impacted during the Glenwood Canyon closures in 2020 and 2021, as many drivers were directed by online maps to traverse Independence Pass—a steep and at-times single lane road summitting over 12,000 feet—which stressed Pitkin County's transportation infrastructure in the extreme.

* * *

Situated on and near the I-70 corridor, Amici are directly impacted by the Board's December 15, 2021 Decision ("Decision") approving the Uinta Basin Railway ("Railway"). Ultimately, Amici—not the Board—must respond to accidents, wildfires, and the fallout from the Board's Decision. Amici have an obvious interest in understanding the full array of potential effects attending the Board's Decision, including what can be done to mitigate those impacts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici harbor serious concerns about the Board's environmental analysis conducted under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, and embodied by the Uinta Basin Railway Final Environmental Impact Statement ("FEIS"), STB Docket No. FD 36284 (Aug. 6, 2021).

The Board's FEIS is fatally flawed. It mischaracterizes the actual scope of the agency action and the effects analysis required by NEPA and the Council on Environmental Quality's ("CEQ") binding regulations. The FEIS then shrugs off entirely foreseeable impacts by erroneously labeling them mere "downline" effects, rather than direct or indirect impacts of the Board's Decision.

In turn, the Board avoided scrutinizing grave risks to communities near the Union Pacific Line, which will receive most of the new traffic the Decision creates. For example, the Board did not examine the elevated risks of train derailment, wildfire ignition, and economic losses in the I-70 corridor that follow inexorably from its Decision. As the Grizzly Creek Fire shows, a single spark can raze Glenwood Canyon. But the Decision at issue entails more than just a spark; the release of highly flammable crude oil could ruin this unique region for decades. The failure to analyze—let alone mitigate—that risk is arbitrary and capricious.³

³ Amici's legal contentions bolster arguments made in Petitioners' opening briefs. *See, e.g.*, Eagle County's Opening Brief at 27-42.

ARGUMENT

I. The Board Arbitrarily Ignored Impacts to the I-70 Corridor and Union Pacific Line by Classifying Them as “Downline” Impacts

When evaluating a “major Federal action[] significantly affecting the quality of the human environment,” an agency must “to the fullest extent possible” rigorously examine “the environmental impact of the proposed action,” including “any adverse environmental effects which cannot be avoided should the proposal be implemented” 42 U.S.C. § 4332(C). CEQ—the agency that administers NEPA—has promulgated regulations that are “*binding* on all federal agencies.” 40 C.F.R. § 1500.3 (emphasis added).⁴ Those regulations define “effects” of the action to include those “which are caused by the action and occur at the same time and place” and those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(a)-(b).

Where an agency has no delegated authority to deny authorization on the basis of downstream environmental harm, it need not analyze the indirect effects of its action because it cannot act on that information. *See Sierra Club v. FERC*, 867 F.3d 1357, 1372-73 (D.C. Cir. 2017) (citing *Sierra Club v. FERC*, 827 F.3d 36, 47-48 (D.C. Cir. 2016)). However, where an agency retains legal authority to avoid

⁴ The Board evaluated the Railway under the 1978 NEPA regulations. *See* Conservation Groups’ Opening Brief at 6 n.1.

the indirect effects of its action, the agency's decision is the legally relevant cause of those impacts and they fall squarely within NEPA's ambit. *Id.*

The Board's Decision is the "legally relevant cause" of increased rail traffic on the Union Pacific Line and all effects stemming from that increase via derailments, wildfires, and economic losses. The Board admits it had the authority to "deny the proposal[] or grant it with conditions (including environmental mitigation conditions)" after analyzing "the environmental impacts associated" with its proposed authorization of the Railway. *Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah*, FD 36284, slip op. at 6 (STB served Jan. 5, 2021).

Moreover, the "Union Pacific Railroad Company [] mainline from Kyune to Denver, Colorado [is] the *only* practical route for all rail traffic moving eastward from the Uinta Basin Railway"; therefore, "*all* rail traffic heading east would use this route." FEIS, App'x T at 37 (emphases added); *see also id.* (noting that 90% of the Railway's trains will travel east). The Board also acknowledges that the Kyune-Denver line "would experience more than two times the risk of an accident than under baseline (existing) conditions," this segment will see roughly one new accident per year "involving a loaded crude oil train," and "one in four accidents involving loaded trains would result in a release of crude oil." FEIS at 3.2-6, 7.

Yet, while the Board purported to analyze and mitigate a broad spectrum of risks *in Utah* (the project study area), including wildfires, soil erosion, landslides, and avalanches, *see* FEIS at 3.4-14, 3.5-21, it did not give the I-70 corridor in Colorado the same consideration. This, the Board accomplished by shunting the Union Pacific Line to its “downline” study area. *See, e.g., id.* at 3.2-7 (asserting that “downline impacts would occur on existing rail lines that are not owned or operated by” the project proponent such that “any potential increase in the risk of accidents in the downline study area would be beyond the Board’s control”). By labeling these impacts “downline,” FEIS at S-13—rather than actual effects of the agency’s Decision—the Board arbitrarily relieved itself of the legal duty to examine in-depth anything besides noise, air pollution, and roadway traffic. *See* 49 C.F.R. § 1105.7(e)(11)(v) (restricting the Board’s analysis of “down-line” impacts to noise, air pollution, and traffic concerns); FEIS at App’x C (citing 49 C.F.R. § 1105.7 in circumscribing the Board’s scope of review for the Railway’s downline impacts).

Regardless of whether the Board has jurisdiction or “control” over the Union Pacific’s Kyune-Denver line, NEPA does not excuse scrutiny of impacts along this corridor. *See Sierra Club*, 867 F. 3d at 1372-73 (holding that an agency’s lack of jurisdiction over downstream effects “d[oes] not excuse [an agency] from considering these indirect effects”). Nor can the regulations governing the Board’s

licensing decisions under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10901, negate the obligations imposed by NEPA and CEQ's binding regulations. This is because "NEPA sets a floor that agencies must comply with even if an agency's underlying statute . . . could be construed to set a lower one." *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 216 (D.D.C. 2022) (citing *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665-66 (D.C. Cir. 2011)).

Not only will communities along Union Pacific's Kyune-Denver line receive virtually all of the new traffic utilizing the Railway, *see* FEIS, App'x T at 37, but they will experience more accidents than communities inside the project study area. *See* FEIS at 3.2-6–3.2-7 (predicting 0.62-1.78 new annual accidents on the Kyune-Denver line, compared to 0.22-0.60 annual accidents in the project study area). Despite the serious risks to communities in the I-70 corridor, the Board flouted NEPA by disclosing and analyzing the impacts of its action in one affected location (the project study area in Utah) but not the location that will be *most affected* by the Board's Decision to authorize a massive increase in the number of flammable crude oil trains jostling through rugged, fire-prone Colorado terrain.

The interdependency of the Board's Decision and impacts to the Union Pacific Line and I-70 corridor is further evident from the Board's discussion of the "No Action Alternative." The Board explains that under the No Action Alternative, the "probability of a rail-related accident on existing rail lines in the downline

study area would not change from current conditions,” because there would remain “a low volume of [downline] rail traffic relative to the predicted traffic on the proposed rail line.” FEIS at 3.2-8, 3.2-6, 3.1-20. Hence, the substantial increase in rail traffic on the Union Pacific Line, and the consequent increased risk of accidents, wildfires, and economic losses in the I-70 corridor, is *entirely contingent* upon the Board granting the petition.

In sum, the Board’s decision to constrain its evaluation of foreseeable and potentially catastrophic impacts along the I-70 corridor to an unduly narrow subset of issues limited to noise, air quality, and road safety concerns—simply by labeling these effects as “downline”—was arbitrary, capricious, and not in accordance with NEPA and CEQ’s regulations.

II. The FEIS Failed to Take a Hard Look at Elevated Risks to the I-70 Corridor Caused by the Board’s Decision

NEPA is a procedural statute, meaning the Act “does not mandate particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.* In this sense, an agency need only identify, evaluate, and disclose to the public the foreseeable effects of its decision. This duty, commonly referred to as the “hard look” doctrine, realizes NEPA’s core policy goals of ensuring that the

agency has “available, and will carefully consider, detailed information concerning significant environmental impacts” and that “the relevant information is made available” to the affected public. *Id.* at 349.

A. The Board Failed to Take a Hard Look at the Elevated Risk of Derailment

i. Crude Oil Cars vs. All Others

In its purported analysis of derailment risks and impacts to railway safety in the downline study area, the Board made two fatal assumptions. Over objections from commenters, the Board surmised that when calculating potential accidents, oil-laden trains are no different than others, *see* FEIS at 3.2-4, and, further, that the route-specific terrain does not affect the risk analysis, *see id.* at App’x E (modeling rail accident rates). These invalid assumptions never gain steam.⁵

As to the former, the Board’s “Predicted Accidents” projection is based on an average incident rate lumping together *all* rail accidents across the nation during a four-year period. *See* FEIS, App’x E at 2 (utilizing “nationwide rates over the last 2 years of about 2.7 accidents per million train miles for all railroads and types of

⁵ The Board said it “considered both loaded and unloaded crude oil trains” when calculating incident rates. FEIS, App’x E at 1. Elsewhere, it backtracks this claim, asserting that “insufficient data exist on accident rates for unit trains carrying crude oil in general, or trains carrying waxy crude oil in particular, to allow OEA to calculate commodity specific accident rates.” *Id.*, App’x T at 108. Regardless, evidence of the Board’s alleged consideration appears nowhere in the FEIS. “Stating that a factor was considered—or found—is not a substitute for considering or finding it.” *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (cleaned up).

track [] as the basis for predicting accident rates”). This sleight of hand uses the law of averages to obscure the relative risk posed by the hulking oil tanker cars at issue here. For example, researchers—including those cited by the Board, *id.*, App’x E at 5—have established that “train length and train weight are likely to affect derailment rate, derailment severity, and the corresponding risk in a route-specific risk analysis.” Liu et al., *Analysis of Derailments by Accident Cause: Evaluating Railroad Track Upgrades to Reduce Transportation Risk*, 2261 TRANSP. RSCH. REC. 178, 182 (2011). In fact, “longer than average trains”—i.e., those comprised of 65 cars or longer on Class 3 tracks—“will have higher car mile train derailment probabilities.” Anderson & Barkan, *Railroad Accident Rates for Use in Transportation Risk Analysis*, 1863 TRANSP. RSCH. REC. 88, 92, 96 (2004).

The record demonstrates that most trains using the proposed Railway will be “longer than average” trains that entail a substantially heightened incident risk compared to national averages. FEIS at 2-35; *see also id.* (anticipating crude oil trains “composed of 110 tank cars each, on average”). Likewise, as the federal agency with relevant expertise has concluded, these oil-laden railcars—weighing 143 tons on average, *see id.* at 2-30—are “heavier in total [and] more challenging to control” than other trains, “which affect[s] train stability” and “increase[s] the risk of derailments.” EI-30487 at 16-17 (citing PHMSA report).

Yet, the Board neither disclosed nor analyzed these elevated risk factors, relying instead on apples-to-oranges national averages that are inapplicable to these longer, heavier trains. This major oversight cannot be sustained. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1046-47 (D.C. Cir. 2021) (rejecting reliance on generic averages where record evidence demonstrated that such averages did not apply to the proposed action).

ii. Study Area Terrain vs. Downline Terrain

The Board compounded its failure to disclose relative risks between train-types by disregarding the risks associated with the terrain along the Railway versus the Union Pacific Line. In contrast to the terrain along the proposed Railway, the Union Pacific Line is extremely treacherous. *See* FEIS, App'x T at 458 (“Between 1992 and 1998, the [Union Pacific] Central Corridor was among the locations in Utah and Colorado that experienced seven derailments that caused releases of diesel fuel, taconite, and sulfuric acid into rivers adjacent to the railroad serious enough to trigger enforcement of the Clean Water Act.”).

The FEIS implicitly acknowledges that derailments are functionally related to route terrain; in rejecting from further consideration alternative Railway routes, the Board repeatedly cites the presence of “steep slopes” and “narrow canyons” as factors that will “substantially increase the risk of derailment and accidents” and the “potential for significant environmental impacts.” FEIS at 2-9-2-19; *cf.* Liu et

al., *supra*, at 182 (finding that to estimate accident probability, “operational and infrastructure information should be incorporated into the model” to account for “route-specific risk analysis”).

Despite this, the Board’s accident projection model in the downline study area does not address terrain-specific factors, or elucidate what effect those might have on incident rates. Rather, the Board’s analysis hinges entirely on “track class,” which is merely a function of maximum-allowable track speed due to the “standards to which [those tracks] are built and maintained.” FEIS at App’x E at 1. In essence, the Board’s view is that accident probability is purely a matter of speed, and therefore higher rates of speed are inversely correlated with derailment rates. *Id.* (“[A]ccident rates increase with lower track classes due to lower track standards/quality.”).

This is obviously not true—other factors, such as train-type, length, and weight affect accident probability. In any event, nowhere does the Board explain why terrain-specific conditions are a sufficient basis to eliminate alternatives in the project study area due to derailment risk, yet inapplicable to estimates of derailment rates in the downline study area. Such dissimilar application of similar risk factors plainly fails. *See, e.g., Transactive Corp. v. U.S.*, 91 F.3d 232, 237 (D.C. Cir. 1996) (“A long line of precedent has established that an agency action is

arbitrary when the agency offered insufficient reasons for treating similar situations differently.”).

B. The Board Did Not Evaluate the Increased Risk of Wildfire and Socioeconomic Impacts in the I-70 Corridor

The Board also failed to take a “hard look” at increased wildfire risks in the I-70 corridor. The Board found that “the downline wildfire impact of the proposed rail line would not be significant” because its Decision “would not introduce a new ignition source for wildfires” on the Union Pacific Line, and because “the area along the downline segments consists of very low, low, [and] nonburnable” habitat classes. FEIS at 3.4-43. These justifications never even leave the station.

The Board’s contention that the Decision does not portend “new ignition source[s] for wildfires” is facially irrational. The Board concluded that 90% of the Railway’s trains will travel the Union Pacific Line, *see* FEIS, App’x T at 37, which presently “has a low volume of rail traffic relative to the predicted traffic on the proposed rail line.” *Id.* at 3.2-6 (emphasis added).⁶ In other words, new oil trains, which elsewhere the Board admits *are* “an ignition source,” FEIS at 3.4-42, will

⁶ The Decision authorizes up to 185,000 new crude oil cars that may utilize Union Pacific’s Kyune-Denver line each year. This comes from multiplying: (1) the number of operating days (365), FEIS at 2-35; (2) the average number of cars/train (110), *id.*; and the number of oil trains/day that will utilize the Union Pacific Line (4.46). *Id.*, App’x C at 1, 3-4 (stating that up to 9.92 trains/day will enter and leave the Railway; assuming that half (4.96 trains/day) will be oil-laden departures, 90% of those (or, 4.46 trains/day) will travel east on the Kyune-Denver line).

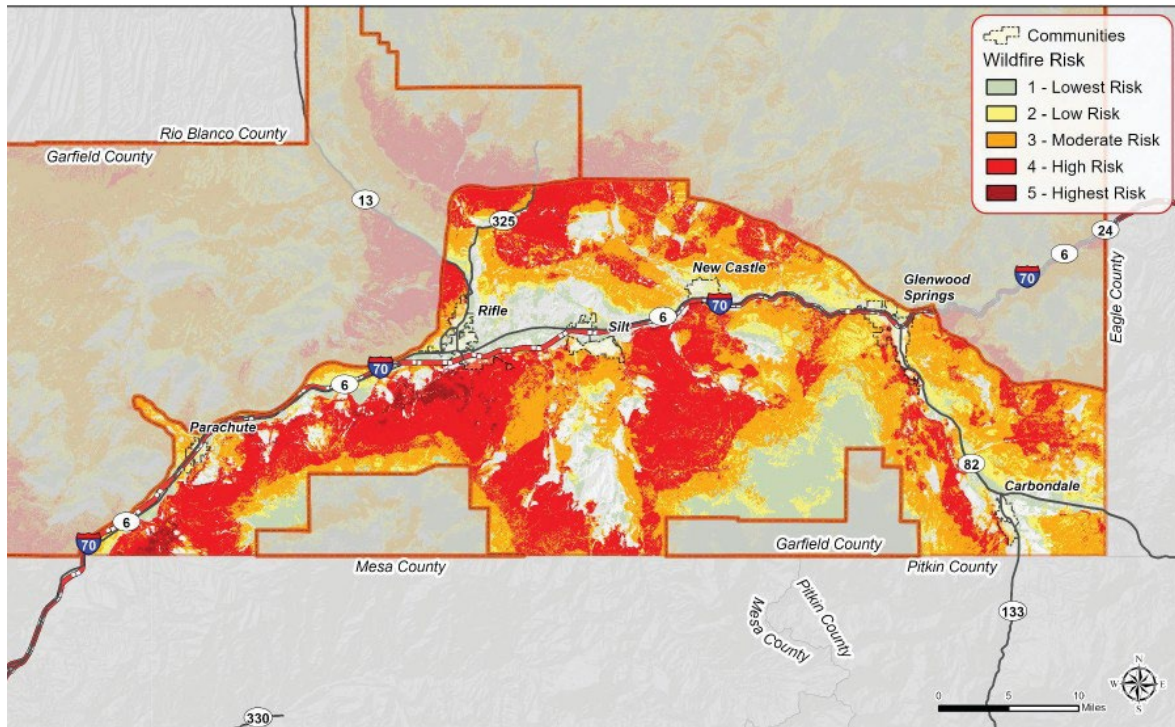
use the Union Pacific Line, meaning there will, of course, be “new ignition source[s] for wildfires” as a result of the Board’s Decision. Remarkably, the Board’s review of potential wildfire impacts *inside* the study area acknowledges this positive correlation between increased rail traffic and wildfire risk. *Id.* at 3.4-41 (“[M]ore trains could increase the risk of sparking a wildfire[.]”). The Board’s contrary position as applied to the exact same impact in the downline area is, therefore, arbitrary and capricious. *Transactive Corp.*, 91 F.3d at 237.

Regardless, this Court has already rejected the Board’s reasoning. In *City of Phoenix v. Federal Aviation Administration*, the Court reviewed an agency’s NEPA analysis undertaken for a decision amending flight paths into and out of an airport. 869 F.3d 963, 971 (D.C. Cir. 2017). There, the agency contended that a 300% increase in a pre-existing impact (noise from overhead aircraft) would not be “significant.” *Id.* at 972. This Court disagreed, explaining that “[t]he idea that a change with these effects would not be highly controversial”—and therefore “significant” under NEPA—“is so implausible that it could not reflect reasoned decisionmaking,” *Id.* (quotation marks and citations omitted). Here, the Board’s Decision will significantly increase the number of ignition sources traveling daily along Union Pacific’s Kyune-Denver line. Hence, the Board’s neglect of this major increase in the *number* of ignition sources simply because there is no new *kind* of ignition source is arbitrary and capricious.

The Board's second justification for downplaying wildfire risk in the I-70 corridor—i.e., one map suggests it is at low risk for wildfires, FEIS at 3.4-16, 43—is equally arbitrary and ignores real-world evidence. While the Board claims wildfire risk in the downline area is “not significant” because “88 percent of the combined downline segments’ study areas are associated with very low, low, nonburnable, and water [] classes,” *id.*, “[c]ommon sense reveals otherwise.” *City of Phoenix*, 869 F.3d at 972. At the same time the Board was evaluating wildfire potential, the Grizzly Creek Fire was scorching Glenwood Canyon. *See* EI-30611 at 31 (noting this in comments). In fact, one month before the Board published its FEIS, Amici were combating the fire's aftermath, fighting extensive debris flows, dealing with I-70 closures, and taking steps to preserve water quality. Given this real-time rebuke of the Board's reliance on an inaccurate wildfire hazard map, it is manifestly illogical for the Board to insist that the risk of wildfire in this fire-prone area is “not significant.”

If anything, the Grizzly Creek Fire should have been instructive regarding the grave risks posed by the Board's Decision, given that the still-smoldering I-70 corridor will receive 90% of the Railway's traffic on the existing Union Pacific Line running alongside I-70. That devastating fire—which burned 32,631 acres, caused massive economic damage, and put lives in danger—ignited from a single source that did *not* involve highly flammable oil. And, the single map the Board

consulted is contradicted by myriad other wildfire risk maps prepared by governmental agencies with localized knowledge of wildlife risks.



(Fig. 3: Wildfire Hazard/Risk Areas in Garfield County)⁷

In any event, the Board's (flawed) risk assessment concedes that the downline study area, including Glenwood Canyon, will see roughly one new rail accident each year as a result of the Decision. FEIS at 3.2-7. Where railcars holding combustible crude oil are involved, one accident—or even one spark—is enough to cause far more catastrophic consequences than the havoc wreaked by the Grizzly Creek Fire. *See* PHMSA, Recommendations for Tank Cars Used for the

⁷ GARFIELD CNTY., COMMUNITY WILDFIRE PROTECTION PLAN at 54 (2022), <https://bit.ly/3SEBL8R>

Transportation of Petroleum Crude Oil by Rail, 79 Fed. Reg. 27,370 (May 13, 2014) (“[R]isk of ignition is compounded in the context of rail transportation because petroleum crude oil is commonly shipped in unit trains that consist of over 100 loaded tank cars.”). Yet, the Board never grappled with comments on this issue, instead assuming insignificant fire risks despite being faced with red-hot evidence of a cataclysmic wildfire in Glenwood Canyon. *See, e.g.*, EI-30611 at 31 (urging the Board to take into consideration recent wildfires along the Kyune-Denver line, including the Grizzly Creek Fire); EI-30481 (same).

By the same token, the Board did not examine the predictable effects to the local economy from oil train derailment and wildfires. As the Grizzly Creek Fire proved, wildfires cause disastrous effects during, and years after, a burn event. Moreover, I-70 (especially near Glenwood Canyon) is highly susceptible to long closures, resulting in grave economic costs. Bruce Finley, *Rain Triggering Rock, Mudslides Forces I-70 Shutdowns in Colorado as New Safety Norm*, DENVER POST (August 22, 2022, 6:00 AM), <https://dpo.st/3VQn9pZ> (“The economic cost to the nation” will carry a price tag of “\$1 million an hour” where a train derailment or wildfire forces closures of I-70.). Yet, while acknowledging its Decision will cause roughly one accident per year “involving a loaded crude oil train” on Union Pacific’s Kyune-Denver segment, FEIS at 3.2-7 the Board neither analyzed the

profound economic harm these accidents will induce nor considered (or adopted) *any* mitigation measures to lessen these calamitous impacts in the I-70 corridor.

For Amici, the potential for another Grizzly Creek-scale fire (or worse) is harrowing. “As wildfires and severe flooding have plagued swaths of the West over the years, there may be no place where the effects have been seen as starkly as they have been in Glenwood Canyon.” Robert Sanchez, *The Stretch of I-70 Through Glenwood Canyon Is 30 Years Old. Will It Survive Another 30 Years?*, 5280 MAG. (Oct. 2022), <https://bit.ly/3yW7riZ>. Although the residents in Amici’s communities are resilient, many continue to feel the fallout from the Grizzly Creek Fire. Indeed, “22 months after the fire, the once-pure water [that flowed through the Canyon] resemble[s] something from a half-flushed toilet.” *Id.*

The informational policy goals embodied by NEPA makes it an ideal vehicle for assuring affected communities that the Board has considered and ameliorated the risk of irreversible catastrophe in the communities directly impacted by its Decision. The Board instead washed its hands of any such examination in the face of obvious risks. Put simply, the Board was asleep at the switch.

CONCLUSION

The Board’s Decision authorizing the Uinta Basin Railway and its EIS are arbitrary and capricious. Both must be set aside.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 5,496 words, according to the Word Count feature of Microsoft Word for Office 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2022, I caused true and correct copies of the foregoing *Brief of Amici Curiae City of Glenwood Springs, Town of Minturn, Town of Avon, Town of Red Cliff, Town of Vail, Routt County, Boulder County, Chaffee County, Lake County, and Pitkin County in Support of Petitioners* to be served via electronic mail upon all counsel of record, by operation of the Court's ECF system.

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