THE *SEVEN COUNTY* CASE AND THE LIMITS OF CAUSATION UNDER NEPA

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This spring, the Supreme Court will decide Seven County Infrastructure Coalition v. Eagle County, *its first significant case under the National Environmental Policy Act (NEPA) since the early 2000s. The Court is considering the extent to which proximate causation doctrines constrain the analysis that NEPA requires agencies to undertake. This Article provides a concise, but thorough, analysis of the petitioners' claims to narrow dramatically the scope of NEPA.*

More broadly, this Article analyzes how proximate cause principles should constrain NEPA review. We reject proposed artificial limits on the range of effects an agency must consider. Although the Court has borrowed the concept of proximate cause from tort law, we find that analogy most persuasive as support for foreseeability as a key concept. Claims by the petitioners that NEPA review necessarily forecloses analysis of impacts such as climate change that are physically distant from a project are inconsistent with the purposes of the statute or proximate cause principles. However, we recognize limits stemming from NEPA's purpose of informed decisionmaking. The primary limits involve the foreseeability of effects, their analytic tractability, and their position of environmental significance. Such limits mean that there will generally be greater limits on indirect effects analysis that applies to site-specific impacts as opposed to aggregate effects.

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INTRODUCTION

Issues about causation permeate the law, from the proximate cause requirement in torts to the "fairly traceable" requirement in standing doctrine. A case now before the Supreme Court focuses on causation in the context of the National Environmental Policy Act of 1969 (NEPA).[1] The case, *Seven County Infrastructure Coalition v. Eagle County*,[2] has important implications for issues such as whether NEPA covers climate change impacts.[3] This Article will attempt to clear away some of the confusion surrounding the topic of NEPA causation.

For readers unfamiliar with NEPA, some background will be helpful. NEPA embodies a commonsense dictate that the government should "look

1. *See generally* National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852. The extensive 2023 NEPA amendments under the Building United States Infrastructure through Limited Delays and Efficient Reviews Act, known as the BUILDER Act, are analyzed in Daniel A. Farber, *Rewriting NEPA: Statutory Continuity and Disruption in a Polarized Era*, 14 MICH. J. ENV'T & ADMIN. L. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4710933 [https://perma.cc/H4WR-WXAH].

2. Eagle Cnty. v. Surface Transp. Bd., 82 F.4th 1152 (D.C. Cir. 2023), *cert. granted*, Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 144 S. Ct. 2680 (June 24, 2024) (No. 23-975).

3. A 2007 decision first established an obligation to consider climate impacts in a case involving the Bush Administration's effort to avoid an impact statement for a regulation of vehicle fuel efficiency standards. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 546–48 (9th Cir. 2007), *vacated and superceded on reh'g denial*, 538 F.3d 1172 (9th Cir. 2008). Other lower court decisions also require inclusion of carbon emissions indirectly resulting from a project. *See, e.g.*, 350 Montana v. Haaland, 50 F.4th 1254, 1272 (9th Cir. 2022) (discussing the greenhouse gas emissions related to the expansion of a coal mine); Vecinos para el Bienestar de la Comunidad Costera v. FERC, 6 F.4th 1321, 1325, 1328–29 (D.C. Cir. 2021) (concerning approval of the construction of liquified natural gas terminals and pipelines).

before [it] leap[s]" when making environmental decisions.[4] Its most important requirement is that federal agencies produce environmental impact statements for major federal actions significantly affecting the environment.[5] This was one of the "action-forcing" provisions that Congress included in § 102 of NEPA to focus agency attention on environmental issues.[6]

NEPA also established the Council on Environmental Quality (CEQ), which issued regulations about NEPA compliance in 1978 that guided agencies and courts for more than forty years.[7] In 2020, however, the Trump Administration made major revisions to the CEQ regulations, which in turn were revamped by the Biden Administration.[8] The CEQ regulations, in their various forms, have much to say about causation issues, as do the recent NEPA amendments.

Our reading of NEPA is that an agency must consider an impact on the environment if (a) the agency has discretion to consider it in its ultimate decision, and (b) a reasonable decision maker would take it into account. These concepts are captured in the term "reasonable *foreseeability*," which asks whether the relevance and significance of an outcome would lead a reasonable person to take it into account. This is analogous to rules in tort law about which risks to others a reasonable person would consider before acting. The logic behind our position is simple: if an agency has discretion to consider an environmental effect in its decision and a prudent person would do so, failure to consider it would be arbitrary and capricious under the Administrative Procedure Act. NEPA applies this principle to environmental issues and specifies environmental impact statements as the mechanism for ensuring

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4. Nicholas C. Yost, *The Background and History of NEPA*, *in* THE NEPA LITIGATION GUIDE 1, 1 (Albert M. Ferlo, Karin P. Sheldon & Mark Squillace eds., 2d ed. 2012).

5. *See id.* at 6.

6. 42 U.S.C. § 4332(C) (2018); S. REP. NO. 91-296, at 9 (1969).

7. 42 U.S.C. §§ 4342–47 (2018); *see* Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970), as amended by Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977) (discussing the role, responsibilities, and expectations of the Council on Environmental Quality (CEQ)). The Supreme Court has said in dictum that the CEQ was "established by NEPA with authority to issue regulations interpreting it." Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004). A divided panel of the D.C. Circuit recently concluded that the CEQ lacks the statutory authority to issue binding regulations. Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902, 912 (D.C. Cir. 2024). Our argument does not rely on the CEQ regulations as binding authority, in part because they have recently been the subject of regulatory ping-pong between the Trump and Biden Administrations. Thus, we need not address the validity of the panel's somewhat startling decision.

8. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–08, 1515–18); National Environmental Policy Act Implementing Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507–08).

consideration. As we will see, concepts such as proximate cause in tort law are helpful in deciding what effects a reasonable agency would consider, although NEPA's own goals provide the ultimate touchstone.

Part II traces how the Supreme Court, CEQ, and Congress have dealt with the causation issue. Part III focuses on the *Seven County* case and rebuts some of the more extreme restrictions on causation advocated by the petitioners and amici. Part IV lays out our own theory and applies it to the issue of climate change, and Part V concludes.

We have some sympathy with the asserted purpose of petitioners' proposals, which is to speed up the ponderous process of infrastructure construction. But the extent to which NEPA slows down projects is unclear.[9] If NEPA really is an important part of the problem, it is unclear whether the fault lies in substantive issues, like what effects NEPA covers, or in procedural problems, such as delays by agencies or courts (some of which Congress addressed in the 2022 amendments).[10] It would be a serious mistake to distort NEPA law in the pursuit of such uncertain benefits. And to the extent that clear standards about what kinds of impacts should be analyzed by agencies would be beneficial, that is a policy choice that is better made by Congress, not the Court.

I. EVOLVING RULES OF NEPA CAUSATION

A. Causation and the CEQ Regulations

When originally enacted, NEPA referred to the "environmental effects" of an action but did not specify precisely what causal relationship is required. The 1978 CEQ regulations distinguished between "direct effects," reasonably foreseeable "indirect effects," and "cumulative" effects.[11] Those regulations remained in effect for over forty years. In 2020, however, the Trump Administration issued a thoroughgoing revision of the regulations.[12] Three changes are particularly relevant.

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9. *See* David E. Adelman, *Permitting Reform's False Choice*, 51 ECOLOGY L.Q. 129, 138–41 (2024) (summarizing studies and providing new data).

10. National Environmental Policy Act Implementing Revisions, 87 Fed. Reg. at 23,460–61.

11. 40 C.F.R. §§ 1508.7–.8 (1979). Direct effects were those that "are caused by the action and occur at the same time and place." *Id.* § 1508.8(a). Indirect effects are those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b). Cumulative effects were those that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7. These definitions are very similar to the Biden CEQ regulations. *See* text accompanying *infra* notes 16–20.

12. For critiques of the Trump Administration's revisions, see Alejandro E. Camacho, *Bulldozing Infrastructure Planning and the Environment Through Trump's Executive Order 13807*, 91 U.

First, the 2020 regulations narrowed the types of environmental impacts that agencies were required to consider. In the 2020 version, § 1508.1(g)(2) provided that "[e]ffects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain."[13] Reinforcing the geographic specificity presumption, § 1501.3(b)(1) stated that "significance would usually depend only upon the effects in the local area."[14] Also, CEQ said analysis of cumulative effects would not be required. In response to commentators, CEQ denied that the provisions foreclosed *all* possible consideration of the impacts of projects on climate change, but that seemed to be its general implication.[15]

In part because it disagreed with the interpretation of Supreme Court precedent used to support the 2020 changes, the Biden CEQ repealed the 2020 provisions on causation and largely returned to the 1978 language.[16] The regulation again distinguished between three categories of effects, with all of them covered by NEPA. First are direct effects, "which are caused by the action and occur at the same time and place."[17] Then there are indirect effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[18] As examples, the regulation refers to changes in land use, population density, and effects on natural systems.[19] Finally, cumulative effects "result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[20]

In his second term, President Donald Trump issued an Executive Order revoking CEQ's ability to set binding NEPA guidelines for agencies and

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COLO. L. REV. 511, 538–41, 544–45 (2020); Robert L. Glicksman & Alejandro E. Camacho, *The Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ENV'T L. REP. 10281, 10281–82 (2020).

13. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,374–75 (July 16, 2020) (to be codified at 40 C.F.R. § 1508.1(g)(2)).

14. *Id.* at 43,360.

15. According to the rule's prologue, "[t]he rule does not preclude consideration of the impacts of a proposed action on any particular aspect of the human environment. The analysis of the impacts on climate change will depend on the specific circumstances of the proposed action." *Id.* at 43,344.

16. *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442, 35,575 (May 1, 2024) (to be codified at 40 C.F.R. § 1508.1(i)).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

directing CEQ to repeal the existing NEPA guidelines.[21] The implications of these changes for the development of NEPA in practice by agencies are still unclear. However, because our argument draws on case law and the statute, these changes do not alter our underlying arguments.

B. NEPA Causation in the Supreme Court

The Supreme Court first discussed NEPA causation in *Metropolitan Edison Co. v. People Against Nuclear Energy* (*PANE*).[22] The Nuclear Regulatory Commission (NRC) considered whether to reopen a nuclear plant unit that had been temporarily shut down.[23] Another unit at the plant had suffered a major accident, and a citizen's group claimed that reopening any part of the plant would traumatize local residents due to fear of a future nuclear accident.[24] The Court rejected that claim, holding that a health effect must have "a reasonably close causal relationship [to] a change in the physical environment" to constitute an environmental impact.[25] The Court cited the proximate cause requirement in tort law as an analogy.[26] It also noted that NEPA served a different purpose than tort law, and that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[27] The Court concluded that this relationship was missing in the case before it: any psychological trauma would be caused by the fear of future environmental changes that might or might not ever occur.[28]

The Supreme Court issued one other major ruling on NEPA causation in *Department of Transportation v. Public Citizen*.[29] The complex procedural background of this case was explained more fully in the Ninth Circuit's opinion than the Supreme Court's.[30] The North American Free Trade Agreement (NAFTA) liberalized trade between the United States, Mexico, and Canada.[31] In 2001, an arbitration panel ruled that the refusal of the United

21. Exec. Order No. 14,154, 90 Fed. Reg. 8,353 (Jan. 20, 2025).
22. 460 U.S. 766 (1983).
23. *Id.* at 769.
24. *Id.* at 768–69.
25. *Id.* at 774.
26. *Id.*
27. *Id.* at 774 n.7.
28. *Id.* at 776–77.
29. 541 U.S. 752 (2004).
30. *See* Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1012–14 (9th Cir. 2003).
31. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301–3473).

States to allow fuller U.S. access to Mexican trucks violated NAFTA.[32] However, President George W. Bush quickly announced that he would allow entry, invoking his powers under an earlier law governing motor vehicles, as soon as the Department of Transportation was ready to issue regulations governing safety and inspections.[33] Under an appropriations rider, the Federal Motor Carrier Safety Administration (FMCSA) had to certify the safety of Mexican trucks before they could be admitted to the country.[34] After FMCSA took the required steps to ensure safety, President Bush gave permission for the trucks to operate in the United States,[35] which then allowed individual companies to apply to do so.[36]

The point of this procedural history is that, while the FMCSA action was necessary before the trucks could enter, the major policy decision was made by the President, seemingly based on foreign policy grounds, and was announced even before the FMCSA acted (though not formalized until later). There is certainly no evidence that Congress authorized FMCSA to engage in a free-ranging determination of whether admitting the trucks to the United States was desirable on environmental or other grounds—in other words, that it was supposed to second-guess the President's decision.

The issue before the Supreme Court was whether NEPA merely required FMCSA to consider the environmental effects of the certification, inspection, and safety program, or whether it had to consider the effects of the President's decision, given that FMCSA's action was necessary before the President could take formal action.[37] Or, in simpler terms, did FMCSA only need to consider the environmental impacts of its programs near the border or the entire environmental impact that the trucks might have across the United States?

Not surprisingly, the Supreme Court rejected the effort to expand the impact statement beyond the environmental effects the agency had authority to consider.[38] The Court emphasized that FMCSA had no authority to deny permission to any carrier complying with its safety rules to operate in the United States.[39] Fundamentally, "inherent in NEPA and its implementing

32. *Pub. Citizen*, 316 F.3d at 1013.

33. *Id.*

34. *Id.*

35. *Id.* at 1014.

36. *Id.* at 1018.

37. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004).

38. *Id.*

39. *Id.* at 768. As the Court explained:

> [The Federal Motor Carrier Safety Administration (FMCSA)] has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States. To be sure,

regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an [environmental impact statement (EIS)] based on the usefulness of any new potential information to the decisionmaking process."[40] But "[s]ince FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS."[41] As the Court remarked later in its opinion, "FMCSA does not have the ability to countermand the President's decision to lift the moratorium, nor could it act categorically to prevent Mexican carriers from being registered or Mexican trucks from entering the United States."[42] Thus, the environmental effects of admitting the trucks did not have a "reasonably close causal relationship" with FMCSA's decision.[43] Nor would broadening the scope of the environmental statement serve NEPA's other purpose of allowing the broader public to provide environmental information relevant to the agency's decision, since information on the general effects of Mexican trucks would not, in fact, be relevant to the agency's decision.[44]

"Put another way," the Court said, "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion."[45] The opinion could be considered a bit ambiguous about whether the decisive factor was the FMCSA's lack of authority over the entry of the trucks or its lack of authority to consider the effects of the trucks' admission.[46]

> [Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, § 350, 115 Stat. 833, 864 (2001)] did restrict the ability of FMCSA to authorize cross-border operations of Mexican motor carriers, but Congress did not otherwise modify FMCSA's statutory mandates. In particular, FMCSA remains subject to the mandate of 49 U.S.C. § 13902(a)(1), that FMCSA "shall register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" the safety and financial responsibility requirements established by DOT.

Id. at 766 (omission and third alteration in original).

40. *Id.* at 767.
41. *Id.* at 768.
42. *Id.* at 772.
43. *Id.* at 767.
44. *Id.* at 768–69.
45. *Id.* at 769.
46. As the Court put it:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally

The Court did not need to distinguish the two because Congress had delegated to the President, not the FMCSA, the decision about admitting the trucks, including consideration of the effects of doing so.[47]

C. The 2022 NEPA Amendments and the Causation Issue

Congress extensively amended NEPA for the first time in 2022. The eventual NEPA revision emerged from a 2021 bill, the Building United States Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act.[48] Section 2(a)(3)(B)(i) of the bill restricted consideration to "reasonably foreseeable environmental effects with a reasonably close causal relationship to the proposed agency action."[49] A later version of the bill retained that language but also defined "reasonably foreseeable" as meaning likely to occur within ten years and in the area "directly affected" by the agency action.[50] As ultimately enacted, however, the BUILDER Act did not include either the language about "close causal connection" or the restricted definition of reasonable foreseeability.[51] Instead, it merely amended § 102(2)(C) to require that environmental impact statements include discussions of "(i) *reasonably foreseeable* environmental effects of the proposed agency action; [and] (ii) any *reasonably foreseeable* adverse environmental effects which cannot be avoided should the proposal be implemented."[52]

The House sponsor of the ultimate bill explained that the requirement of reasonable foreseeability was meant to limit consideration to effects that were likely enough that a reasonably prudent person would take them into account.[53]

> relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its [Environmental Assessment (EA)] when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.

Id. at 770.

47. The respondents in *Public Citizen* did not argue that the type of safety regulations issued by FMCSA would have a connection with environmental impacts, and thus NEPA analysis was not required for the specific content of the regulations—just the admission of the trucks. This difference is significant because FMCSA did have discretion over the content of its regulations, which would be independent of the President's decision to open the border to Mexican trucks, and thus the outcome of the case might well have been different. *Id.* at 764.

48. H.R. 2515, 117th Cong. § 1 (2021).

49. H.R. 2515, § 2(a)(3)(B)(i) (proposing to amend NEPA § 102(2)).

50. H.R. REP. NO. 118-28, pt.1, at 14–15 (2023).

51. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, tit. III, sec. 321, § 102(2), 137 Stat. 10, 38 (incorporating the BUILDER Act).

52. *Id.* § 321(a)(3) (emphasis added).

53. 169 CONG. REC. H2704 (May 31, 2023) (remarks of Rep. Westerman).

II. THE *SEVEN COUNTY* CASE: CONSIDERATION OF UPSTREAM AND DOWNSTREAM EFFECTS

A. The Seven County *Case*

The facts of the case are described in depth in the D.C. Circuit's opinion.[54] At issue was the decision of the federal Surface Transportation Board (the Board) to use a streamlined procedure to approve the construction of a new railroad line, based in part on the environmental impact statement it had prepared.[55] The eighty-mile stretch of track in question would connect the Uinta Basin with the national rail network, allowing greatly expanded exploitation of the area's mineral resources—notably, huge amounts of waxy oil.[56] The rail line's "predominant and expected primary purpose" was transportation of that oil to market.[57] The Basin's oil production would represent up to 0.8% of U.S. greenhouse gas emissions and 0.1% of global emissions.[58]

The Board granted the project streamlined approval subject to completion of the environmental impact statement.[59] After consideration of the impact statement and other environmental issues, the Board issued its approval of the project.[60]

The D.C. Circuit faulted the Board's analysis on two major grounds. First, the Board failed to consider downstream effects, such as the impact of increased production on communities in Texas and Louisiana that were already overburdened by pollution from refineries.[61] The Board contended that it was impossible to predict which of the thirty refineries in the downstream area would receive the oil.[62] However, the Board did discuss some impacts such as the "[d]ownstream end use emissions associated with the combustion of the crude oil that could be transported on the Line."[63]

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54. Eagle Cnty. v. Surface Transp. Bd., 82 F.4th 1152, 1165–69 (D.C. Cir. 2023).

55. *Id.* at 1164. The streamlined procedure (formally, an exemption from the normal process) can be granted when, among other requirements, full consideration is not required to carry out national transportation policy. *Id.*

56. *Id.* at 1165.

57. *Id.* at 1166.

58. *Id.* at 1168.

59. *Id.* at 1167.

60. *Id.*

61. *Id.* at 1168.

62. *Id.* at 1177. There was also controversy over whether the agency had properly considered the downline effects of the additional trains, such as increased fires or accident risks on otherwise underutilized lines. *Id.* at 1181.

63. *Id.* at 1176.

Another downstream effect was the increased risk of accidents due to added rail traffic between the terminus of the line and the refineries, along with possible environmental impacts of those accidents, such as pollution of the Colorado River.[64]

Second, as to upstream effects, the Board limited its consideration of ecological impacts to the area within several hundred feet of the rail line, excluding major impacts on habitat in the much larger area that would also be affected by well and road construction, drilling, and truck traffic.[65] The Board contended, however, that the number and location of wells were "simply unknown and unknowable."[66]

The D.C. Circuit began with the principle that "[i]n determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation,' with *reasonable* being the operative word."[67] In terms of the upstream effects, the court said:

> The Board provides no reason why it could not quantify the environmental impacts of the wells it reasonably expects in this already identified region. Further, the Board's cursory assertion that it could confine the upstream impacts of oil development on vegetation and wildlife to areas where oil development and railroad construction would overlap lacks any reasoned explanation and is unsupported in the record. At a minimum, the Board "must either quantify and consider the project's [upstream impacts] or explain in more detail why it cannot do so."[68]

The court rejected the argument that NEPA did not require discussion of upstream effects because the Board "lacks authority to prevent, control, or mitigate those developments."[69] Rather, the court pointed out, the Board concededly had "authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits," and the Board had jurisdiction to consider "reasonably foreseeable environmental harms."[70]

The D.C. Circuit also found the consideration of downstream effects defective. The Board had refused to consider impacts on disadvantaged communities near refineries, even though it had "identified the refineries that

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64. *Id.* at 1181–82. Within the litigation, these railway-related impacts are referred as "downline impacts," as distinct from "downstream impacts," which occur after the oil is delivered to refineries. *See generally id.* at 1168, 1177, 1181. For our purposes, the difference is only significant to the extent that railway safety issues are closer to the core mission of the Surface Transportation Board (the Board).

65. *Id.* at 1177.

66. *Id.*

67. *Id.* at 1178 (quoting Sierra Club v. Dep't of Energy, 867 F.3d 189, 198 (D.C. Cir. 2017)).

68. *Id.* at 1179.

69. *Id.* at 1180.

70. *Id.*

likely would be the recipients of the oil resulting from the Railway's operation."[71] In addition, the court found that the Board had violated its own regulation in the method used to estimate the number of increased downline rail accidents.[72] The Board claimed to have considered possible effects of downline accidents on the Colorado River but cited nothing in the record to support this claim.[73]

In short, the court said:

> The "cumulative" effects within the Uinta Basin of a major expansion of oil drilling there, on Gulf Coast communities of refining the oil, and the climate effects of the combustion of the fuel intended to be extracted are foreseeable environmental effects of the project. These are effects the Board ultimately has the authority to prevent. The Board was required not only to identify those effects under NEPA, as discussed above, but also to weigh them in its ICCT [Termination] Act analysis.[74]

The *Seven County* group that had applied for approval of the new rail line filed a certiorari petition, asking the Court to consider the following question: "Whether [NEPA] requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority."[75] The impacts in question were "the local effects of oil wells and refineries that lie outside the Board's regulatory authority."[76]

B. The Case Against Arbitrary Line-Drawing

The private petitioners shifted their ground somewhat as the case progressed and espoused several strict limits on the scope of causation under NEPA.[77] But the upshot is that they have called for conforming NEPA law to tort law and more specifically for a series of limits on NEPA causation.[78] We return later to the relationship between NEPA and tort law, as well as whether tort law imposes similar limits (it does not).[79] We also find these limits implausibly broad for several reasons.

First, while the private petitioners have argued that NEPA analysis should exclude those effects that are covered by another agency's regulatory jurisdiction,[80] it makes no sense to limit consideration to effects over which the

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71. *Id.* at 1179.

72. *See id.* at 1184.

73. *See id.*

74. *Id.* at 1194.

75. Petition for a Writ of Certiorari at *i*, Seven Cnty. Infrastructure Coal. v. Eagle Cnty., No. 23-975 (U.S. Mar. 4, 2024).

76. *Id.*

77. *Compare id.*, *with* Brief for Petitioners at 16–18, Seven Cnty. Infrastructure Coal. v. Eagle Cnty., No. 23-975 (U.S. Aug. 28, 2024).

78. *See* Brief for Petitioners, *supra* note 77.

79. *See infra* Part III.A.

80. *See* Brief for Petitioners, *supra* note 77, at 16.

agency has independent regulatory authority. The Bureau of Land Management (BLM) has no regulatory authority over air pollution, water pollution, wildlife, public health, or fire beyond the boundaries of the land it manages. It would be absurd to say that it must ignore harms on private or state lands adjoining federal property because BLM has no jurisdiction there. After all, a key purpose of NEPA is to grant authority to agencies to generally consider environmental effects, even if the environment is not specifically within the factors or goals Congress has tasked the agency with.[81]

The logic of the private petitioners' position implies that BLM would have no jurisdiction to consider harms on adjacent National Forests, which are administered by the Forest Service. Similarly, one of the risks of oil transportation in *Seven County* is that an accident could result in an oil spill into the nearby Colorado River. It would be bizarre to say that the Board could not consider the effects of such a spill no matter how likely an accident might be or how serious the harm caused by spills because the Environmental Protection Agency (EPA) is the agency with jurisdiction over water pollution.[82] Besides being bizarre, it would also be a misfit with NEPA's purpose of informed environmental decisionmaking.

To take another example, suppose a federal agency is considering whether to fund a new facility that will produce large amounts of air pollution. The emissions may require a permit from a different agency (here, the EPA) as a major source, but EPA only has the power to require the use of the best system of emission reduction, not the power to prevent construction completely.[83] Only the funding agency has authority to consider the situation as a whole and ask whether the juice is worth the squeeze. If such issues were excluded from consideration under NEPA, there would be little left of the statute.

In any event, NEPA explicitly recognizes that the agency will consider impacts under the regulatory authority of other agencies. Section 102(2)(C) calls on the agency preparing the impact statement to obtain comments from any other agency that "has jurisdiction by law or special expertise with respect to any environmental impact involved."[84] There would be little for those other agencies to comment about if the impact statement excluded any effect subject to the jurisdiction of another agency.[85]

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81. *See* 42 U.S.C. §§ 4332(2), 4335 (2018).

82. *See generally* Clean Water Act, 33 U.S.C. §§ 1251–1387 (1988) (granting the Environmental Protection Agency the authority to regulate water pollution).

83. Clean Air Act, 42 U.S.C. § 7411.

84. 42 U.S.C. § 4332(c).

85. It is possible the provision could still be operative where the initial agency shares permitting jurisdiction over the subsequent decision with other agencies. *Cf.* Rayan Sud &

A second proposed limitation articulated by the private petitioners would exclude impacts remote in space or time.[86] Language in NEPA cuts against any effort at ringfencing consideration of environmental effects. Section 102(2), the very provision imposing the requirement of environmental impact statements in subsection (C), also provides in subsection (F) that agencies must "recognize the worldwide and long-range character of environmental problems."[87] Moreover, in amending NEPA, Congress did not impose any requirement of geographical or temporal proximity; instead, it required that effects be "reasonably foreseeable."[88] Arbitrary spatial or temporal limits would have absurd consequences. For example, many chemicals cause cancer decades in the future. A temporal limitation would mean that an agency would have to ignore latent toxicity, even if it is virtually certain to kill people. Discharging pollution into rivers causes harm downstream, no matter how many miles the river flows. For an agency to ignore these effects would be senseless.

The 2020 CEQ regulations did contain language that presumptively limited the geographic scope of the impact statement, so Congress would have had no trouble writing such limits into law if it had wished to do so.[89] It chose not to do so. The omission is even more glaring because earlier versions of the bill did contain such language.[90]

The third proposed limitation articulated by the private petitioners would limit NEPA review based on the number of intervening actors or events between the agency's decision and a specific environmental harm.[91] Of course, like remoteness in time and space, these may often be relevant considerations. But imposing arbitrary limitations would lead to results that defy common sense. Consider a proposal to build a government lab to experiment with dangerous viruses. If there is a leak, a virus could be set loose, but its spread would go through many intervening steps and involve uncertainties about what precautions would be taken or which individuals might transmit the virus to others. Quite possibly, a court would deny tort liability on policy

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Sanjay Patnaik, *How Does Permitting for Clean Energy Infrastructure Work?*, BROOKINGS INST. (Sept. 28, 2022), https://www.brookings.edu/articles/how-does-permitting-for-clean-energy-infrastructure-work/ [https://perma.cc/DV5P-9SNM] ("When multiple permits are required, one agency is typically designated as the 'lead' and coordinates all permits and consultations with other agencies."). But the provision is not limited by its terms to those circumstances, indicating that Congress had a broader intent than that.

86. *See* Brief for Petitioners, *supra* note 77, at 16–17.

87. 42 U.S.C. § 4332(f) (2018).

88. H.R. 2515, § 2(a)(3)(B)(i).

89. *See* Farber, *supra* note 1, at 13.

90. See Farber, *supra* note 1, for a detailed review of the legislative history.

91. *See* Brief for Petitioners, *supra* note 77, at 18.

grounds.[92] Yet would anyone say that the government should therefore ignore the risk of a lab accident?

At times, the petitioners even appeared to take the position that a single intervening action, such as the responses by other private or government actors to the initial agency decision, forecloses any examination of subsequent environmental impacts based on those responses.[93] For instance, they argued that agencies should not have to examine the environmental effects of development that is prompted by a government infrastructure project, such as the wells that would be developed in response to the new rail line.[94] But such a position would essentially amend the statutory text to add "direct" before the word "effect," eviscerating indirect effects analysis, a category long recognized in the CEQ regulations, and specifically endorsed by the Supreme Court in a prior case.[95]

One indication of the artificiality of the proposed limits is that the petitioners did not heed them. Their briefs are full of invitations for the Court to consider the impact of its decision on the length and time needed to produce impact statements, neither of which the Court has any jurisdiction over.[96] The briefs also invite the Court to consider how its decision would affect energy and other development projects in ways that could be economically beneficial.[97] Those possible effects involve the independent decisions of thousands of firms and individuals across the entire country and at times stretching into the indefinite future, far from the railroad project in the case the Court is reviewing, and none of which the Court has any authority over. Their actions belie their expressed views about what effects of a decision are relevant to decisionmakers.

Congress could decide to provide sharp limits on NEPA causation if it decides to rethink the costs and benefits of environmental assessment. But that is a legislative task. The judicial task is to apply the statute as it is. In the next section, we explain how that can best be done.

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92. *See* Kuciemba v. Victory Woodworks, 531 P.3d 924, 930–31 (Cal. 2023) (holding on public policy grounds that an employer was not liable for negligence resulting in the wife of an employee contracting COVID).

93. *See* Brief for Petitioners, *supra* note 77, at 41, 46.

94. *Id.* at 41.

95. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting, regarding the indirect effects of an off-site development prompted by a proposed ski area, that NEPA analysis establishes a role for other agencies to respond to the possible project). In *Metro. Edison Co. v. People Against Nuclear Energy* (*PANE*), the Court held that the causal chain must include a change in the physical environment, but that is far different from saying the chain can only contain a single link or that every link has to be a change in the physical environment. 460 U.S. 766 (1983).

96. *See* Brief for Petitioners, *supra* note 77, at 19, 29, 49–51.

97. *Id.* at 18.

III. A FUNCTIONAL APPROACH TO NEPA CAUSATION

A. NEPA Policies Bearing on Causation

As noted above, in determining the scope of proximate cause under NEPA, the Supreme Court has directed judges to consider the underlying policies of the statute—policies that are now woven into the text and structure of the amended statute.[98] Accordingly, while proximate cause might be informed by the concept as developed in tort, it will necessarily be different.[99]

Which NEPA policies might be relevant for a proximate cause analysis? In *Public Citizen*, the Court identified two policies: "Ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[100]

More specifically, under NEPA, all agencies assess significant environmental impacts of their proposed actions so that the agencies will consider the environment as a relevant factor,[101] consistent with their other existing statutory authority.[102] NEPA thus added the environment as a factor to be considered by all agencies, supplementary to any existing factors those agencies should consider.[103] But NEPA did not make the environment a primary factor superior to those other factors.[104]

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98. *See supra* Part I.B.

99. *PANE*, 460 U.S. at 774 n.7 (noting that proximate cause analysis may produce different results under tort law and NEPA).

100. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004) (quoting *Robertson*, 490 U.S. at 349).

101. 42 U.S.C. § 4335 (2018) (stating that NEPA is "supplementary" to the policies and goals of all federal agencies); 42 U.S.C. § 4332 ("[T]he policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ."); *National Environmental Policy Act*, CTR. FORWARD (Apr. 2023), https://center-forward.org/wp-content/uploads/2023/04/NEPA-Basic-FINAL.pdf [https://perma.cc/AN73-U72Y].

102. National Environmental Policy Act of 1969, Pub. L. 91-910, § 102(2)(C), 83 Stat. 852, 853–54 (codified as amended at 42 U.S.C. § 4332(C)) (requiring agencies to conduct environmental review "except where compliance would be inconsistent with other statutory requirements").

103. Petitioners appear to argue that "pro-development" agencies like the Board should have less of an obligation to consider environmental effects. *See* Brief for Petitioners, *supra* note 77, at 48. Such a position is inconsistent with NEPA's requirement that all agencies consider environmental factors in their decisionmaking. *See Robertson*, 490 U.S. at 350–52. Section 102(2) of NEPA mandates compliance for "all agencies of the Federal Government," and nowhere in either the original version of NEPA nor the 2023 Amendments is there any indications that some agencies are less bound than others. *See* 42 U.S.C. § 4332; Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10. If anything, NEPA is more important in its application to pro-development agencies than others, because those are the agencies most in need of being reminded to consider environmental impacts.

104. *See Robertson*, 490 U.S. at 350–52.

Two corollaries follow from the point that under NEPA the environment is a co-equal factor or goal with existing agency goals, but not an overriding factor or goal. First, agencies can choose how to weigh the environment vis-à-vis other goals.[105] Because NEPA does not articulate a prioritization among goals, it does not impose judicially enforceable obligations on agencies in terms of how to use the information developed through environmental review.[106] Second, NEPA's requirement for environmental analysis should not be extended where it fundamentally interferes with an agency's ability to achieve its other goals, for instance, by imposing unrealistic or excessive analytic requirements on agencies that do little to achieve NEPA's goals.[107] This is the "rule of reason" that the Supreme Court has articulated.[108]

Comparing these policies with the policies that drive proximate cause limitations in tort law can help us understand where the analogies to tort law hold, and where they break down.

Proximate cause has been defined in many ways in tort law. While the Second Restatement defines proximate cause as whether a defendant's actions are "a substantial factor in bringing about the harm" to the plaintiff,[109] the Third Restatement discards proximate cause for a "scope of liability" test as to whether the harm the defendant caused "result[ed] from the risks that made the actor's conduct tortious."[110] But in both cases, the standards relate closely to the concept of foreseeability; if subsequent effects or harms are foreseeable, a defendant is generally liable for them.[111] And in both cases, the policy rationales are similar. Proximate cause addresses concerns about tort liability that is disproportionate to the defendant's responsibility or

105. *See id.* at 350.

106. *See id.* at 352–53.

107. Metro. Edison Co. v. PANE, 460 U.S. 766, 776 (1983) ("The scope of the agency's inquiries must remain manageable if NEPA's goal of 'insur[ing] a fully informed and well-considered decision,' . . . is to be accomplished." (alteration in original) (citation omitted)).

108. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004) (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373–74 (1989)).

109. RESTATEMENT (SECOND) OF TORTS § 431 (AM. L. INST. 1965).

110. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. L. INST. 2010).

111. RESTATEMENT (SECOND) OF TORTS § 435 (AM. L. INST. 1965) (noting if a defendant's action is a substantial factor, lack of foreseeability of harms will not foreclose liability); *id.* cmt. b ("[I]f the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence."); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmts. d, e & j (AM. L. INST. 2010) (noting role of foreseeability in determining scope of liability).

blameworthiness,[112] and reducing the risk of chilling private activity through sweeping liability.[113]

But those policy rationales do not have much traction in the context of NEPA. NEPA implies no blameworthiness for an agency action with significant environmental impacts. It imposes no monetary penalty on agencies. And, if the environmental review is adequate, it authorizes no injunctive relief against an agency regardless of harm to the environment. Whether liability matches the wrongfulness of a defendant's actions, or the harm that those actions caused, simply is not relevant.

The upshot is that there is no basis for the view that a subsequent action or decision by another government agency or private actor necessarily breaks the chain of causation and limits an agency's responsibility to analyze the relevant environmental impacts of its proposed action. Indeed, even in tort law, an intervening act by a third party that is foreseeable generally does not affect the liability of a defendant.[114] And, as the above analysis makes clear, given NEPA's policies, there is no reason to impose a stricter standard of proximate cause under NEPA than in tort.

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112. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (AM. LAW INST. 2010); *id.* cmt. m (describing "cases in which the scope of liability would be too vast, in light of the circumstances of the tortious conduct"); *id.* § 29 cmt. e (noting importance of "intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct, but for no others"); *see id.* § 29 reporter's note cmt. e (noting that a common policy rationale for proximate cause in torts is "to balance the degree of wrongdoing with the extent of liability and to avoid a significant imbalance between the two"); RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. LAW INST. 1965) (emphasizing the importance of "responsibility" to proximate cause).

113. *See* Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. 1, 42–46 (2017).

114. In tort law, the Third Restatement simply applies the same standard of scope of liability to assessing whether intervening acts by third parties cut short liability. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 (AM. LAW INST. 2010). As a result, the same foreseeability standard applies. *Id.* cmt. e (stating that "unforeseeable, unusual, or highly culpable" intervening acts by third parties may bear on whether liability exists). Under the Second Restatement, a similar approach applied through a framework that distinguished between independent and dependent intervening acts, where independent acts were not "stimulated" by the prior actions of the defendant, and dependent acts were. RESTATEMENT (SECOND) OF TORTS § 441 cmt. c (AM. LAW INST. 1965). In either case, where intervening acts are foreseeable, the defendant is liable. *See id.* § 442B cmt. b ("[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate,' no matter how it is brought about, except where there is such intentionally tortious or criminal intervention . . . ."); *id.* § 443 cmt. b (explaining that even where an intervening third-party act is independent, if it is a "normal" consequence of the defendant's actions, it will not eliminate liability for the defendant, where normal is "the antithesis of abnormal, of extraordinary" and is thus broader than what is foreseeable).

Likewise, there is no reason to apply a directness test under NEPA if we are to look to tort law as even a rough guide. As every law student learns from the *Palsgraf* case,[115] there have been two opposing approaches to causation in torts: one based on foreseeability and the other based on directness and proximity in time and space.[116] Congress appears to have opted for the first approach.[117] Moreover, the omission of the language regarding a "close causal connection" may also be significant. The Biden CEQ had eliminated this language prior to the BUILDER Act, giving Congress every reason to speak up if it disagreed. Instead, Congress followed the Biden CEQ in dropping the language. CEQ's rationale was that the phrase was superfluous and misleading "because an agency's ability to exclude effects too attenuated from its actions is adequately addressed by the longstanding principle of reasonable foreseeability that has guided NEPA analysis for decades."[118]

B. A Framework for NEPA Causation Requirements

The policies of NEPA elaborated above, and the comparison with tort law, produce three basic principles for proximate cause in terms of the agency's environmental review responsibilities, which are principles reflected both in the statute and in the leading Supreme Court cases.

1. *Environmental Effects.* First, any effects to be analyzed must be environmental.[119] As the Court held in PANE, however, effects that do not result from environmental changes, directly or indirectly, need not be analyzed.[120] But indirect effects can be covered even if they result from predictable human actions rather than directly from the project. A completed highway does not

115. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

116. *See generally id.* The foreseeability approach is central to Cardozo's majority opinion, see *id.* at 101, while the Andrews dissent stresses proximity in time and space, along with other gauges of the "closeness" of the causal connection. *Id.* at 103–04 (Andrews, J., dissenting).

117. While foreseeability was clearly intended to be the dominant standard, adopting that standard does not necessarily preclude exceptions "[w]here the preparation of an [environmental impact statement (EIS)] would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS." Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004).

118. National Environmental Policy Act Implementing Regulations Revision, 87 Fed. Reg. 23,453, 23,465 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502 & 1507–08).

119. Metro. Edison Co. v. PANE, 460 U.S. 766, 772 (1983) ("NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment."); 42 U.S.C. § 4332(2)(C)(ii) (calling for examination of "environmental effects").

120. *PANE*, 460 U.S. at 775–77 (concluding that psychological effects from risk of nuclear accident are too attenuated from environmental effects to be considered under NEPA).

produce air pollution unless drivers choose to use it, but air pollution is one of the most predictable and significant potential impacts. Similarly, it is hard to see a more obvious environmental risk than a leak in an oil pipeline, yet that leak requires that firms decide to use the pipeline. An environmental impact statement that omitted these effects would be nothing but a bad joke.[121]

2. *Reasonable Foreseeability*. Second, any effects to be analyzed must be reasonably foreseeable.122 As a result, effects that are overly speculative, beyond the technical capabilities of the agency to analyze, too complex to assess, or are otherwise intractable for an agency to assess need not be documented in an environmental impact statement. For instance, long causal chains or attempts at predicting the strategic behavior of individual actors in the future are not necessarily out of bounds but may well not be tractable, an issue where CEQ can provide expert guidance.

Foreseeability may be much greater at the aggregate level. For instance, when oil is produced, it is very likely that it will eventually be burned and release carbon dioxide, contributing to climate change. Assessing the impact on increases of global average temperatures from the production of fossil fuels (at least within a range of values) is thus relatively tractable and may well be reasonably foreseeable. And global impacts from climate change—

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121. Thus, there are situations where economic or policy decisions that result from the initial agency decision may result in subsequent environmental impacts that should be analyzed as indirect effects. For instance, construction of a highway might produce increased demand for development near the new highway, which in turn should be analyzed under NEPA, and traditionally has been. *See infra* note 125 and accompanying text. Such scenarios are distinct from the effects at issue in *PANE*. In the highway example, the mediating effects are specific economic ones that will produce environmental effects in "the world around us." 460 U.S. at 772. In *PANE*, the mediating effect was an increased risk of a nuclear accident that allegedly would produce psychological effects. *Id.* at 775. The *PANE* court, in concluding these effects did not meet proximate cause, emphasized how psychological effects might reflect, or be hard to disentangle from, policy disagreements that are not properly the subject of NEPA. *Id.* at 777. The existence of environmental impacts due to a project's economic effects does not present the same risk of overlapping with policy disagreements. Holding that economic factors cut causal chains would in fact eliminate much NEPA analysis, since economics often drives much of the impact of government decisions. For instance, the environmental impacts of setting an emissions standard or approving a new facility will, in large part, depend on the economics driving the production processes that will produce emissions or mean that a facility operates at a certain level of capacity. *PANE* merely requires that the economic effects themselves stem from a change in the physical environment such as a new road or an increase in pollution and in turn will produce concrete effects on the physical environment.

122. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, sec. 321(a)(3)(B), § 102(2), 137 Stat. 10, 38 (limiting analysis to "reasonably foreseeable environmental effects").

such as providing a range for increases in mean sea level on a global scale—may also be more tractable since these generally follow from changes in global average temperatures. Less tractable, and thus less foreseeable, are the impacts of increases of global average temperatures on regional or local weather, specific species or ecosystems, or communities, since such predictions depend on the interaction of global average changes in temperature with local or regional climate patterns, ecological conditions, and social and political contexts.[123] And even less tractable might be assessing the specific places where those fossil fuels would be processed or consumed, and what the impacts on surrounding neighborhoods might be—those impacts may depend on the strategic behavior of a wide range of economic actors (determining where specific amounts of fossil fuel are sold to, what they are processed into, and how they are used).[124]

Subsequent permitting decisions by other agencies are relevant to the extent they can make analysis less tractable by making future outcomes less predictable and thus less foreseeable. This will be particularly true where those effects are indirect ones that are site-specific. For instance, it may not be tractable to assess how a future permitting decision for an individual, yet-to-be-proposed project will proceed, what conditions that permitting process will impose, and what effects might result. Following on the discussion in the previous paragraph, predicting the specific neighborhood-level impacts of production of fossil fuels will be complicated not just by the strategic behavior of economic actors, but also by decisions by individual regulatory agencies that oversee the facilities where fossil fuels are processed or burned. In contrast, aggregate impacts analysis that involves subsequent permitting decisions may well be tractable because that analysis will not necessarily depend on the behavior of individual agencies or private parties in the future.

A couple of examples can help illuminate this distinction. Consider construction of a new highway that is a federal project. That construction will have two indirect effects: First, it will cause more people to drive on the highway as it will replace a prior road that regularly had traffic jams. Second, by making an outlying area more convenient to travel to, it will encourage

123. Improvements in attribution science have made these kinds of assessments more tractable. *See* Eric Biber, *Regulating Greenhouse Gas Emissions Under the Endangered Species Act*, 13 MICH. J. ENV'T & ADMIN. L. 1, 51–60 (2023); Aisha I. Saad, *Attribution for Climate Torts*, 64 B.C. L. REV. 867, 899 n.184, 899–901 (2023).

124. Specific downstream consumption may be tractable when there are a limited number of consumers whose behavior is fairly predictable. *See* Sierra Club v. FERC, 867 F.3d 1357, 1371–74 (D.C. Cir. 2017) (finding reasonably foreseeable the carbon dioxide emissions from natural gas plants that will combust gas transported by a proposed pipeline, because the plants are limited in number and specifically identified as recipients of the gas).

development of that area, which will produce impacts on habitat, water quality and other natural resources. In both cases, predicting how a particular individual or project will be affected in the future is simply not tractable. Whether increased traffic on the highway in five years will, on a particular day, cause a particular person or people to experience additional congestion that will produce traffic delays and air pollution is not feasible to predict. Nor is it feasible to predict, in general, how a particular parcel of land near the highway will be developed in five years since that will depend on the motivations of the owner, the regulatory framework as applied by the relevant permitting body to that specific parcel, and more. But it is feasible to predict—and such predictions are often made—how much traffic might likely increase along the highway on average in five years, given potential development along it and current uses, and what that average traffic increase might mean for air quality and traffic delays. And it is feasible to predict—given current regulations and economic demands in the area—a range for how much land might be developed, and the general location where that development might occur. It is unsurprising therefore that it is standard in NEPA reviews for highway projects to assess the potential development effects the project might produce.[125]

Another example, closer to the facts of the *Seven County* case, involves leasing federal lands for oil and gas development. The legal framework for leasing involves an initial lease of large areas of federal land for exploration; however, only a small fraction of leases will produce development, development may only occur on limited areas of leases, and development requires subsequent permitting decisions. Thus, predicting site-specific impacts of future development is usually too speculative and intractable. Nonetheless, courts have upheld, and agencies regularly perform, environmental analyses at the leasing stage assessing the impacts that leasing might have on the landscape, by assessing the total aggregate acreage that might be affected by development, and the impacts that aggregate acreage of development might have on resources, regardless of the specific locations where that development might occur.[126] The 2023 amendments to NEPA added specific references to

125. *See* AM. ASS'N OF STATE HIGHWAY & TRANSP. OFFS., PRACTITIONER'S HANDBOOK: ASSESSING INDIRECT EFFECTS AND CUMULATIVE IMPACTS UNDER NEPA 5–9 (2016), https://environment.transportation.org/wp-content/uploads/2021/05/ph12-2.pdf [https://perma.cc/GSM7-G9MJ].

126. *See, e.g.*, Conner v. Burford, 848 F.2d 1441, 1450 (9th Cir. 1988) (finding a violation of NEPA where the agency had not analyzed the future impacts of leasing on aggregate affected land); Cady v. Morton, 527 F.2d 786, 798 (9th Cir. 1975) (denying coal leasing before an analysis of future impacts on affected land was performed); Sierra Club v. Peterson, 717 F.2d 1409, 1414 (D.C. Cir. 1983) (explaining that environmental analyses performed early in the leasing process should still project out attenuated future impacts).

programmatic impact statements, which are often keyed to precisely such aggregate effects, in §§ 108 and 111(11).[127]

3. *Consistency with Other Statutes.* Third, the analysis requirement under NEPA is to be followed by agencies consistent with other statutory requirements.[128] Most importantly, where an agency has no discretion to consider some or all environmental impacts, analysis of those relevant environmental impacts of that decision would serve no purpose under NEPA and would be inconsistent with those other statutory requirements.[129] The 2023 amendments to NEPA codify this analysis in § 102(2)(C), which qualifies requirements for an environmental impact statement when "compliance would be inconsistent with other statutory requirements . . . ."[130]

Similarly, § 106(a)(4) excuses compliance entirely when the "agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action."[131] Notice that this exclusion is keyed to whether the agency can consider environmental effects in making its own decision about an action, not to whether the agency can independently regulate the effects.

There is no special reason, whether from policy or from a comparison of the policies of NEPA with the policies and doctrine of proximate cause in tort law, that subsequent agency decisionmaking or jurisdiction should be treated differently from any other subsequent act or even in determining whether to analyze indirect effects. But Congress sometimes divides decisionmaking responsibility between officials or agencies in a way that dictates what environmental impacts an official or agency must consider. For instance, in *Public Citizen*, only the President could consider whether to authorize entry of Mexican trucks to the United States, while the FMCSA's consideration was limited to safety and inspection.[132] Thus, in *Public Citizen*, requiring the Department of Transportation to analyze the environmental effects of opening the United States to Mexican trucks would have done nothing to inform its own decision, which did not allow consideration of whether to admit the trucks or whatever pollution might result from use of the tracks inside the United States.[133]

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127. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, sec. 321, §§ 108, 111(11), 137 Stat. 10, 43–46.

128. 42 U.S.C. § 4332.

129. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768–69 (2004).

130. Fiscal Responsibility Act of 2023 sec. 321(a)(3)(A), § 102(2), 137 Stat. at 38.

131. Fiscal Responsibility Act of 2023 sec. 321(b), § 106(a)(4), 137 Stat. at 39.

132. *Pub. Citizen*, 541 U.S. at 759–61.

133. As noted above, *supra* note 47, plaintiffs did not preserve claims that the content of the safety regulations might have mattered for emissions impacts, so the case really did turn on the question of whether admitting trucks from Mexico would produce more emissions.

Another variation on this third and final category are what are frequently called "small handle" problems.[134] A federal agency is considering a permit for a small portion of a much larger nonfederal action—for instance, a Clean Water Act permit required to authorize the crossing of a mile or two of waterways out of a pipeline project that is hundreds of miles long.[135] There have been sharp divisions in appeals courts about whether the federal agency should restrict its NEPA analysis to the segment of the overall project that it is permitting, or examine the effects of the project as a whole. On the one hand, the federal permit is a "but for" cause for the overall project, which cannot proceed without it. However, one can argue that Congress did not intend that NEPA apply to the entire nonfederal action. In the pipeline example, the permitting requirement applies to waterways, not to pipelines as a whole. The agency is thus faced with a dilemma. The agency could conduct the NEPA analysis of the project as a whole, producing information that it either could act upon (potentially contravening Congress's intent as to the scope of the relevant regulatory program), or refuse to act on (making the NEPA analysis superfluous). Or the agency could only conduct NEPA analysis for the permit, not the project as a whole, arguably ignoring foreseeable consequences of the agency action (again, contravening Congress's intent). Understandably, courts differ in which horn of the dilemma they embrace.

It is important to note the limits of any "small handle" doctrine. Remember that NEPA does authorize and require all agencies to consider environmental effects as a supplement to their existing policies and goals.[136] The issue in the "small handle" doctrine is therefore one of extreme disproportionality. The federal agency decision is so small compared to the larger nonfederal action that it raises the question of whether environmental effects are being made superior to other factors—for instance, federalism or congressional desire to constrain the scope of regulatory requirements. One can understand the "small handle" doctrine as an example of a *de minimis* exception to NEPA, where the federal action is so small it cannot support the broad expansion of NEPA review and consideration of environmental effects.

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134. *See, e.g.*, Jeslyn Miller, *Clarifying the Scope of NEPA Review and the Small Handles Problem*, 37 ECOLOGY L.Q. 735, 735 n.2 (2010) (citing HOLLY DOREMUS, ALBERT C. LIN, RONALD H. ROSENBERG & THOMAS J. SCHOENBAUM, ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 261 n.2 (5th ed. 2002)) (describing the "small handles" problem as one that arises when an action is partly federal, which thus raises the question of whether the "federal handle" of the action requires that the state and local components, or the project in its entirety, are subject to federal NEPA review).

135. *See, e.g.,* Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 34 (D.C. Cir. 2015) (concerning a challenge to NEPA compliance for federal permitting for less than 5% of total pipeline length).

136. *See supra* notes 101–103 and accompanying text.

Indeed, in much of the litigation over whether the federal agency should have considered the effects of the larger nonfederal project, it appears that the plaintiffs are using the small federal action as a pretext—the plaintiffs are not really concerned about the impacts of that small component, what they are concerned about is the broader action.[137] Alternatively, the idea of a very small tail wagging a very large dog could be seen as triggering the absurdity doctrine. The "small handle" doctrine thus should be narrowly construed, and the codification of the doctrine in the 2023 NEPA amendments appears to do so, limiting it to situations where there is "no or minimal federal funding" or involvement such that "a Federal agency cannot control the outcome of the project[.]"[138]

Such cases present difficulties that are not raised by the *Seven County* case, where the project as a whole is subject to federal approval. Moreover, in a portion of its opinion that was not challenged on appeal, the D.C. Circuit held that the "public convenience and necessity" standard in the Board's governing statute gave it the authority to consider environmental effects of approving the rail line beyond track construction and train operation.[139] The close link between the reasoned consideration of environmental effects required for the agency's decision on the merits and the description of those effects in the impact is clear—so clear that in this case the Board actually incorporated the impact statement into its decision on the merits.[140] Given that environmental effects were relevant to its decision on the merits, surely discussion of them in the impact statement would be proper.

C. Explaining the Case Law

Understanding these foundations for applying causation in NEPA cases can help make sense of some confusing lower court precedent, including cases where lower courts have arguably (and in our view, wrongly) limited NEPA's scope on the grounds that another agency has primary authority over managing the relevant impacts. Indeed, a close review of those cases indicates that, as in *Public Citizen*, the case law can overall best be explained by the principles we have just discussed. In some of the cases, strategic choices by plaintiffs as to which arguments to make further explain the outcomes, rather than some broad principle that subsequent agency decisionmaking cuts short proximate cause limits.[141]

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137. *See, e.g.*, 803 F.3d 31 at 44 (discussing the doctrine limiting "segmentation" and NEPA's coverage of "connected- and cumulative-actions").

138. *See* 42 U.S.C. § 4336e(10)(B)(i).

139. Eagle Cnty. v. Surface Transp. Bd., 82 F.4th 1152, 1180 (D.C. Cir. 2023).

140. *Id.* at 1167.

141. *See, e.g.*, Sierra Club v. FERC, 827 F.3d 36, 45 (D.C. Cir. 2016) (declining to decide whether NEPA review division was improper segmentation because plaintiffs failed to bring the argument).

For instance, in a statutory scheme that, like *Public Citizen*, features a division of responsibility for decisionmaking between two federal entities, approvals of liquified natural gas export terminals are divided between the Federal Energy Regulatory Commission (FERC), which approves the facility, and the Department of Energy (DoE), which approves the export decision.[142] The D.C. Circuit upheld the agency's position that this division of decisionmaking requires dividing analysis of the direct impacts of the pipeline project itself (to be analyzed by FERC) from the indirect effects of exporting the gas (to be analyzed by the DoE).[143] Subsequent D.C. Circuit case law divided on whether this limitation on FERC's review of environmental effects stemmed from its lack of discretion in making the decision, or whether the fact that DoE was a subsequent agency decisionmaker that cut short the causal chain.[144]

The answer is probably neither rationale is (completely) correct. The division between FERC and the DoE is the result of a Secretarial Order by the Department of Energy, spinning off the project-level approval to FERC, but keeping the decision to export with the Secretary.[145] In other words, the case can better be understood as a question of scope and timing of NEPA review, with the agency making a reasonable choice to allocate NEPA analyses across the components of the DoE that were making the relevant decisions, a choice that courts might well defer to.[146] It is also the case that some

142. *See id.* at 40–41; EarthReports, Inc. v. FERC, 828 F.3d 949, 952–53 (D.C. Cir. 2016).

143. *Sierra Club v. FERC*, 827 F.3d at 50.

144. *Compare* Sierra Club v. FERC, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (stating decisions "rested on the premise that FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports"), *with id.* at 1379–80 (Brown, J., concurring in part and dissenting in part) (arguing that prior decisions rested on the premise that "[w]hen an agency '"has no ability to prevent a certain effect due to" [its] "limited statutory authority over the relevant action[]," then that action "cannot be considered a legally relevant cause"' of an indirect environmental effect under [NEPA]" (alterations in original) (quoting *Sierra Club v. FERC*, 827 F.3d at 47)).

145. *Sierra Club v. FERC*, 827 F.3d at 40–41 (quoting SAMUEL W. BODMAN, U.S. DEP'T OF ENERGY, S1-DEL-FERC-2006, DELEGATION ORDER NO. 00-004.00A, § 1.21.A (May 16, 2006)).

146. *See* Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976) (deferring to agency determinations about scope of NEPA review). The Department of Energy did conduct a review of the environmental impacts of exports of natural gas to non-free trade agreement countries. Sierra Club v. Dep't of Energy, 867 F.3d 189, 192 (D.C. Cir. 2017) (upholding agency's environmental review, and noting "the Department was independently required to consider the environmental impacts of its export authorization decision under NEPA"). It is possible that

component of the exporting decision is non-discretionary: if natural gas is to be exported to a country with which the United States has a free trade agreement, then the DoE must approve that export.[147] For those decisions, NEPA review by FERC would properly only focus on the direct impacts of the project. The key point is that the only issue was internal to the agency, involving which offices would perform different parts of the impact statement.

Another series of cases involves challenges to the Army Corps of Engineers (Corps) issuing permits under § 404 of the Clean Water Act for the filling of wetlands where the permits were a small component of a much larger coal strip mining project that is regulated by state agencies pursuant to the federal Surface Mining Control and Reclamation Act.[148] The Corps limited its review to the impacts of the specific filled areas rather than the larger strip mining project.[149] While the Fourth Circuit twice upheld that limited review on the grounds that the subsequent state agency permit limited the chains of causation that the Corps was required to analyze, these cases are better understood as small handle problems.[150]

Similarly, multiple NEPA challenges to the construction of the Obama Presidential Library in a public park in Chicago appropriately failed not because (as the court held) the federal agencies had no control over the relevant municipal decisions to allow the library,[151] but because the federal actions at

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dividing NEPA review in this way constituted improper segmentation, but the plaintiffs never made any such arguments. *Sierra Club v. FERC*, 827 F.3d at 45.

147. 15 U.S.C. § 717b(c). As to exports to free trade partners, the Department of Energy is in much the same position as the Board in *Public Citizen*—it had no discretion whether to approve the cross-border aspects of the activity, and therefore a knowledge of related impacts could not inform its decision.

148. *See* Ohio Valley Env't Coal. v. Aracoma Coal Co., 556 F.3d 177, 194–97 (4th Cir. 2009); Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs, 746 F.3d 698, 707–10 (6th Cir. 2014).

149. *See Ohio Valley Env't Coal.*, 556 F.3d at 195; *Kentuckians for the Commonwealth*, 746 F.3d at 707.

150. Whether the handle in these cases was so "small" as to justify limiting NEPA review is not an issue we take a position on in this analysis—we simply note that the small handle justification fits the causation analysis better than the approach taken by the courts in those cases. For a similar case using similarly flawed reasoning, where the handle is more likely to be larger and more likely to justify NEPA review of the entire project, see Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F.3d 1288, 1302, 1311–12 (11th Cir. 2019) (limiting the scope of environmental review for a Clean Water Act § 404 permit for phosphate mining to exclude the impacts of the disposal of the waste of the fertilizer produced by that mining on the grounds that a state environmental agency regulated those impacts).

151. Protect Our Parks, Inc. v. Buttigieg, 39 F.4th 389, 401 (7th Cir. 2022) (concluding federal agencies need not evaluate alternatives to a proposed project where agencies had no control over project selection by local government); *see also* Protect Our Parks, Inc. v. Chi. Park Dist., 971 F.3d 722, 737–38 (7th Cir. 2020) (same).

issue only involved relatively tangential issues (such as funding improvements to streets in the park) or non-discretionary findings.[152]

There are only a few examples of cases that appear to incorrectly rely on subsequent permitting or limited agency jurisdiction for constraining NEPA review where the decision would likely be different under our analysis. For instance, one case allowed the NRC, in the wake of the September 11, 2001, terrorist attacks, to refuse to analyze the environmental impacts of a terrorist attack by an airplane on a nuclear facility on the grounds that such a question was within the jurisdiction of the Federal Aviation Administration.[153] But the correct approach, as taken by another court considering the same types of NEPA claims for a different nuclear facility, is whether such an analysis is overly speculative, such that any effects would not meet the foreseeability standard.[154]

In short, our analysis would generally support most of the existing case law constraining environmental review. Indeed, a foreseeability standard that is properly applied would constrain many of the most extreme examples of abusive NEPA review and provide useful guardrails for agency NEPA review.

D. Analyzing Seven County

Applying our principles to the *Seven County* case illustrates nicely how our principles provide guidance to courts and agencies. In particular, our principles allow us to identify where some impacts might be more foreseeable than others and, therefore, more amenable to meeting NEPA's proximate cause requirements.

To begin with, it is highly foreseeable that the rail project would result in a large expansion in oil production in the basin. The agency and the project proponents have made clear that that expansion in oil production is the justification for the project. Indeed, we would suggest that where an agency has discretion to consider the economic costs or benefits of some effect of its actions, it presumptively has the discretion to consider the corresponding environmental effects. After all, as the Supreme Court said in *Michigan v. EPA*,[155] "[o]ne would not say that it is even rational, never mind 'appropriate,'" to ignore the costs of a decision, with the term *costs* encompassing harms to

152. *Protect Our Parks v. Buttigieg*, 39 F.4th at 394, 400 (noting funding for streets and mandatory decisionmaking process for National Park Service).

153. N.J. Dep't of Env't Prot. v. U.S. Nuclear Regul. Comm'n, 561 F.3d 132, 139–41 (3d Cir. 2009).

154. San Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n, 449 F.3d 1016, 1029–30 (9th Cir. 2006).

155. 576 U.S. 743 (2015).

"human health or the environment."[156] Thus, if the Board could consider the economic benefits of producing and selling oil, it should be able to consider the corresponding environmental costs. Otherwise, its final decision would be hopelessly skewed.[157]

Based on that foreseeable, and quantifiable (within a reasonable range) expansion in oil production, one can likely analyze at least some aggregate impacts of increased oil production on the Uintah Basin as reasonably foreseeable.[158] Such an approach is, as noted above, common in the context of federal oil and gas leasing, where aggregate levels of leasing development are used to assess aggregate levels of at least some environmental impacts.

However, assessing the site-specific impacts of potential future projects may be much less foreseeable. Whether and how particular sites will be developed may be the result of the interplay of decisions by property owners, oil and gas developers, the specific location of oil and gas resources, and local land-use regulation. As noted above, this kind of strategic interaction of decisionmaking—including subsequent local permitting decisions—makes foreseeability more difficult.

Downstream impacts can similarly be separated between what is more foreseeable and what is likely less foreseeable. The possibility of accidents, at least in the aggregate along specific routes, can be assessed through estimates of increased train travel (itself a product of the amount of traffic produced by the railroad, and a reasonably foreseeable effect), and estimates of accident risks. Thus, these impacts are likely reasonably foreseeable.

On the other hand, the specific impacts of emissions from specific downstream refineries on particular neighborhoods may be much less foreseeable. Those impacts are the product of interacting economic decisions by oil producers, oil refiners, and the purchasers of the refined product, the capacity and nature of individual refineries (which might itself change over time), and the decisions by state and/or federal regulators to maintain or change emissions standards at individual facilities in response to the influx of new oil. While it is obvious that such communities *could* be impacted, analyzing the impacts could be intractable given the difficulty of predicting precise locations and the potential for intervention by air pollution regulators.

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156. *Id.* at 752.

157. *Id.*

158. The EIS refers to half of the production as being "up to 175,000 barrels" of oil a day. Eagle Cnty. v. Surface Transp. Bd., 82 F.4th 1152, 1177 (D.C. Cir. 2023). If it were correct that the amount of oil production was completely unknown, that would be equally true of the economic benefits of the project, making it arbitrary and capricious to make that a factor in the Board's decision.

Indeed, one can identify a general principle here: For indirect effects, aggregate effects will generally be more tractable and foreseeable than site-specific effects. We do want to emphasize that there will be site-specific effects that are tractable and therefore foreseeable—where indirect effects involve relatively simple causal chains, with relatively few actors with minimal interaction, then analysis can be feasible.

CONCLUSION

As law students invariably learn in their torts or criminal law classes, causation issues can pose difficult conceptual problems.[159] In the NEPA context, we have argued that a few basic principles should guide the analysis. First, since the point of the impact statement is to ensure that an agency considers environmental impacts in making its decision, the impact statement should only include impacts that the agency has the discretion to consider. NEPA expands agency discretion to consider environmental impacts, but not every imaginable impact is relevant to a particular agency decision. That was the fundamental holding of *Public Citizen*.[160] Second, as a corollary, impacts must be reasonably foreseeable, a requirement now enshrined in statute. If an impact cannot be foreseen in sufficiently clear terms to allow an assessment of its significance, the agency can do little more than note the uncertainty. Third, as in tort law, the causation analysis under NEPA does not lend itself to hard and fast rules such as a ban on indirect or geographically remote effects. There are useful rules of thumb, such as the greater tractability of predicting indirect aggregate effects compared to indirect site-specific effects, but they are only rules of thumb.[161]

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159. *See generally* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

160. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 769–70 (2004).

161. It may be helpful to compare our approach with those offered by the Respondents in *Seven County*. We agree with the Environmental Respondents that reasonable foreseeability is a central concept in the statute. *See* Environmental Respondents' Brief at 2–3, 10, Seven Cnty. Infrastructure Coal. v. Eagle Cnty., No. 23-975 (U.S. Oct. 18, 2024). We disagree with their view, however, that the concept of reasonableness has no relevance beyond the foreseeability analysis. There is room for further consideration of foreseeability because of the core goal of NEPA (its aim to contribute to informed decisionmaking). It is also relevant because of NEPA's goal of supplementing but not trumping the mission that other statutes give an agency. That requires some bounds on inquiry when the mere complexity of an environmental statement would undermine the agency's ability to perform its primary mission, and it requires some degree of proportionality between limitations on the agency's role and its extent of the impact statement (the small handle issue). The government brief also assigns a rule for reasonableness beyond the foreseeability inquiry, but suffers from vagueness in delineating that role, which our approach avoids. *See generally* Reply Brief for the Federal Respondents Supporting Petitioners, Seven Cnty. Infrastructure Coal. v. Eagle Cnty., No. 23-975 (U.S. Nov. 18, 2024).

As in tort law, the governing concept is reasonableness, and despite the frustrations of law students, that is something our legal system has lived with for centuries. No doubt, like law students, agencies would be happier if there were a rule book drawing precise distinctions between foreseeable and unforeseeable effects. But Congress has not supplied such a rulebook, and it is not up to the courts to legislate on Congress's behalf. The Court should leave the decision to Congress as to whether, and how, to balance greater certainty in terms of the scope of NEPA analysis against providing for informed and effective decisionmaking with respect to environmental effects across the wide variety of decisions the federal government makes.