Nos. 22-1019, 22-1020 (consolidated)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EAGLE COUNTY, COLORADO,
Petitioner

v.

SURFACE TRANSPORTATION BOARD, et al.,
Respondents,

and

SEVEN COUNTY INFRASTRUCTURE COALITION, et al.,
Intervenor-Respondents.

On petition for review of final action
of the Surface Transportation Board

INTERVENOR-RESPONDENTS' PETITION FOR REHEARING EN BANC

Jay C. Johnson
Venable LLP
600 Massachusetts Ave., NW
Washington, DC 20001
(202) 344-4000
jcjohnson@venable.com

Counsel for Intervenor-Respondents Seven County Infrastructure Coalition and Uinta Basin Railway, LLC

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RULE 35 STATEMENT

Intervenor-Respondents are seeking en banc review because the panel's holding that certain indirect environmental effects were reasonably foreseeable contradicts this Court's recent decisions in *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104 (D.C. Cir. 2022) and *Center for Biological Diversity v. FERC*, 67 F.4th 1176 (D.C. Cir. 2023). Consideration by the full Court is thus necessary to secure and maintain the uniformity of the Court's decisions.

Intervenor-Respondents also seek en banc review because the panel's failure to apply the statutory presumption favoring rail construction conflicts with the decisions of two other courts of appeals: the Eighth Circuit in *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), and the Ninth Circuit in *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011). This conflict involves a question of exceptional importance to federal rail policy.

INTRODUCTION

The Uinta Basin Railway—a new rail line in Utah that would serve people living in an isolated part of the state—is the latest in a long line of fossil fuel transportation projects to be challenged in this Court. Before this case, the Court had drawn a bright line: A project's downstream indirect effects were reasonably foreseeable when the project was "known to transport" fossil fuels to "particular power plants," *Delaware Riverkeeper*, 45 F.4th at 109, and "not reasonably foreseeable" when the agency "cannot identify the end users" of the fuels, *Center for Biological Diversity*, 67 F.4th at 1185. The panel here dropped that distinction, even though it admitted that the agency could not "identify specific refineries" as end users. Op.32. That holding not only conflicts with this Court's precedent on reasonable foreseeability, it also forces agencies to speculate about local environmental effects in a way that benefits no one.

A similar problem affects another part of the panel's decision. This Court has held that when the record does not allow an agency to "predict the number and location of any additional wells" needed to supply a transportation project, those wells' effects are not reasonably foreseeable. *Delaware Riverkeeper*, 45 F.4th at 109. But the panel held the opposite, requiring a review of local environmental

effects even where the agency did not know the wells' "direct parameters"—that is, their number and location. Op.32.

Beyond its criticism of the agency's environmental review, the panel found a lack of balance between what it called the project's "incredibly significant environmental effects" and its "uncertain transportation benefits." Op.62. This portentous balancing language ignores the presumption favoring rail construction that is part of the governing statute. And that failure conflicts with cases in the Eighth and Ninth Circuits that have endorsed the statute's pro-construction presumption. *See Mid States*, 345 F.3d at 552; *N. Plains Res. Council*, 668 F.3d 1091-92. Resolving this conflict is important because Congress has said that new rail construction "shall" be authorized unless it is "inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c). The panel's holding that the Surface Transportation Board should simply "weigh" environmental effects against transportation benefits does not follow that directive.

STATEMENT OF THE CASE

The Uinta Basin is a 12,000-square mile area in northeast Utah and northwest Colorado that is isolated by the mountain ranges and plateaus of the western Rockies. JA279. Though the basin is larger than eight states, the only way to reach it is over two-lane roads that cross high mountain passes. JA822; JA280–81. This inaccessibility makes it hard for people living in the basin—including the Ute Indian Tribe of the Uintah and Ouray Reservation—to participate in the broader economy. JA280–81; JA792, JA1315.

If the basin were less isolated, it would change people's lives. The basin is filled with untapped natural resources, including valuable minerals, natural gas, and crude oil. JA280. The basin's farmers and ranchers grow alfalfa, corn, and cattle. *Id*. But without better infrastructure, these products can never reach the rest of the country. JA281.

The Uinta Basin Railway is the kind of infrastructure that could unlock the basin's potential. By building 80 miles of track from the heart of the basin to a new connection with the national rail network, it would bridge the transportation gap that today stops farmers, ranchers, and oil producers from selling to wider markets. JA281–82. This railway would carry all sorts of commodities, improving lives by boosting the basin's economy. But its initial success

depends on its ability to transport the basin's waxy crude oil to refineries in other parts of the country. JA283–87.

Of course, success is not guaranteed. JA286. The Uinta Basin Railway is an economic development project sponsored by a unit of state government, Intervenor-Respondent Seven County Infrastructure Coalition. JA252, JA285. To facilitate environmental review, Seven County gave the Surface Transportation Board high and low estimates of the oil production that the project could support. JA230. It also told the Board about refineries around the country where that oil could be delivered. JA1189. But it did not have contracts with any of those downstream refineries or any upstream oil developers, and it had no way of knowing which customers or shippers would eventually use the new rail line. *See* JA39.

When the Surface Transportation Board prepared the Environmental Impact Statement for the railway, it recognized that neither Seven County nor its fellow Intervenor-Respondent Uinta Basin Railway, LLC "propose[d] to undertake any oil and gas development projects." JA1235. Rather, any new development in the basin would involve "many separate and independent projects that have not yet been proposed or planned." JA1238. These projects "could occur on private, state, tribal, or federal land and could range in

scale from a single vertical oil well to a large lease involving many horizontal wells." JA1238. Thus, the Board found, "it would not be possible to determine which of these as yet unproposed, unplanned, and unsponsored projects would or would not proceed . . . ." JA1238.

The destination of oil shipped on the railway is equally uncertain. The Board used "likely regional destinations" in Louisiana, Texas, Kansas, Oklahoma, and Washington to study traffic on the existing rail lines that might carry Uinta Basin trains. JA1190–92. But that was the best the Board could do. Because "[t]here are many different potential destinations for Uinta Basin oil," the Board found that "it is not possible to identify specific refineries that would receive shipments" of that oil. JA41. Indeed, within just three of the regions that the Board identified as potential destinations, 36 different refineries could take Uinta Basin oil. JA1189. "The final destinations of the trains," the Board explained, "would depend on the ability and willingness of refineries in other markets" to "receive" and "process" the oil. *Id.* In other words, once oil from the Uinta Basin reaches the national rail network, its destination is market-driven. JA39.

The panel recognized all of this. Op.29. And it knew that the Board had calculated greenhouse gas emissions from well

construction and oil combustion using a conservative, "high oil production scenario." Op.26–28. Yet the panel held that the lack of "'direct parameters' about the oil wells that would need to be drilled" did not matter; the National Environmental Policy Act still required the Board to "quantify" the local environmental impacts of those wells. Op.30, 32. In the same way, the panel held that even if the Board "cannot identify specific refineries that will receive and process the oil," NEPA demanded that it "take the next step and estimate" localized, refinery-specific "emissions or other environmental impacts." Op.32, 66. The panel also bowed to objections from a Colorado county, finding that the Board failed to take a hard look at potential indirect impacts caused by trains moving on the national rail network. Op.40–45.

Having held that the Board's review of environmental impacts violated NEPA, the panel turned to the rail transportation merits. Rail construction, the panel knew, must be authorized by the Board under the ICC Termination Act. Op.54. As the panel saw it, that Act required the Board to "compare both sides of the ledger," weighing the new railway's potential environmental effects against its potential for opening new markets in the basin. Op.64. The panel then found that "[t]he Board's consideration of these impacts and

benefits was cursory at best" and vacated the Board's decision. Op.64–65. The ICC Termination Act, according to the panel, required more discussion of why the project's "transportation benefits outweighed [its] environmental impacts." Op.64.

ARGUMENT

Rule 35 authorizes en banc review when a panel decision conflicts with other decisions of this Court or with "authoritative decisions" of other circuits. Fed. R. App. P. 35(b)(1). Both reasons for rehearing are present here.

I. The panel's decision irreconcilably conflicts with *Center for Biological Diversity* and *Delaware Riverkeeper*.

In recent years, this Court has regularly been asked whether an agency reviewing the proposed transportation of fossil fuels must study the potential uses and sources of those fuels. Before the panel's decision in this case, the Court's answers had turned on whether the agency knew the specific end users and well locations. Now, its cases conflict.

A. Because end users are unknown, *Center for Biological Diversity* should have controlled.

After this case had been submitted, but before it was decided, the Court released its opinion in *Center for Biological Diversity v. FERC*, 67 F.4th 1176 (D.C. Cir. 2023). There, the Federal Energy Regulatory Commission had authorized a new liquid natural gas pipeline in Alaska. *Id.* at 1180. The pipeline's opponents argued that the Commission had violated NEPA by not considering reasonably foreseeable greenhouse gas emissions from the combustion of

gas that was delivered "for sale and use in Alaska." *Id*. at 1185. The Court disagreed, pointing out that the pipeline company had no contracts with any customers in Alaska. *Id*. As a result, the Commission "could not reasonably identify the end users of the gas," and its decision "not to consider the indirect effects of Alaska-bound gas was lawful." *Id*. at 1185–86; *see also Delaware Riverkeeper*, 45 F.4th at 110 (holding that downstream emissions "were not reasonably foreseeable because the Commission was unable to identify the end users" of the gas being transported).

The Court's analysis of downstream indirect effects in *Center for Biological Diversity* should have controlled the panel's analysis of downstream indirect effects here. Seven County said as much in a notice of supplemental authority. In a footnote, the panel disagreed. Op.33 n.1. But its effort to distinguish *Center for Biological Diversity* is unpersuasive.

The panel recognized *Center for Biological Diversity*'s holding that "indirect emissions are not reasonably foreseeable if the Commission cannot identify the end users of the gas." Op.33 n.1 (quoting *Ctr. for Biological Diversity*, 67 F.4th at 1185). And it had already admitted that the Board "cannot identify specific refineries that will receive and process" oil from the Uinta Basin. Op.32. That the

Board had identified "specific regions that will receive the oil"—regions that include dozens of different refineries—does not set this case apart from *Center for Biological Diversity*. Op.32, 33 n.1. Regions are not "end users," and *Center for Biological Diversity* holds that indirect effects are not reasonably foreseeable when end users are unknown. 67 F.4th at 1185–86.

Should the Court decline en banc review on this point, agencies will face a dilemma. *Center for Biological Diversity* says that if the agencies "cannot identify the end users," then downstream indirect effects "are not reasonably foreseeable" and need not be studied. 67 F.4th at 1185. The panel in this case, by contrast, tells the agencies that if they can predict the general region receiving fossil fuel, they must take the "next step" and study indirect local impacts, even if they cannot identify specific end users. Op.32–33.

Worse, agencies trying to follow the panel's instructions will have no way to succeed because the market for fossil fuels is too complex to predict. Fluctuating commodity prices, refinery capacity, and consumer demand can direct fuel shipped on the national rail or pipeline networks to different end users on different days. In this tempest, customer contracts are the only anchor for agency analysis. When no such contracts are in place, agencies can only

speculate about the fuel's end users. *See Ctr. for Biological Diversity*, 67 F.4th at 1185. That sort of speculation does nothing to advance NEPA's twin causes: public participation and informed agency decisions. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004).

B. Because the number and location of new wells is unknown, *Delaware Riverkeeper* should have controlled.

Before the panel's decision here, a similar reasonable foreseeability analysis applied to the indirect effects of any upstream wells that might supply fossil fuels for a new transportation project. That analysis is described in *Delaware Riverkeeper*, where the Court confronted a natural gas pipeline project that would increase system capacity. 45 F.4th at 109. The Federal Energy Regulatory Commission seemed to concede that this additional capacity could lead to "additional wells" in Pennsylvania's gas fields. *Id.* But because the Commission could not "predict the number and location of any additional wells that would be drilled," the Court found that such wells were not reasonably foreseeable indirect upstream effects of the project. *Id.* (quoting *Birkhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019)).

The situation here was the same. The Board did not know the number of new oil wells that would be needed to supply the new railway, only that its model showed between 1,245 and 3,330 wells after 15 years. JA1108–09. Nor could the Board say where those wells might be located within the Uinta Basin's oil fields. *See* JA1238. Thus, under *Delaware Riverkeeper*, the localized environmental effects of those potential future wells were not reasonably foreseeable. 45 F.4th at 109.

The panel did not follow *Delaware Riverkeeper* on this point. Its opinion nods to the lack of "'direct parameters' about the oil wells that would need to be drilled," but never explains that the unknown parameters included both the number and the location of those wells. Op.32. That reasoning does not distinguish this case from *Delaware Riverkeeper*. And, as with downstream oil delivery, telling the Board to "quantify the environmental impacts of the wells that it reasonably expects in" the Uinta Basin "region" mandates baseless speculation. *Id*. The basin is about the same size as Maryland. The Board cannot quantify impacts in so vast an area if it does not know how many wells might be drilled, or where. Again, en banc review is needed to bring consistency and common sense to the Court's reasonable foreseeability precedent.

II. The panel failed to consider the presumption favoring rail construction adopted by other circuits.

Atop its criticism of the Board's environmental review, the panel rejected the Board's transportation merits analysis. As the panel saw it, the ICC Termination Act required the Board to "weigh" the railway's environmental effects against its transportation benefits. Op.62. The panel likened this weighing to a "scale": On one side sits the railway's potential environmental effects and on the other, its transportation benefits. Op.64. If the scale tips toward more environmental effects, the panel seems to say, the Board should not authorize the project.

But authorizing rail construction under the ICC Termination Act is not like using a scale—or at least not an evenly balanced one. The Act says that "[t]he Board *shall*" authorize new rail construction "*unless* the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c) (emphasis added). More, this compulsory language has evolved over several decades, and each new iteration has made rail construction easier. *Mid States*, 345 F.3d at 552 (discussing the older versions of the rail construction statute). On that basis, the Eighth and Ninth Circuits have found that "there is a statutory presumption that rail

construction is to be approved." *Id.*; *see N. Plains Res. Council*, 668 F.3d at 1091–92 (adopting the Eighth Circuit's view).

The panel's decision never mentions the statutory presumption favoring rail construction, even though it was briefed. *See* Seven County Br. at 10, 12; Board Br. at 3–4, 9, 18, 73. If it had, the panel could not have described the project's environmental effects and transportation benefits as occupying two sides of a scale. Op.64. The ICC Termination Act demands instead that the Board approve new rail construction unless that construction is contrary to "the public convenience and necessity." 49 U.S.C. § 10901(c).* That presumption does not preclude a finding that environmental harms outweigh transportation benefits, but it makes such a finding harder than the panel's decision admits.

The panel's failure to account for the presumption favoring rail construction warrants en banc review as a question of exceptional importance. Rule 35's sole example of such important questions is a panel decision that "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the

* The presumption favoring rail construction also applies when a party seeks authority using the Board's exemption process. *See Cal. High-Speed Rail Auth. – Constr. Exemption – In Merced, Madera, and Fresno Counties, Cal.*, 87 Fed. Reg. 79034, 79037 (Dec. 23, 2022) (applying the presumption in an exemption proceeding).

issue." Fed. R. App. P. 35(b)(1)(B). Here, such conflict exists because both the Eighth and Ninth Circuits have acknowledged and applied the presumption favoring rail construction. *See Mid States*, 345 F.3d at 552; *N. Plains Res. Council*, 668 F.3d at 1091–92.

Even more important, the presumption favoring rail construction was created by Congress. The ICC Termination Act is supposed to encourage new rail construction, even when strong countervailing arguments may exist. Rail transportation—including both freight and passenger rail—is the most environmentally friendly mode of surface transportation. By making new rail construction harder, the panel has put those benefits at risk. En banc review is needed to address this vital issue.

III. These issues are likely to recur regularly.

Though Rule 35 does not expressly list how often an issue arises as a reason to grant en banc review, frequent recurrence fits the rule's other criteria. When an issue arises regularly, conflicting panel decisions present an even greater threat to "the uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). Future panels may widen the split in authority by following one conflicting decision over the other, exacerbating the problems facing agencies, litigants, and courts. For similar reasons, a recurring issue is more readily

characterized as exceptionally important than an issue that rarely comes up. *See* Fed. R. App. P. 35(a)(2); *Al-Hela v. Biden*, 66 F.4th 217, 266 (D.C. Cir. 2023) (Randolph, J., concurring) ("When an important and recurring but unresolved question is confronting our court, that is a reason for deciding the question en banc, not for evading it and perpetuating uncertainty.").

The reasonable foreseeability of upstream and downstream environmental effects arises regularly, especially in the context of fossil fuel transportation projects. This case, *Delaware Riverkeeper*, and *Center for Biological Diversity* were all decided within about a year of each other. Before that, this Court had decided at least three other cases covering similar ground since August 2017. *See Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019); *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022). And at least two pending cases raise the same sorts of questions. *See Food & Water Watch v. FERC*, D.C. Cir. Docket No. 22-1214 (filed Aug. 19, 2022); *New Jersey Conserv. Found. v. FERC*, D.C. Cir. Docket No. 23-1064 (filed May 25, 2023). These frequent cases reflect the unsurprising fact that transporting fossil fuels is and will remain controversial. Such ongoing controversy is another reason to grant en banc review.

But the Uinta Basin Railway will carry more than just fossil fuels. The panel's decision hurts farmers and ranchers who want to sell their products in the national market. JA280–82. Even worse, the panel's decision denies needed infrastructure to the generations of people who will live in the basin long after its oil fields are dry.

These harms show that the controversy over fossil fuel transportation is not the only context in which reasonable foreseeability is important. The reasonable foreseeability of indirect environmental effects is a basic concept in all NEPA reviews. *See* 40 C.F.R. § 1508.1(g)(2) (defining indirect effects under NEPA). Indeed, recent amendments to NEPA—the first substantive changes since the law's inception—have enshrined reasonable foreseeability in the statute itself. 42 U.S.C. § 4332(2)(C)(i) (2023) (requiring that agencies study the "reasonably foreseeable environmental effects" of their proposed actions). The centrality of this concept means that the conflict over reasonable foreseeability in this Court's fossil fuel transportation cases will likely spill over into other NEPA cases. *See, e.g.*, *Friends of the Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1064 (D.C. Cir. 2017) (citing FERC reasonable foreseeability precedent in the context of a light rail project). En banc review would benefit those cases too.

The presumption favoring rail construction, while not as hot a button as fossil fuel transportation, is also likely to come up again. Since its decision here, the Surface Transportation Board has referenced the presumption favoring rail construction in two more cases—one involving freight rail and one involving high-speed passenger rail. *See Savage Tooele R.R. Co. – Constr. & Operation Exemption – Line of Railroad in Tooele Cnty., Utah*, 2023 WL 2732199 (STB March 29, 2023); *Cal. High-Speed Rail Auth. – Constr. Exemption – In Merced, Madera & Fresno Cntys., Cal.*, 2022 WL 17830050 (STB Dec. 19, 2022). It is now unclear how the Board will apply this presumption in the future, especially given the disagreement between this Court and the Eighth and Ninth Circuits. En banc review would help the Board and the parties appearing before it by addressing this circuit split.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Jay C. Johnson
Jay C. Johnson
VENABLE LLP
600 Massachusetts Ave, NW
Washington, DC 20001
(202) 344-4000
jcjohnson@venable.com

Counsel for Seven County Infrastructure Coalition and Uinta Basin Railway, LLC

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CERTIFICATE OF COMPLIANCE

This petition for rehearing en banc complies with the word limits and typeface requirements in the D.C. Circuit Rules. It contains 3,639 words, as calculated by Microsoft Word's word-count function.

/s/ Jay C. Johnson
Jay C. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, I served a true and correct copy of this petition for rehearing en banc by electronic mail on all counsel of record via the Court's electronic filing system.

/s/ Jay C. Johnson
Jay C. Johnson