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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 36284**

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

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**On remand from the United States Court of Appeals  
for the District of Columbia Circuit**

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**REPLY TO MOTIONS TO PREPARE A SUPPLEMENTAL  
IMPACT STATEMENT AND ORDER A FULL APPLICATION**

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**REPLY TO MOTIONS TO PREPARE A SUPPLEMENTAL  
IMPACT STATEMENT AND ORDER A FULL APPLICATION**

On remand from the D.C. Circuit Court of Appeals, the Coalition asked the Board to reaffirm its decision authorizing the Uinta Basin Railway.<sup>1</sup> *See* Motion to Reaffirm (310167). Project opponents filed two separate replies, each of which included a cross-motion asking the Board to (1) prepare a supplemental environmental review and (2) require a full application under 49 U.S.C. § 10901. *See* Center for Biological Diversity, et al. Reply and Motion (310714); Eagle County, Colo. Reply and Cross-Motion (310705). Other parties also filed letters and comments. This reply explains why neither a supplemental environmental review nor a full application is needed.

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<sup>1</sup> The Seven County Infrastructure Coalition has recently accepted an eighth member—Sanpete County—and is renaming itself the Rural Utah Infrastructure Coalition.

## INTRODUCTION

Rarely does a case return to the Board after a decision in the U.S. Supreme Court, much less the kind of landmark decision that the Court made in this case. So when the Court says that the Board’s environmental review “needed to address only the effects of the 88-mile railroad line. And the Board’s EIS did so,” *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 174 (2025), the Board should take the Court at its word. And when the Court explains that agencies have “broad latitude” in deciding “how far to go in considering the environmental effects from the project at hand,” the Board should apply that rule here. *Id.* at 182. The Supreme Court has—in this very case—rejected NEPA’s use as “a blunt and haphazard tool employed by project opponents ... to try to stop or at least slow down new infrastructure and construction projects.” *Id.* at 183. Yet the opponents of the Uinta Basin Railway project want to do just that. The Board should not let them.

Nor should the Board let the railway’s opponents use other laws to stop the project. The Endangered Species Act is no more a blunt tool for blocking projects than NEPA is. Rather, the ESA applies only where there is a “reasonably certain” causal link between a project and a harm to protected species. No such reasonably certain link exists between a new rail line in Utah and species living near a different rail line hundreds of miles away, especially when the alleged harm depends on minor leaks, rare and unpredictable accidents, and the oil market’s vicissitudes.

The ICC Termination Act is an even more inapt instrument for blocking a rail construction project, not least because the Act has a built-in pro-construction presumption. The Act's policy tells the Board to "ensure the development and continuation of a sound rail transportation system," emphasizing "effective competition ... with other modes" that will "meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Nothing in that policy, or any other part of the Act, demands the fine-toothed review of a project's financial viability that project opponents want. The Board's role under the Act is to foster new rail development, not to crush it with economic analyses or overbroad environmental reviews. That is one reason why Congress created exemptions from the usual application process and required the Board to use them whenever it can.

The D.C. Circuit already heard most of these arguments when this case returned to it from the Supreme Court, and it agreed not to vacate the Board's original decision authorizing the new rail line. Nothing project opponents say in their motions calls for a different result. The Uinta Basin Railway is precisely the kind of life-changing, community-building rail infrastructure that Congress wants the Board to approve. That "project objectors" are attempting "unjustified obstructionism ... by raising a slew of remote effects that they think ought to be considered," *Seven Cnty.*, 605 U.S. at 190 (internal quotation marks omitted), should not slow the Board down.

## DISCUSSION

The project opponents' request to prepare a supplemental environmental review and require a full application cuts against the grain of everything that has happened since the Supreme Court's decision in this case. The Court's decision, while it did not address ESA or ICC Termination Act issues, could hardly have been clearer: the Board did all it needed to do (and then some) under NEPA. Given the tenor of the Court's ruling, and the narrow issues left on remand, the Coalition asked the D.C. Circuit to send the case back to the Board without vacating the Board's original decision. Over the project opponents' strong objections, the D.C. Circuit agreed. All that is left now is for the Board to provide the explanations that the D.C. Circuit found missing during its first pass through the case.

### **I. The Supreme Court both upheld the Board's NEPA review here and changed the way that all NEPA reviews work.**

The Supreme Court's decision in this case was as practical as it was broad. The Court took pains to emphasize that in this case and more generally, the way lower courts had interpreted NEPA caused "[d]elay upon delay, so much so that the process sometimes seems to 'border on the Kafkaesque.'" *Seven Cnty.*, 605 U.S. at 184 (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 557 (1978) (brackets omitted)). No more. After *Seven County*, it is clear that NEPA does not "give citizens a general opportunity to air their policy objections to proposed federal actions." 605 U.S. at 192. And since such objections are the core of the project opponents' motions, those motions should be denied.

**A. No part of the D.C. Circuit’s NEPA analysis is exempt from *Seven County*.**

Project opponents cannot make a NEPA argument to the Board unless they can first wriggle free from the Supreme Court’s plain holding that the Board’s EIS “needed to address only the effects of the 88-mile railroad line. And the Board’s EIS did so.” *Seven Cnty.*, 605 U.S. at 174. But they choose instead to ignore that holding. Just as bad, they claim that the Board is still bound by the D.C. Circuit’s interpretation of NEPA, even where that interpretation flatly contradicts the Supreme Court’s. The Board should reject both those tactics.

**1. The Supreme Court plainly held that the Board’s EIS “did” all that it “needed” to do.**

As they did on remand in the D.C. Circuit, project opponents argue that the scope of the Supreme Court’s review in this case was limited to the NEPA implications of upstream oil wells and downstream refineries, and that the Court thus had nothing to say about “downline impacts.” *Eagle Cnty. Cross-Mtn.* at 5; *CBD Cross-Mtn.* at 3. It is true that the Court never uses the technical term “downline.” But that technicality cannot override the Court’s plain holding that the Board “needed to address *only* the effects of the 88-mile railroad line. And the Board’s EIS *did so*.” *Seven Cnty.*, 605 U.S. at 174 (emphases added). That holding leaves no room for doubt: The “only” thing that the Board’s EIS “needed” to do, it “did.” *Id.*

Project opponents point out, rightly, how the Court also held that “the Board’s EIS did not need to address the environmental effects of upstream oil drilling or downstream oil refining.” *Id.*; *see Eagle Cnty. Cross-Mtn.* at 5. But

the Court did not imply that the Board had to address every other imaginable environmental effect, as project opponents would have it. Rather, in the very next sentences, the Court explained what the Board did need to address—i.e., “only the environmental effects” of the new rail line—and held unequivocally that “the Board’s EIS did so.” *Seven Cnty.*, 605 U.S. at 174. It is hard to imagine a clearer holding.

Project opponents try to escape this clear holding by parsing the first page of the Coalition’s certiorari petition and emphasizing the government’s narrower view of the case. *See Eagle Cnty. Cross-Mtn.* at 5. But the Coalition’s petition talked about “downline” impacts throughout, including by critiquing the D.C. Circuit’s “cradle-to-grave review” approach, cert. pet. at 23, which required review of “the oil’s extraction, transportation on other rail lines, [and] refinement”—all of which was outside the Board’s regulatory authority, *id.* at 19. To capture these upstream, downline, and downstream effects, the petition used a broadly worded question presented: “Whether [NEPA] requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.” *Id.* at i. The government may have disagreed, but the government also opposed certiorari, so the Coalition’s view is what matters.

On the merits, “downline” impacts were thoroughly briefed. *See Coalition Opening Br.* at 1, 2, 17, 32, 36–37, 40–41, 45, 46–47. They were also addressed repeatedly at oral argument. *See Oral Arg. Tr.* At 4, 18, 21–22, 116 (“The question presented doesn’t distinguish between downline and downstream.”). That a concurring Justice saw the question presented more narrowly, *see* 605 U.S. at

197 (Sotomayor, J., concurring), despite the Coalition’s thorough presentation, only underscores the breadth of the majority’s holding: The Board “needed to address only the effects of the 88-mile railroad line. And the Board’s EIS did so.” *Id.* at 174.

**2. The Court’s emphases on NEPA’s limits and agency discretion apply on remand.**

The Coalition’s motion to reaffirm suggested that even after the Supreme Court’s plain endorsement of its EIS, the Board could use a belt-and-suspenders approach on remand by nonetheless addressing the D.C. Circuit’s critique of its “downline” effects analysis. *See* Coalition Mot. at 5–6. In so doing, the Coalition argued, the Board should not take the D.C. Circuit’s decision “on its own terms,” but should instead apply the Supreme Court’s interpretation of NEPA in *Seven County*. *Id.* at 10. The project opponents call this idea “remarkable,” CBD Cross-Mot. at 28, and claim that it would “ignore[] the binding effect of *Eagle County* as the law of the case,” *Eagle Cnty. Cross-Mot.* at 9. But it is neither remarkable nor contrary to the law of the case doctrine to apply an intervening Supreme Court decision on remand—especially when that intervening decision is in the same case.

The Supreme Court’s decision here roundly rejects the D.C. Circuit’s interpretation of NEPA. After highlighting the “substantial deference” that courts ought to show agency NEPA reviews, the Court explained that “[s]ome courts have strayed and not applied NEPA with the level of deference demanded by the statutory text and this Court’s cases.” *Seven Cnty.*, 605 U.S. at 183. “Those decisions,” the Court said, “have instead engaged in overly

intrusive (and unpredictable) review” that has “slowed down or blocked many projects.” *Id.* It should go without saying that the Court’s critique was referring to the D.C. Circuit’s actions in this case. But the Court said it anyway: The D.C. Circuit “did not afford the Board the substantial judicial deference required in NEPA cases.” *Id.* at 179. As a result, the Board must not “respond to the D.C. Circuit on its own terms.” Coalition Mot. at 10. Going forward, the Board should operate under the “substantial deference” standard that the Court articulated in *Seven County*, not the less deferential standard that—according to the Supreme Court—the D.C. Circuit improperly applied in *Eagle County*.<sup>2</sup>

The law of the case doctrine accounts for such intervening changes in the legal standard. Indeed, “[t]he general rule of long standing is that the law announced in the [Supreme] Court’s decision controls the case at bar.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989). Whatever the D.C. Circuit said in *Eagle County*, then, it continues to govern only insofar as it is consistent with “the law announced in” *Seven County*. And since *Seven County* explicitly held that the D.C. Circuit failed to give the Board’s NEPA review the level of deference it deserved, applying the Supreme Court’s new standards does no violence to the law of the case. *See Bahlul v. United States*, 77 F.4th 918,

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<sup>2</sup> *Seven County* makes clear that the “substantial judicial deference” standard that applies when agency decisions are challenged is meant to give agencies more freedom when conducting NEPA reviews. Because “[t]he agency is better equipped to assess what facts are relevant to the agency’s decision than a court is,” and because “[a]n agency must make predictive and scientific judgments in assessing the relevant impacts,” agencies have “broad latitude to draw a ‘manageable line.’” 605 U.S. at 181–82 (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)).

925–26 (D.C. Cir. 2023) (recognizing that the court of appeals “may depart from the law of the case and from circuit precedent ... based on an intervening Supreme Court decision”). As the D.C. Circuit itself has put it, “[a]fter *Seven County*, the era of searching NEPA review is over—or at least it should be.” *Sierra Club v. FERC*, 153 F.4th 1295, 1311 (D.C. Cir. 2025).

**B. The Board can address “downline” impacts with explanations.**

Once the project opponents’ mistaken view of the law of the case is corrected, their lead argument for a supplemental environmental review crumbles. After *Seven County*, nothing the D.C. Circuit said requires a supplemental EIS. In any case, as the Coalition explained in its motion to reaffirm, the D.C. Circuit’s holdings found the Board’s *explanations* inadequate; they did not demand more investigation. And *Seven County* makes it much easier for the Board to offer adequate explanations.

**1. The Board’s decision to use national rail accident rates was reasonable.**

The project opponents’ argument against the use of national rail accident rates in the EIS well illustrates the problems with NEPA before *Seven County*. Faced with “limited data on accident rates for” the specific “geographic area” involved in this case, *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1182 (D.C. Cir. 2023), the Board chose national accident rates as a reasonable proxy. See FEIS at 3.2-3, E-1–E-2, T-40. Before *Seven County*, the D.C. Circuit held that was not good enough. The Board needed to “explain *why* the information was unavailable and *what actions* the agency took to address that unavailability.” *Eagle Cnty.*, 82 F.4th at 1182 (emphasis added, internal quotation marks

omitted). Nor was it enough, in the D.C. Circuit’s view, for the Board to respond to a comment about the “unique derailment risks” of oil trains by saying that the data was “insufficient” for it to calculate those risks. *Id.*

*Seven County* flatly rejects the D.C. Circuit’s approach to this issue: “When assessing significant environmental effects ... an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content, and level of detail of the resulting EIS. Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness.” 605 U.S. at 182–83. Demanding that the Board explain and address unavailable accident data for oil trains in the Rocky Mountains is quintessential micromanagement. On remand, the Board need only affirm that national accident data is a reasonable proxy for purposes of this case. *See* FEIS at T-108 (explaining the lack of more specific data); *Seven Cnty.*, 605 U.S. at 181 (“A relatively brief agency explanation can be reasoned and detailed; an EIS need not meander on for hundreds or thousands of pages.”).

The now-withdrawn CEQ rules can be ignored. Those rules were a cornerstone of the D.C. Circuit’s decision here, *Eagle Cnty.*, 82 F.4th at 1182, but the D.C. Circuit has since held that they were issued without “lawful authority.” *Marin Audubon Soc. v. FAA*, 121 F.4th 902, 912–14 (D.C. Cir. 2024). Beyond that, the CEQ withdrew them. 90 Fed. Reg. 10610, 10613–14 (Feb. 25, 2025). And while that withdrawal was prospective, *id.* at 10614, applying rules that were withdrawn nearly a year ago would be, at minimum, strange.

## **2. The record shows that wildfires are unlikely to cause harm.**

Project opponents next claim that the Board must address wildfire risks in a supplemental review, with “input” from “downline communities.” *Eagle Cnty. Cross-Mot.* at 18; *see CBD Cross-Mot.* at 10–11. But even they seem to concede that there is no additional evidence to be gathered on this point—or at least, they identify none. The D.C. Circuit acknowledged, and project opponents cannot deny, that the record evidence shows “a low probability of train-induced wildfire” downline. *Eagle Cnty.*, 82 F.4th at 1183 (internal quotation marks omitted). But the court of appeals still found the Board’s overall analysis “unreasoned.” *Id.* at 1184. On remand, the Board can use the evidence already in the record to better explain its reasoning. *See, e.g.*, FEIS at 3.4-16–3.4-17 (calculating downline wildfire potential); T-235–T-236 (explaining that “large wildfires caused by railroads are very rare and are not a reasonably foreseeable outcome of a railroad construction project”). Under *Seven County*, that updated reasoning will be entitled to “substantial deference.” 605 U.S. at 183.

## **3. The Board need not consider worst-case scenario effects on downline water resources.**

Project opponents defend the D.C. Circuit’s conclusion that the Board failed to take a hard look at downline water resources by emphasizing the “potentially devastating impacts” of an oil spill into the Colorado River. *Eagle Cnty. Cross-Mot.* at 13; *see CBD Cross-Mot.* at 13–14. NEPA, they say, demands investigation of such harms. But they also admit the Coalition’s key point: Downline accidents will be rare, and accidents involving spills into the Colorado River will be even rarer. That admission dooms their argument.

NEPA does not require agencies to study worst-case scenarios. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989). Rather, NEPA gives agencies “broad latitude to draw a manageable line” when deciding “how far” to go “in considering indirect effects that might occur outside the area of the immediate project.” *Seven Cnty.*, 605 U.S. at 182 (internal quotation marks omitted). And there is no doubt that the Colorado River—which parallels a different rail line hundreds of miles away from the rail line at stake here—is far “outside the area of the immediate project.” So while it may be true that an unlikely disaster involving oil from the Uinta Basin could affect the environment in Colorado, nothing in NEPA obligates the Board to study such improbable effects. All the Board needs to do is explain where and why it is drawing a manageable line.<sup>3</sup>

The Board can give both factual and legal reasons for not studying the effects of accidents in Colorado. Factually, the Board’s EIS explains that traffic originating on the new rail line will (at most) lead to one new downline rail accident per year. FEIS at 3.2-6–3.2-7. Only a quarter of those accidents will involve spills, and many of those spills will either occur away from the Colorado River or be too small to significantly affect the environment. *See id.* at 3.4-33; E-2. Already, then, the chances of harm are slim. Add to that the traits of the Basin’s waxy crude, including a “tend[ency] to not disperse” stemming

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<sup>3</sup> Project opponents claim that the Board’s rules have already drawn a line that includes downline effects. CBD Cross-Mot. at 3–4. That argument overreads the Board’s NEPA rules, which focus on energy, noise, and air impacts. *See* 49 C.F.R. § 1105.7(e). Nothing in those rules obliges the Board to consider the effects of unlikely spills on other rail lines hundreds of miles away.

from an inability to “flow at room temperature,” *id.* at 3.3-29, 3.3-30, and the Board can reasonably conclude that the potential harms of a rare spill are not “relevant to the agency’s own decision”—a conclusion that agencies are “better equipped” to reach than courts, *Seven Cnty.*, 605 U.S. at 180–81. Especially after *Seven County*, NEPA does not require agencies to delve into improbable events. It is more than enough to acknowledge the potential for harm from unlikely-but-not-impossible accidents, just as the Board here has already done.

Legally, the Board can draw a manageable line that excludes rare accidents near the Colorado River because such accidents would not be proximately caused by the Uinta Basin Railway. As the Supreme Court reiterated in *Seven County*, “a mere ““but for” causal relationship is insufficient to make an agency responsible for a particular effect.”” 605 U.S. at 189 (quoting *Pub. Citizen*, 541 U.S. at 767). It is thus not enough that the new railway generates new rail traffic. An accident hundreds of miles away will have any number of intervening causes, from the condition of the separately owned and operated rail line, to the actions of the unrelated locomotive operator, to the weather conditions that might prevail on any given day. When “the causal chain is too attenuated,” NEPA does not demand the effects be considered. *Id.* at 187 (quoting *Metropolitan Edison Co v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). Here, the chain between the new rail line and the effects of an admittedly rare spill downline has, for NEPA purposes, far too many links.

**C. Project opponents' new information does not justify supplemental environmental review.**

To boost their chances of winning the delay that comes with supplemental environmental review, project opponents offer a collection of new information in three categories: (1) new studies about the risks of longer, loaded freight trains; (2) new information about spills of waxy crude and recent spill cleanups; and (3) new information about truck-to-rail transload facilities that handle Uinta Basin waxy crude. This new information, they say, demands more environmental review. But once the standards for such supplemental reviews are set out, it is clear that those standards are not met.

**1. NEPA does not demand a supplemental review whenever new information comes to light.**

The Supreme Court has long held that “an agency’s decision whether to prepare a supplemental EIS” is governed by “a rule of reason.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). This rule of reason recognizes that if agencies had to supplement their NEPA review “every time new information comes to light” it would “render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a new decision is made.” *Id.* This “intractable” loop is a close cousin of the “[d]elay upon delay,” unending-analysis problem that the Court solved in *Seven County*. 605 U.S. at 184. A request for a supplemental NEPA review is “a classic example of a factual dispute the resolution of which implicates substantial agency expertise.” *Marsh*, 490 U.S. at 376. And “when an agency makes those kinds of speculative assessments or predictive or scientific judgments ..., a reviewing court must be at its ‘most deferential.’” *Seven Cnty.*, 605 U.S. at 182

(quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983)). Here, the new evidence offered by project opponents does not paint the kind of “seriously different picture of the environmental landscape,” *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004), that might justify a supplemental NEPA review.

## **2. The Board has already considered the risks of longer trains.**

Start with the new studies that purport to show longer freight trains pose greater derailment risks. *See* CBD Cross-Mot. at 26–27 (citing studies). Because this same sort of information was available when the Board prepared the EIS here, it does not suggest a “seriously different picture” of the issue. *See, e.g.*, FEIS at T-108 (CBD comment citing PHMSA study on “longer, heavier” trains and Board response noting that “OEA considered train length and composition in identifying the potential impacts”); *id.* at E-1–E-2 (discussing the Board’s accident rate analysis). The Board knew that longer trains may have marginally higher accident risks. It still reasonably chose to use national accident rates as a proxy for purposes of its EIS. Because that choice falls within the “broad zone of reasonableness” afforded to agencies, *Seven Cnty.*, 605 U.S. at 183, no supplemental review is needed.

## **3. The Board has already considered harms from spills.**

Project opponents’ new information about spills falls into the same category. They offer stories about the harm caused by a December 2025 coal spill into the Gunnison River, which flows into the Colorado, and about a variety of waxy crude spills. Eagle Cnty. Cross-Mot. at 13–14; CBD Cross-Mot. at 14–

18. Again, though, the Board has always known that spills could cause environmental harm. *See* FEIS at 3.3-30 (noting that “Uinta Basin crude oil is toxic, and an accidental release would have negative effects on the environment”). Nothing in the project opponents’ cross-motions shows “seriously different” harms from spills or disproves that Uinta Basin waxy crude “tends to form globules of semisolid material” that are easier to clean up than traditional oil spills. *Id.*; *compare* CBD Cross-Mot. at 15 (noting “quarter-size to fist-sized waxy globules”). Again, no supplement is needed.

**4. The Board has already considered the use of transload facilities.**

Finally, the project opponents claim that “new oil transloading facilities and expansion of existing loadouts” demand a reassessment of the project’s impacts and its purpose and need. CBD Cross-Mot. at 20. It is true that, since the Board’s EIS was published, the number of trucks moving Uinta Basin waxy crude to transload facilities has multiplied. But as the EIS explained, the new rail line “would eliminate the existing tanker truck traffic transporting crude oil from production areas in the Basin to the Price River Terminal.” FEIS at 3.1-8. Back then, those trucks were moving about 10,000 barrels of oil per day. *Id.* Now, that number is much larger, which means the benefits from taking trucks off the roads would also be much larger. And “[a]n agency is generally not required to conduct a new environmental analysis when changes result in less harmful environmental effects than originally anticipated.” *Ctr. for Biological Diversity v. U.S. Army Corps of Engr’s*, 941 F.3d 1288, 1305 (11th Cir. 2019). As for purpose and need, project opponents get it all wrong. The Uinta Basin Railway

is meant to bring rail access to an isolated part of Utah. FEIS at 1-3. Yes, waxy crude is a key economic driver, but the Coalition’s goal is to grow the Basin’s economy by improving rail access for all. *Id.*; see Petition for Exemption (300676) at 7–9, 12–18. That goal has not changed.

**II. The Endangered Species Act action area should exclude the Colorado River, where harm to species is not reasonably certain.**

Turning to the D.C. Circuit’s conclusions under the Endangered Species Act, project opponents acknowledge that the court of appeals found the Board’s ESA action area “unreasoned.” CBD Cross-Mot. at 30 (citing *Eagle Cnty.*, 82 F.4th at 1187). On that basis, they argue that the Board “must prepare a new biological assessment that defines the action area to include downline areas” along the Colorado River. *Id.* But that is not the Board’s only option. When a court remands an “unreasoned” conclusion, the agency may respond by “offer[ing] a fuller explanation.” See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (internal quotation marks and citation omitted). Such an explanation of the Board’s ESA reasoning is the best approach here.

**A. An ESA action area depends on reasonably certain effects, not but-for effects.**

The project opponents do not dispute that the ESA action area extends only as far as the project’s effects. They highlight that those effects include both direct and indirect effects, CBD Cross-Mot. at 29 (citing 50 C.F.R. § 402.02), and the Coalition agrees, Coalition Mot. at 12. But they also must admit that the chain of causation has limits. If an indirect effect is not “reasonably certain to occur,” then, by definition, it is not “caused by the proposed action”—even

if that effect is a “but for” result of the proposed action. 50 C.F.R. § 402.02; *see* CBD Cross-Mot. at 35 (discussing the “reasonably certain” standard). Thus, the central question in defining an ESA action area is whether project effects are reasonably certain to occur there.

Despite acknowledging the ESA rules’ reasonably certain standard, project opponents repeatedly return to a but-for causal standard. For example, they argue that “the Board’s actions may result in an unauthorized ‘take’” of protected fish, “which raises the specter of criminal sanctions ....” CBD Cross-Mot. at 29. But that argument only underscores the necessity of the reasonably certain standard. Neither the Board nor the Coalition and its private partner could be held criminally liable for a take caused by a spill or leak on a different rail line operated by a different rail carrier hundreds of miles away. Rather, criminal sanctions under the ESA “may be based neither on the ‘butterfly effect’ nor on remote actors in a vast and complex ecosystem.” *Aransas Project. v. Shaw*, 775 F.3d 641, 657–58 (5th Cir. 2014) (footnote omitted). The same limits must apply to the Board’s consultation obligation.

Project opponents also try to equate NEPA’s “reasonably foreseeable” standard with the ESA’s “reasonably certain” standard. CBD Cross-Mot. at 35. That effort fails on its face, as the words “foreseeable” and “certain” have vastly different meanings that cannot be elided by the adjective “reasonably.” And even discounting the Services’ 2019 statement that reasonably certain sets “a higher threshold” than reasonably foreseeable, *see* 84 Fed. Reg. 44976, 44992 (Aug. 27, 2019), multiple courts of appeals have endorsed that dictionary-based conclusion. *See Medina Cnty. Envtl. Action Ass’n v. Surface Transp. Bd.*, 602 F.3d

687, 702 (5th Cir. 2010) (calling the reasonably foreseeable standard “broader” than the reasonably certain standard); *Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1055 (9th Cir. 2013) (noting that reasonably foreseeable cumulative effects under NEPA are “broader” than reasonably certain cumulative effects under the ESA). So regardless of what may be reasonably foreseeable under NEPA, the Board should not grant that those same things are reasonably certain under the ESA. And, following the ESA rules, the Board should make clear that but-for causation cannot define the ESA action area.

**B. The Uinta Basin Railway is not reasonably certain to harm species in the Colorado River.**

The causal chain between the Board’s approval of the Uinta Basin Railway and potential harms to protected species in the Colorado River is, by all accounts, a long one. First, oil shipments on the new rail line must be sent to the Gulf Coast via Colorado, not to some other destination or using some other route. Next, some sort of accident or minor leak must occur more than 100 miles away on the 52% of the Union Pacific rail line that parallels the Colorado River. Then, that release must reach the river and harm the fish, even though Uinta Basin waxy crude will be transported at temperatures where, if spilled, it will not flow. Because all these causal links must be in place for any harm to happen, the uncertainty associated with each link accumulates. The upshot is that harm to Colorado River species from the Uinta Basin Railway is not even close to reasonably certain.

Project opponents do not dispute the necessity of this causal chain. Instead, they try to disaggregate the links, arguing that each one is certain enough for

the Board to expand its ESA action area. *See* CBD Cross-Mot. at 33–39. But on the agreed facts, that approach fails. The data on which the Board relied to predict downline environmental effects prove that effects on Colorado River species are far from certain.

First, the Board estimates that most traffic from the new rail line will travel on the Union Pacific line that parallels the Colorado River. FEIS at 3.1-1. But as the Coalition pointed out in its motion to reaffirm, neither it nor the Board has any control over the routing decisions on the UP line, *see id.* at 3.1-2, T-36, much less over the oil markets that determine shipping destinations. Project opponents say that these facts have “no bearing on the Board’s evaluation of the shortest and most practical route,” CBD Cross-Mot. at 34, and they are right. Their problem is that the Board’s projection of the most practical route does not remove all uncertainty, especially when the line is operated by other carriers who can make different choices for any number of reasons. And that is just the uncertainty baseline.

Once trains are moving on the Union Pacific line toward Colorado, they can harm protected species only if there is some kind of leak or spill. But as project opponents admit, the Board concluded that such spills of loaded trains will happen just once every four years. FEIS at 3.4-33; *see* CBD Cross-Mot. at 37. And since only 52% of the UP line parallels the Colorado River, *id.* at 36, the odds say that a spill along the river would happen closer to once every *eight years*. Such a rare event makes harm to listed species even more uncertain.<sup>4</sup>

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<sup>4</sup> Project opponents also point out that “minor leaks or drips of fuel or lubricants ... may occur” along the UP line. CBD Cross-Mot. at 37 (quoting FEIS at 3.4-

Then there is the nature of Uinta Basin waxy crude. It is a fact that waxy crude “does not flow at room temperature,” FEIS 3.3-29, and that is the temperature at which it is transported by rail.<sup>5</sup> If spilled, waxy crude “tends to not disperse.” *Id.* at 3.3-30. As a result, the Utah Department of Environmental Quality has said that Uinta Basin waxy crude is “cleanup friendly” and that “spills can be easily cleaned up afterward.” *Id.* at 3.4-34. Those same traits make it less likely that the rare spills of waxy crude along the Colorado River would reach the river, and if they did, that they would harm protected species. Again, the uncertainty builds.

In sum, the combination of uncertain routing, uncertain spills, and uncertain harm from waxy crude means that the effects on Colorado River species from the Uinta Basin Railway are not reasonably certain. The Board thus had good reason to exclude the Colorado River from its ESA action area. All it needs to do now is provide those reasons to the Fish and Wildlife Service. That consultation process, like the NEPA process, is subject to strict, relatively short timelines. *See* 16 U.S.C. § 1636(b). Those timelines mean that the ESA process should be no more a source of unmerited delay in agency decisionmaking than the NEPA process should be.

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47). But there is no reasonable certainty that such “minor leaks or drips” will ever reach the Colorado River, much less that they would harm species.

<sup>5</sup> When waxy crude is transported by truck, it is heated. *See* FEIS at 3.3-29.

### **III. An exemption approving the Uinta Basin Railway advances the ICC Termination Act's rail transportation policy.**

Finally, project opponents insist that, despite the ICC Termination Act's "clear presumption in favor of approving railways," *Seven Cnty.*, 605 U.S. at 194 (Sotomayor, J., concurring), the Coalition "misplace[s]" its reliance on that presumption here. *Eagle Cnty. Cross-Mot.* at 20. But the Act's strong, pro-construction presumption is not so easily discarded. Congress wants the Board to approve new rail lines, and it wants the Board to use exemptions from the full application process whenever it legally can. Nothing in the Act's rail transportation policy points the other way.

#### **A. The Uinta Basin Railway advances the rail transportation policy.**

The Board has wide discretion in applying the ICC Termination Act's rail transportation policy. That includes discretion to choose which policy factors to apply in a given case, so long as its choice is reasonable. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1083–84 (9th Cir. 2013). And it includes the discretion to balance those policy factors as it sees fit. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 293–94 (1974). So while the D.C. Circuit held that the Board's original decision lacked "a reasoned application of the appropriate Rail Policies," *Eagle Cnty.*, 82 F.4th at 1196, the Board is not barred from approving the project. It need only explain its reasoning.

#### **1. The ICC Termination Act favors new rail construction.**

Project opponents mischaracterize the Coalition's reliance on the Act's pro-construction presumption. The Coalition is not saying that the Act's presumption "negate[s]" the Board's "obligation" to apply the rail transportation

policy. Eagle Cnty. Cross-Mot. at 20. To the contrary, the presumption is *part of the rail transportation policy*. See *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 552 (8th Cir. 2003) (holding that the policy factors favoring effective competition and reducing barriers to entry bolster the Act’s pro-construction presumption). And the ICC Termination Act “privilege[s] the interests of the applicant” and lowers the bar for new construction approvals. *Alaska Survival*, 705 F.3d at 1085. Thus, any “reasoned application” of the Act’s policy must start with the Act’s pro-construction presumption.

The project opponents do not see things this way. They think that “the Coalition’s focus on the presumption misses the whole point” of the Board’s approval power. Eagle Cnty. Cross-Mot. at 20. Citing 140-year-old legislative history, they claim that the Board must “be regarded as the people’s attorneys.” *Id.* (citing 36 Cong. Rec. 3477 (1886)). But a lot has changed in the last century-and-a-half. Earlier versions of the Interstate Commerce Act would allow new rail lines “only if public convenience and necessity ‘require or will be enhanced by’ the construction.” *Mid States*, 345 F.3d at 552 (quoting 49 U.S.C. § 10901(a) (1979)). Congress later “relaxed this restrictive policy” so that construction would be approved whenever “public convenience and necessity ‘permit’” it. *Id.* (quoting 49 U.S.C. § 10901(a) (1982)). Finally, the ICC Termination Act changed the default from disapproval to approval by “directing that the Board ‘shall issue’ construction licenses ‘unless the Board finds that such activities are *inconsistent* with the public convenience and necessity.’” *Id.* (quoting 49 U.S.C. § 10901(c)) (emphasis in *Mid States*).

None of this means that the Board must always approve new rail construction. Nor is the Coalition trying to “brush[] aside” the D.C. Circuit’s holdings, *Eagle Cnty. Cross-Mot.* at 22. The Coalition’s point is just that the Board and the D.C. Circuit must consider the Act’s pro-construction presumption in applying the rail transportation policy.

**2. Approving the Uinta Basin Railway will foster development of a sound rail transportation system.**

Project opponents devote most of their energy on the transportation merits to arguing that the Uinta Basin Railway should not be approved because it is not financially viable. *See CBD Cross-Mot.* at 43–60; *Eagle Cnty. Cross-Mot.* at 24–30. But that argument answers the wrong question. Or at least it skips over a crucial preliminary question: What does the rail transportation policy say about financial feasibility?

The rail transportation policy favors “the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.” 49 U.S.C. § 10101(4). On its face, this factor does not mention a project’s financial feasibility. If anything, a policy favoring “development” that will create “competition ... with other modes” and “meet the needs of the public” sounds more consonant with the pro-construction presumption.<sup>6</sup> Yet project opponents latch onto the phrase “*sound* rail transportation system,” reading

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<sup>6</sup> The factor favoring “sound economic conditions in transportation” and “effective competition and coordination between rail carriers and other modes,” 49 U.S.C. § 10101(5), is too broad to demand financial feasibility analysis for each rail construction project.

it to mean that the Board should never approve new construction without “consider[ing] financial issues.” *Eagle Cnty. Cross-Mot.* at 25 (emphasis in original). But considering financial issues and conducting an independent investigation of financial feasibility, as the project opponents ask, are two different things.

The Board should explain on remand that, as a rule, it considers financial issues involved in “development ... of a sound rail transportation system” by allowing the financial markets to work. This explanation will counter the D.C. Circuit’s claim that the Board was adopting “a new rule without real explanation” when its original decision pointed to market forces. *Eagle Cnty.*, 82 F.4th at 1193. The rule itself, meanwhile, will clarify the Board’s existing practice, get the Board out of the freight business of making financial projections for new rail lines, and leave projects to stand or fall on their own merits.

The project opponents’ counterarguments are unpersuasive. As a legal matter, they claim that a review of the project’s financial feasibility is necessary to protect communities that might be hurt if a project were left unfinished. *CBD Cross-Mot.* at 43–44. But even the Board decision on which project opponents rely emphasizes that “as with any business transaction, the financial community itself will ultimately determine whether it considers the project to be economically viable” and is wary of any Board action that might “foreclose that opportunity.” *Tongue River R.R. Co., Inc. – Constr. & Operation – W. Alignment*, STB Docket No. FD 30186, 2007 WL 2936132, at \*8–10 (decided Oct. 5, 2007). What is more, project opponents’ concerns can and will be addressed in other ways. The Forest Service, for example, can require “a bond or other

security” to ensure that any damage to its land is repaired, even if a special-use permit-holder defaults. 36 C.F.R. § 251.56(e). Bureau of Indian Affairs rules likewise require a bond for rights-of-way over tribal lands. *See* 25 C.F.R. § 169.103. Such bonds offer more protection than a front-end screen for financial viability because they protect against all kinds of unexpected events.

Factually, the project opponents claim that new evidence disproves the railway’s financial viability. *See* CBD Cross-Mot. at 46–54. It does not. The Coalition and its private partner are using conventional tools for financing an infrastructure project, including private activity bonds, federal loans under the Railroad Rehabilitation and Improvement Financing program, competitive federal grant funding, and various equity investment vehicles.<sup>7</sup> That the current private activity bonding has already been allocated says nothing about these other financing paths and, as the project opponents note, private activity bonds may become available again in the future. CBD Cross-Mot. at 47. Nor is reliance on public funding vehicles inconsistent with the idea of a market-based feasibility determination. *Contra id.* at 58–60; Eagle Cnty. Cross-Mot. at 29. The very point of such public funding vehicles is to finance infrastructure projects that provide public benefits. *See* 49 U.S.C. § 22402(c) (prioritizing projects that “promote economic development” and “enhance service and capacity in the

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<sup>7</sup> As noted in the Coalition’s motion to reaffirm, the Coalition has authorized issuance of \$2.4 billion in private activity bonds. Coalition Mot. at 26. The Coalition’s private partner has also applied for a loan under the RRIF program. *See* <https://www.transportation.gov/sites/buildamerica.dot.gov/files/2025-12/January%202026%20Pipeline%20List.pdf>.

national system”). And as the allocation of the private activity bonds shows, the market for those funds is competitive.

More broadly, project opponents use their own analysis of the Uinta Basin waxy crude market, including potential competition from new and expanding transload facilities, to claim that the Uinta Basin Railway is no longer viable. *See* CBD Cross-Mot. at 48–54. Set aside the irony of these groups suggesting transload projects they are actively *opposing* would put the railway out of business.<sup>8</sup> The sheer speculation that surrounds their claims illustrates the wisdom of letting the market decide. Will the West Texas Intermediate oil price continue its three-year decline? *Id.* at 49. Why or why not? Would the new railway be able to “compete financially with existing transportation alternatives”? *Id.* at 50. What factors in the “competitive free market” would matter? *Id.* at 51. Will expanded transload facilities be built, or will the opponents of the new railway try to stop them too? *Id.* at 52–53. The Board does not need to answer these questions. The market will. All the Board needs to do is authorize the new railway and let it compete. 49 U.S.C. § 10101(4) (endorsing “effective competition among rail carriers and with other modes”).

Finally, and perhaps most ironically, project opponents complain that the costs of the new rail line have “ballooned.” CBD Cross-Mot. at 54. Cost

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<sup>8</sup> The Center for Biological Diversity and Southern Utah Wilderness Alliance have slammed the environmental review for the Wildcat terminal expansion. *See* <https://suwa.org/trump-administration-uses-bogus-energy-emergency-to-rubberstamp-expansion-of-utah-crude-oil-transport-facility-7-3-25/>.

increases are the fate of all delayed projects.<sup>9</sup> This project has been delayed by the very groups now complaining about the increased costs—and that is just the point. As the Supreme Court saw, “more agency analysis” means that “[f]ewer projects make it to the finish line” and “[t]hose that survive often end up costing much more than is anticipated or necessary, both for the agency ... and for the builder of the project.” *Seven Cnty.*, 605 U.S. at 184. The Court drew the line in *Seven County*, and the Board should draw the line here. “NEPA is not a game where project objectors can engage in unjustified obstructionism,” *id.* at 190 (internal quotation marks omitted), and neither is the Board’s exemption process. The Board should not be distracted or dissuaded by the project opponents. It should approve the Uinta Basin Railway before costs go up even more.

### **3. Approving the Uinta Basin Railway will foster public health, safety, and energy efficiency.**

The remaining rail transportation policies, which project opponents spend comparatively little time on, all favor the project. One set of opponents simply rejects the EIS’s conclusion that the rail line will reduce the movement of waxy crude by truck, thereby encouraging energy conservation. CBD Cross-Mot. at 62. That is not enough. As the Coalition noted above, increased truck traffic today, as compared to when the EIS was prepared, offers more opportunities

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<sup>9</sup> For example, the National Highway Construction Cost Index shows that costs have tripled since 2003. See [https://explore.dot.gov/views/NHIIInflationDashboard/NHCCI\\_1?%3Aiid=1&%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay\\_count=n&%3AshowVizHome=n&%3Aorigin=viz\\_share\\_link](https://explore.dot.gov/views/NHIIInflationDashboard/NHCCI_1?%3Aiid=1&%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay_count=n&%3AshowVizHome=n&%3Aorigin=viz_share_link).

to “encourage and promote energy conservation” by shifting waxy crude from truck to rail. 49 U.S.C. § 10101(14); *see supra* at 16. Another project opponent argues that a project “dedicated to extracting oil” cannot possibly encourage energy conservation. Eagle Cnty. Cross-Mot. at 34–35. That argument fails because the rail transportation policy applies only to actions “regulating the railroad industry,” 49 U.S.C. § 10101, and the cargo being transported by a rail carrier does not fall into that category.

Nor does the rail transportation policy “to operate transportation facilities and equipment without detriment to the public health and safety” reach as far as project opponents claim. 49 U.S.C. § 10101(8). That policy directs the “operat[ion]” of “facilities and equipment” in a way that protects “public health and safety.” *Id.* It does not and should not include more generic environmental issues. *See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 117–18 (2022) (limiting consideration of “public health more generally” in a vaccine mandate case). And to the extent operation of rail equipment could include “downline” harms like wildfires and oil spills, Eagle Cnty. Cross-Mot. at 33, CBD Cross-Mot. at 6, the EIS gives the Board more than enough information to apply the policy here.

As for the policy favoring “fair wages and safe and suitable working conditions in the railroad industry,” 49 U.S.C. § 10101(11), project opponents have all but given up. As the Coalition explained in its motion to reaffirm, that policy is about rail labor, not any broader environmental concerns. *See Coalition Mot.* at 29. Because the Railway Labor Act and Railroad Retirement Act will apply here, the Board should find this policy factor met. *See id.*

**4. The Board has discretion to weigh environmental costs against transportation benefits.**

Finally, the project opponents claim that, regardless of the ICC Termination Act's pro-construction presumption, the Board should reject the Uinta Basin Railway because its environmental costs outweigh its transportation benefits. *See* CBD Cross-Mot. at 63–64; Eagle Cnty. Cross-Mot. at 37–38. For all the reasons just discussed, that claim is inconsistent with the application of the rail transportation policy in this case. Yet project opponents continue to tout the “many and great” harms to people in Colorado who are “threaten[ed]” by the project. CBD Cross-Mot. at 63. And they mock the idea that a new rail line could improve the lives of people in Utah if it leads to the release of more greenhouse gases. *Id.* at 64. All of which underscores just how far away the project opponents are from the ICC Termination Act's true goals. The Act is not a national environmental policy tool, and “[a] relatively modest infrastructure project should not be turned into a scapegoat for everything that ensues from upstream oil emissions to downstream refinery emissions.” *Seven Cnty.*, 605 U.S. at 190. The Act favors new rail line construction because it benefits the whole rail system, and especially those people living nearby. On those grounds, the Uinta Basin Railway should be approved.

**B. The Board should approve the Uinta Basin Railway using an exemption.**

On top of the project opponents' objections to the Board's substantive decision authorizing the Uinta Basin Railway, they object to the process by which the Board made that decision. *See* Eagle Cnty. Cross-Mot. at 22–23. But their key argument fails to grasp this substantive-procedural distinction. In their

view, any failure to “properly consider and apply the relevant rail policies” is enough to trigger a full application process. *Eagle Cnty. Cross-Mot.* at 23. In other words, they would require an application any time a court finds the Board’s explanation on the merits wanting.<sup>10</sup>

The problem with the opponents’ argument is that a flawed explanation is not the same thing as a flawed process. The ICC Termination Act *requires* the Board to use an exemption from the full application process when that full process “is not necessary to carry out the rail transportation policy ....” 49 U.S.C. § 10502(a).<sup>11</sup> Whether the Board adequately explained its conclusions on the transportation merits—i.e., the project’s consistency with the rail transportation policy—says nothing about whether a full application process was needed to reach those conclusions.

Slightly closer to the mark, but still missing it, project opponents claim that a full application is needed to “assess[] the project’s financial viability and the applicant’s fitness.” *CBD Cross-Mot.* at 43. That claim at least suggests that the Board cannot make a merits decision without a fuller process. But for reasons already discussed, the Board did not need to conduct a more extensive inquiry into the new rail line’s financial feasibility. *See supra* at 24–28. Further, if such an inquiry were required, it would seemingly preclude the use of an exemption in nearly every case, vitiating Congress’s instruction that exemptions be used

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<sup>10</sup> Of course, even on project opponents’ telling, the Board can use an exemption if it finds the rail transportation policy factors met.

<sup>11</sup> The Board must also find that the project is limited in scope or that an application process is not needed to protect shippers. *Id.* No one disputes that part of the test here.

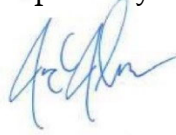
“to the maximum extent” consistent with the law. 49 U.S.C. § 10502(a). That is why the Board has long used exemptions for a wide variety of requests, including new rail construction projects, regardless of size. *See Cal. High-Speed Rail Auth. – Constr. Exemption – Merced, Madera & Fresno Cntys., Cal.*, STB Docket No. FD 35724, 2013 WL 3053064, at \*11 (decided June 13, 2013). The project opponents here offer no reason for a change now.

### **CONCLUSION**

The D.C. Circuit has already remanded this case without vacating the Board’s original decision. The Board should now deny the project opponents’ requests for a supplemental environmental review and a full application, and it should promptly grant the Coalition’s motion to reaffirm the original decision in this case.

Dated: February 2, 2026

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jay C. Johnson", positioned above a horizontal line.

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Uinta Basin Railway LLC*

**CERTIFICATE OF SERVICE**

I certify that I have this day, February 2, 2026, served copies of the foregoing document on all parties of record in this proceeding by email and first-class U.S. Mail.

/s Jay C. Johnson  
Jay C. Johnson