

6. This decision is effective on January 14, 2022.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Oberman dissented with a separate expression.

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BOARD MEMBER OBERMAN, dissenting.

I respectfully dissent from today's decision (Today's Decision) granting the Coalition's petition for exemption. The project's environmental impacts outweigh its transportation merits, and I would accordingly deny the Coalition authority to construct the Line.

As an initial matter, as I explained in my dissent to the January 5 Decision, the Board should not have utilized a so-called two-step process and granted preliminary approval of the transportation merits before completion of the environmental review. In addition, the Board should have required the Coalition to submit additional information before concluding that an application under 49 U.S.C. § 10901 was not necessary. I raised grave concerns then regarding the Line's financial viability given the increasingly uncertain global market for crude oil, and the likelihood that it would be the public—and not private investors—who would bear the cost of constructing an ultimately unprofitable rail project. These concerns have grown over the last year, as the world economy has accelerated its transition away from use of the internal combustion engine and corresponding need for crude oil. Ever increasing doubt about the future market for oil undermines the project's transportation merits and counsels against an exemption.

But now that the environmental review has been completed, I have concluded not only that the financial viability of the Line is in serious doubt but also that the Line's environmental impacts significantly outweigh its transportation merits. In my view, it should be underscored that the Board has the power to deny construction approval based on weighing all of the environmental impacts that will arise from oil and gas development in the Basin, and the Board should consider those impacts as the reasonably foreseeable, indirect effects that they are, especially since the "entire purpose" of this Line is to stimulate and support oil production in the Basin. Assessing these impacts solely within a cumulative impact analysis, as Today's Decision does, badly understates their significance, and in particular the significance of downstream greenhouse gas emissions that will result from the combustion of oil moved over the Line. The critical question presented in this proceeding is whether the Line would serve the public interest given its centrality to oil development in the Basin and the broader and dire global warming crisis, *as well as* the very serious, significant, and unavoidable environmental impacts that Today's Decision *does* in fact attribute to the project.

Absent some particularized national need for increased oil from the Basin, of which there is none, I cannot support construction of the Line.

#### Transportation Merits

As noted in my dissent to the January 5 Decision, it is beyond controversy that the project's financial success depends entirely upon increased oil production in the Uinta Basin. January 5 Decision, FD 36284, slip op. at 14 (Board Member Oberman dissenting). But yet,

questions abound regarding the “future global demand for oil,” as well as the “quantity of oil reserves in the Basin, the demand for the specific type of oil found there, and whether there are sufficient proven reserves to provide long term business for the proposed railroad.” *Id.* at 16, 17.

Although the price of oil has rebounded since the January 5 Decision, it remains volatile. Moreover, since that time, government and business leaders have advanced new commitments and policies to achieve carbon neutrality in the coming years, with diminished use of the internal combustion engine—and resulting oil consumption—playing a significant role. At the federal level, the United States has rejoined the Paris Agreement and the Biden Administration has set a goal of achieving net-zero emissions economy-wide by 2050. See Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021). The President has even more recently called for 50% of all new passenger cars and light trucks sold in the United States to be zero-emission by 2030 and, to help achieve this goal, has directed the Environmental Protection Agency and Department of Transportation to develop new emission and fuel efficiency standards.<sup>1</sup> Strengthening Am. Leadership in Clean Cars & Trucks, Exec. Order 14037, 86 Fed. Reg. 43583 (Aug. 5, 2021). Critically, Congress recently passed the Infrastructure Investment and Jobs Act, which, among other things, provides \$7.5 billion for electric vehicle charging stations, \$5.75 billion for the replacement of public transit vehicles with zero emission vehicles, and establishes a carbon reduction program at the Department of Transportation. See Pub. L. 117-58 (2021).<sup>2</sup>

States as well have passed new legislation meant to curb oil consumption and have continued to award grants for, or have otherwise initiated, green infrastructure projects, including to support vehicle electrification. See, e.g., Act of Mar. 18, 2021, ch. 263, 2021 Va. Legis. Serv. (H.B. 1965) (West) (codified at Va. Code Ann. §§ 10.1-1307 & 10.1-1307.04) (establishing low-emissions and zero-emissions vehicle program for motor vehicles, consistent with California standards, with a model year of 2025 or later); Washington Climate Commitment Act, ch. 316, 2021 Wash. Sess. Laws 2606 (creating, among other things, greenhouse gas cap-and-invest program that includes declining limits on major emission sources); Press Release, Cal. Energy Comm’n, California Announces \$17.5 million for Public Electric Vehicle Charging in 13 Rural Counties (May 17, 2021) (advancing September 2020 executive order requiring sales of all new passenger vehicles in California to be zero-emission by 2035).<sup>3</sup> Such action has not been limited

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<sup>1</sup> See also Executive Order on Catalyzing Clean Energy Industries and Jobs through Federal Sustainability, Exec. Order 14057, 86 Fed. Reg. 70935 (Dec. 8, 2021) (directing executive agencies to achieve 100% zero-emission vehicle acquisitions by 2035).

<sup>2</sup> On November 19, 2021, the House of Representatives passed the Build Back Better Act, which among other things, raises the electric vehicle tax credit to \$12,500 and provides tens of billions of dollars for electric vehicle infrastructure and the replacement of heavy-duty vehicles with zero emissions vehicles. See H.R. 5376, 117th Cong. (2021).

<sup>3</sup> Available at: <https://www.energy.ca.gov/newsroom/news-releases>. This builds on the California Public Utilities Commission’s (CPUC) prior approval of a \$437 million electric vehicle charging program to be implemented by Southern California Edison. See Press Release, CPUC, CPUC Expands SCE Charge Ready 2 Transportation Electrification Program (Aug. 27, 2020), <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M345/K822/345822512.PDF>.

to the United States. For example, the European Commission in July proposed expanding the EU's emissions trading scheme, strengthening vehicle emissions standards, including by requiring that all new cars be zero emission by 2035, and introducing a carbon price on imports. Press Release, European Commission, European Green Deal: Commission Proposes Transformation of EU Economy and Society to Meet Climate Ambitions (July 16, 2021).<sup>4</sup> And, on May 26, 2021, a Dutch court stunningly ordered Royal Dutch Shell (Shell) to reduce its carbon dioxide emissions, arising both from its business operations and sold energy-carrying products, by net 45% by the end of 2030, relative to 2019 levels. Rb. Hague 26 mei 2021, ECLI:NL:RBDHA:2021:5337 (Vereniging Milieudéfensie/Royal Dutch Shell PLC).<sup>5</sup>

In response to these trends, and ominously for the future of oil proposed to be extracted from the Basin and the Line's fiscal foundation, car manufacturers are increasingly committing to the sale of electric vehicles in the coming years. Immediately following President Biden's executive order on clean cars and trucks, Ford, General Motors and Stellantis jointly announced their intention to achieve sales of 40-50% of annual U.S. volumes of electric vehicles by 2030. Press Release, General Motors, Ford, GM and Stellantis Joint Statement of Electric Vehicle Annual Sales (Aug. 5, 2021).<sup>6</sup> Volkswagen has set a similar global sales target for 2030, while by that date Ford has separately committed to sell only electric passenger vehicles in Europe. Press Release, Volkswagen Group, NEW AUTO: Volkswagen Group Set to Unleash Value in Battery-Electric Autonomous Mobility World (July 13, 2021);<sup>7</sup> Press Release, Ford Motor Co., Ford Europe Goes All-In on EVs on Road to Sustainable Profitability (Feb. 17, 2021).<sup>8</sup>

Other automakers have announced time horizons for transitioning to fully electrified vehicle fleets, including as early as 2025. See, e.g., Press Release, Volvo Car USA, Volvo Cars to be Fully Electric by 2030 (Mar. 2, 2021);<sup>9</sup> Press Release, Tata Motors, Jaguar Land Rover Reimagines the Future of Modern Luxury by Design (Feb. 15, 2021) (announcing that Jaguar vehicles will be "all-electric" by 2025);<sup>10</sup> see also Press Release, Nissan Motor Corp., Nissan Unveils Ambition 2030 Vision to Empower Mobility and Beyond (Nov. 28, 2021) (announcing

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<sup>4</sup> Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3541](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541).

<sup>5</sup> Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>. Since then, Shell has sold its assets in the Permian Basin and pulled out of a controversial plan to develop a new oil field near the Shetland Islands. See Press Release, Shell, Shell Completes Sale of Permian Business to ConocoPhillips (Dec. 1, 2021), <https://www.shell.com/media/news-and-media-releases.html>; Danica Kirka, [Shell Pulls Out of Controversial Cambo Project in Scotland](https://www.shell.com/media/news-and-media-releases.html), Associated Press, December 3, 2021, <https://apnews.com/article/business-europe-environment-economy-scotland-ef91aa323b36cb3d8f3d7dcf9b616a36>.

<sup>6</sup> Available at: <https://media.gm.com>.

<sup>7</sup> Available at: <https://www.volkswagen-newsroom.com/en/press-releases>.

<sup>8</sup> Available at: <https://media.ford.com/content/fordmedia/feu/en/news.html>.

<sup>9</sup> Available at: <https://www.media.volvocars.com/us/en-us/media/pressreleases/list>.

<sup>10</sup> Available at: <https://www.tatamotors.com/investors/jlr-press-release-archive/>.

investments of \$17.6 billion over the next five years to accelerate the electrification of its vehicle lineup).<sup>11</sup> Prevailing company valuations highlight the internal combustion engine’s bleak future, with electric vehicle manufacturers Tesla and Rivian currently having enterprise values of approximately \$1 trillion and \$100 billion, respectively, making them the first and third most valuable automobile manufacturers by market capitalization. See Yahoo Finance, [https://finance.yahoo.com/screener/predefined/auto\\_manufacturers/](https://finance.yahoo.com/screener/predefined/auto_manufacturers/) (last visited Dec. 14, 2021).

Not surprisingly, the American oil majors uniformly identify increased political and social attention to greenhouse gas emissions as risks that may result in reduced demand for their oil. See, e.g., ConocoPhillips, Annual Report (Form 10-K) 27 (Feb. 16, 2021) (“[T]he new administration has recommitted the United States to the Paris Agreement, and a significant number of U.S. state and local governments and major corporations headquartered in the U.S. have also announced their intention to satisfy [the Paris Agreement] commitments.”); Pioneer Natural Resources Co., Annual Report (Form 10-K) 28 (Mar. 1, 2021) (noting that numerous proposals “have been made and could continue to be made at the international, national, regional and state levels of government to monitor and limit existing emissions of GHGs as well as to restrict or eliminate such future emissions”); Chevron Corp., Annual Report (Form 10-K) 22 (Feb. 25, 2021) (“[I]f new legislation, regulation, or other governmental action contributes to a decline in the demand for the company’s products, this could have a material adverse effect on the company and its financial condition.”); Occidental Petroleum Corp., Annual Report (10-K) 10 (Feb. 26, 2021) (explaining that government action relating to greenhouse gas emissions could impose increased operating and maintenance costs, such as “higher rates charged by service providers” or “promote the use of alternative sources of energy and thereby decrease demand for oil”).

This risk is being increasingly reflected in the financial markets. As noted in my dissent to the January 5 Decision, investment managers—under pressure from their clients to pursue environmentally sustainable investing—have begun aligning their portfolios with net-zero emissions. January 5 Decision, FD 36284, slip op. at 16 (Board Member Oberman dissenting).<sup>12</sup> This includes putting pressure directly on oil producers to develop more sustainable business strategies. For example, on May 26, 2021, Exxon Mobil Corporation’s shareholders elected to its Board—over the opposition of company management—three insurgent directors from a small hedge fund, Engine No. 1. Exxon Mobil Corp., Current Report (Form 8-K/A) 3 (June 21, 2021). These nominees were advanced for the express purpose of directing the company towards a “long-term commitment to only funding projects that can break-even at much more conservative oil and gas prices,” and to explore growth areas in “net-zero emission energy sources and clean energy infrastructure.” Exxon Mobil Corp., Definitive Proxy Statement (Schedule 14A) 5

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<sup>11</sup> Available at: <https://global.nissannews.com/en/pages/all-news-archive>.

<sup>12</sup> On May 20, 2021, President Biden signed an executive order, Climate-Related Financial Risk, which sets forth a policy of “advancing consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk . . . .” Climate-Related Financial Risk, Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 26, 2021). The executive order acknowledges the risk to the competitiveness of companies and markets, as well as workers and communities, should financial institutions fail to adequately account for “the global shift away from carbon-intensive energy sources and industrial processes.” Id. at 27967.

(March 15, 2021). In its proxy statement, Engine No. 1 emphasized “growing long-term oil and gas uncertainty” arising from a “decarbonizing world.”<sup>13</sup> *Id.* at 1.

It bears emphasizing that the political and business developments described above constitute only the latest and a small set of examples of the global transition away from fossil fuels. This broad and rapidly accelerating trend calls into question both the viability of the Coalition’s over \$1 billion rail construction project as well as its ability to raise money from private funding sources. It confirms the significant concerns I raised previously about the extent to which the project will both require the backing of, and put at risk, public funds. January 5 Decision, FD 36284, slip op. at 19 (Board Member Oberman dissenting). These concerns have been exacerbated by the Coalition’s decision not to supply (and indeed, to redact) oil and traffic projections from its consultant’s pre-feasibility study, creating the ineluctable inference that the withheld data, if revealed, would undermine the commercial viability of the project. January 5 Decision, FD 36284, slip op. at 14-15 & n.5 (Board Member Oberman dissenting). The majority’s continuing to turn a blind eye to this glaring omission is even more perplexing in light of the dramatic changes in the world oil market detailed above.

But make no mistake: the writing is on the wall. The Board has previously made clear that “significant questions surrounding the financial feasibility of [a] proposed rail project” may diminish its transportation merits and warrant against the granting of an exemption under § 10502. Tex. Cent. R.R. & Infrastructure, Inc.—Petition for Exemption—Passenger Rail Line Between Dallas & Houston, Tex. (Texas Central), FD 36025, slip op. at 14-15 (STB served July 16, 2020) (citing the RTP factors at 49 U.S.C. §§ 10101(4) and 10101(5) as a basis for denying a petition for exemption given “questions about increased costs and funding sources,” the magnitude of the project, and the substantial public interest). Although the Board in Texas Central permitted the petitioner there to proceed via application, so as to provide additional information about the project’s financial feasibility, an application in this case would not have changed the fact that the Line’s transportation merits are greatly impaired by a future that has little use for the product it will be built to deliver. Moreover, and as explained in the following section, regardless of whether the Coalition had proceeded via application or petition for exemption, the Line’s environmental impacts outweigh its transportation merits.

### Environmental Impacts

Consideration of the Line’s environmental effects must treat as indirect effects those impacts associated with oil development in the Basin that will be supported by the Line,

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<sup>13</sup> The hedge fund Third Point Investors also recently announced that it had taken a stake in Shell in part to advance a growth strategy focused on “aggressive investment in renewables and other carbon reduction technologies.” Available at <https://thirdpointlimited.com/wp-content/uploads/2021/10/Third-Point-Q3-2021-Investor-Letter-TPIL.pdf>.] Weeks later, Shell announced plans to simplify its share structure to accelerate “delivery of its strategy to become a net-zero emissions business.” Press Release, Royal Dutch Shell, Notice of General Meeting – Shell Seeks Shareholder Approval to Change Articles to Implement a Simplified Structure (Nov. 15, 2021), <https://www.shell.com/media/news-and-media-releases/2021/november-press-release.html>.

including downstream greenhouse gas emissions that will result from the oil's eventual combustion. Contrary to the position taken in Today's Decision, the Board has the power to act on these impacts, including by denying construction authority, and accordingly has an obligation to consider them as reasonably foreseeable effects of the project. Only in doing so, may the Board reach the central question in this case: whether it is in the public interest for the Board to authorize the building of a railroad for the near exclusive purpose of facilitating oil and gas development, given all that we know today about the worsening global warming crisis and the role played by fossil fuel combustion. That question lies at the heart of whether the transportation merits of the project outweigh its environmental impacts, including the troubling and unavoidable disturbance to wetlands and wildlife that are in fact acknowledged by the majority as effects of this project. In my view, the Line is not worth these costs.

With respect to downstream greenhouse gas emissions, the Final EIS recognized that construction of the Line “would increase transportation capacity to ship an additional 130,000 to 350,000 barrels of oil on average each day from existing oil fields . . . .” (Final EIS 3.15-51; see also id. 3.15-3 to 3.15-4.) Further, it assumed that the oil from this new production would ultimately be refined into fuel and combusted, and it estimated that the resulting emission of carbon dioxide equivalents would total 19,785,953 metric tons annually under a low oil production scenario and 53,269,873 metric tons annually under a high oil production scenario, the latter of which would represent approximately 0.8% of nationwide greenhouse gas emissions and 0.1% of global greenhouse gas emissions. (Id. at 3.15-36.) The Final EIS also identified other, more localized impacts of oil and gas development on water resources, biological resources, soils, noise, land use, cultural resources, and socioeconomics, including from the drilling of new wells. (See generally id. § 3.15.) These impacts are acknowledged in Today's Decision. Today's Decision 17.

However, they are considered only for the purpose of assessing the project's cumulative impacts. Accordingly, **and importantly**, the Final EIS does not consider as an indirect impact the harm caused to the environment by downstream combustion of increased oil production enabled by the Line's construction. The Final EIS focuses instead only on the **incremental** de minimis effect of emissions from construction and operation of the Line **when added** to emissions from downstream combustion. (Final EIS 3.15-32); see also Twp. of Bordentown, NJ v. FERC, 903 F.3d 234, 258 (3d Cir. 2018) (explaining that a cumulative impact analysis looks at the marginal impact of the jurisdictional project when added to the non-jurisdictional projects' impacts). The majority approved this approach and in so doing obscured the centrality of the Line's construction to oil and gas development in the Basin, which will foreseeably cause far larger emissions from combustion of oil that will be moved over the Line.<sup>14</sup> See Twp. of Bordentown,

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<sup>14</sup> In contrast to the estimated emissions from the production scenarios discussed above, the Final EIS estimated that “[greenhouse gas] emissions from rail operations . . . would represent a small percentage (ranging from 0.9 percent to 3.5 percent) of regional and statewide GHG emissions . . . and would not contribute significantly to global climate change.” (Final EIS 3.7-39.) Not surprisingly, the majority did not find cumulative adverse effects on greenhouse gas emissions or air quality, but rather identified only cumulative adverse effects on water resources, biological resources, paleontological resources, land use and recreation, visual resources, and socioeconomics. Today's Decision 16.

903 F.3d at 258 (“Where the other projects’ impacts are themselves already significant or greatly outweigh the jurisdictional projects’ impacts, such that the jurisdictional project will not meaningfully influence the extent of the already significant environmental impacts, the cumulative impacts test is inapposite.”).

Considering the environmental impacts of oil development in the Basin only in the context of a cumulative impact analysis, and not as reasonably foreseeable impacts attributable to the Line itself, materially affects how those effects are factored by the Board when weighing the Line’s transportation merits against its environmental impacts. See Landmark West! v. U.S. Postal Serv., 840 F. Supp. 994, 1011 (S.D.N.Y. 1993) (explaining that a cumulative impact analysis “entails the consideration of the foreseeable actions of others as background factors, but does not require that the impacts of others’ actions be weighed in assessing the significance” of the agency’s actions, only the “marginal impacts of its own actions”), aff’d, 41 F.3d 1500 (2d Cir. 1994).<sup>15</sup> Today’s Decision justifies this approach by relying on Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), contending that the Board cannot be the “legally relevant” cause of impacts from oil and gas development, and therefore those impacts cannot be considered indirect impacts of the construction project. Today’s Decision 18. Today’s Decision emphasizes that the Board has no authority or jurisdiction over development of oil and gas in the Basin nor any authority to control or mitigate the impacts of any such development. Id. Importantly, and although not said in so many words, its reliance on Public Citizen necessarily implies that the Board cannot be the cause of such impacts *because it lacks the power* to act on them when deciding whether to approve or deny the Coalition’s petition.

I disagree. In Public Citizen, the Supreme Court indeed held 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 relevant ‘cause’ of the effect,” and hence need not consider such effects under NEPA. 541 U.S. at 770. That case, however, is readily distinguishable. At issue in Public Citizen was the planned lifting of a moratorium by the President (with authority from Congress) on cross-border truck traffic from Mexico and related regulations under review by the Federal Motor Carrier Safety Administration (FMCSA). Although the regulations had to be issued before Mexican traffic could enter the United States, by statute the rules were limited to safety and financial responsibility issues. Id. at 758-59. The Supreme Court concluded that the FMCSA had no obligation to evaluate emissions from the truck traffic when assessing the environmental impact of its regulations because FMCSA “simply lack[ed] the power to act on” any such emissions data. Id. at 768. Key to this holding was the Supreme Court’s finding that FMCSA had “*no ability to countermand the President’s lifting of the moratorium*” or otherwise “*categorically*” prevent such traffic from entering the United States. Id. at 766 (emphasis added). As the Supreme Court explained, the “legally relevant cause of 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.” Id. at 769.

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<sup>15</sup> Even though the labeling of the effects of oil and gas development in the Basin as indirect or cumulative impacts may not have affected their analysis within the Final EIS (Today’s Decision 18 n.15), it does affect how they are weighed by the Board.

The scope of Public Citizen becomes even more apparent when considering how the case has been applied in other circumstances involving downstream greenhouse gas emissions. For example, in Sierra Club v. FERC (Freeport), the D.C. Circuit held that the Federal Energy Regulatory Commission (FERC) had no obligation to consider such emissions when approving facility upgrades at a liquified natural gas terminal that would be used to support export operations. 827 F.3d 36, 47-48 (D.C. Cir. 2016). This was because the Department of Energy (DOE) has exclusive jurisdiction over the export of natural gas as a commodity and had already authorized the terminal in Freeport to export gas. Id. at 40. DOE merely delegated to FERC licensing authority over the siting, construction, expansion, and operation of specific facilities. Id. at 40-41. Citing Public Citizen, the D.C. Circuit concluded that FERC could not be the “legally relevant” cause of emissions from gas exported from the terminal because DOE’s “intervening” and “independent decision to allow exports—a decision over which [FERC] has no regulatory authority—[broke] the NEPA causal chain and absolve[d]” FERC of responsibility to consider impacts it “could not act on.” Id. at 47-48.

Public Citizen, which the majority relied upon, and Freeport, which shows its application, lay bare the flaw in the majority’s reasoning. Had Congress itself authorized construction of a railroad out of the Basin, or vested that authority in another federal agency, but left to the Board the narrower responsibility of deciding where that line should be placed and the details of its construction, then perhaps Public Citizen would be instructive. But here, the Board has independent and plenary authority, and exclusive jurisdiction, over whether a line of railroad should be built in the first instance. 49 U.C.S. §§ 10501, 10901. See Alaska Survival v. STB, 705 F.3d 1073, 1086 (9th Cir. 2013) (emphasizing that the decision as to “which communities are entitled to important railroad development projects” is “committed in the first instance to the agency authorized by Congress to approve rail line construction projects, the STB”). That the Board has no authority or jurisdiction over development of oil and gas in the Basin, (Today’s Decision 18),<sup>16</sup> and generally cannot restrict the types of products and commodities that are transported on already constructed rail lines, (Final EIS 3.15-36),<sup>17</sup> are not the types of overarching limitations like that at issue in Public Citizen which would diminish, let alone inform, the Board’s authority over rail construction.

The D.C. Circuit’s decision in Sierra Club v. FERC (Sabal Trail) is on point. That case involved FERC’s decision to approve the construction and operation of certain interstate natural gas pipelines in the southeastern United States. Sabal Trail, 867 F.3d 1357, 1363 (D.C. Cir. 2017). As here, at issue was whether Public Citizen excused FERC’s decision not to attribute to the pipeline, and consider, greenhouse gas emissions arising from the end-use combustion of gas to be moved over the pipeline. Id. at 1365, 1371-72. In its decision, the D.C. Circuit made clear

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<sup>16</sup> See Birkhead v. FERC, 925 F.3d 510, 519 (D.C. Cir. 2019) (rejecting argument that agency cannot be legally relevant cause of emissions from gas transported via agency-approved pipeline “due to its lack of jurisdiction over any entity other than the pipeline applicant”).

<sup>17</sup> The Final EIS cites to Riffin v. STB, 733 F.3d 340, 345-47 (D.C. Cir. 2013), for the established proposition “that *railroads* have a common carrier obligation to carry all commodities, including hazardous materials, upon reasonable request . . .” (Final EIS 3.15-6 (emphasis added).) While that may be true, it has nothing to do with the *Board’s* authority to license rail construction and its obligation to consider environmental impacts when doing so.



that the relevant question is not “‘What activities does [an agency] regulate?’ but instead . . . ‘What factors can [the agency] consider when regulating in its proper sphere?’” *Id.* at 1373. In other words, is an agency “forbidden to rely” on the effects of the impact as “justification” for denying a license? *Id.* The Court found that FERC was “not so limited.” *Id.* Critical to its analysis was that Congress gave FERC broad power over the construction and operation of interstate pipelines, expansively directing it to consider the “public convenience and necessity” when reviewing an application. *Id.* (citing 15 U.S.C. § 717f(e).) The Court emphasized that FERC balances the “public benefits against the adverse effects of the project,” including “adverse environmental effects,” and can deny construction authority “on the ground that [it] would be too harmful to the environment.” *Sabal Trail*, 867 F.3d at 1373. For all of these reasons, the Court concluded that FERC “*is a ‘legally relevant cause’ of the direct and indirect environmental effects of the pipelines it approves.*” *Id.* (emphasis added).<sup>18</sup>

As in *Sabal Trail*, here too the Board has a broad statutory obligation not to authorize rail construction when doing so would be “inconsistent with the public convenience and necessity.” 49 U.S.C. § 10901(c). And although in this case the Coalition has proceeded via a petition for exemption from the prior approval requirements of § 10901, use of the exemption process does not affect the level of environmental review a project receives. *Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera, and Fresno Cnty., Cal.*, FD 35724, slip op. at 21-22 (STB served June 13, 2013). The Board has also made clear that environmental impacts can lead it to categorically decline to authorize rail construction, including when considering a petition for exemption. *Alaska R.R.—Constr. & Operation Exemption—Rail Line Between N. Pole & Delta Junction, Alaska*, FD 34658, slip op. at 10 (STB served Jan. 6, 2010). In either circumstance, and as in *Today’s Decision*, the Board weighs the project’s transportation merits against its environmental impacts when determining whether to grant construction authority. (*Today’s Decision* 23-25.) This is in keeping with NEPA, which requires the Board to consider the environmental impacts of a decision permitting rail construction, regardless of whether it does so by granting an application under § 10901 or an exemption under § 10502.<sup>19</sup> 42 U.S.C. § 4332(C).

I see no reason why the Line’s construction would not otherwise be a sufficient cause of the oil and gas development impacts and downstream emissions identified in the Final EIS. It

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<sup>18</sup> See also *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73 (D.D.C. 2019) (holding that because Bureau of Land Management (BLM) could decline to sell an oil and gas lease if the “environmental impact of those leases—including use of the oil and gas produced—would not be in the public’s long-term interest,” BLM was required to consider downstream greenhouse gas emissions “as indirect effects of oil and gas leasing”), *appeal dismissed per stipulation*, 2021 WL 3176109 (D.C. Cir. Apr. 28, 2021).

<sup>19</sup> In any event, the Board may not exempt construction from § 10901 where regulation is necessary to carry out the RTP, including those factors calling for the development of a sound rail transportation system to meet the public need, operation of transportation facilities without detriment to public health and safety, and energy conservation. 49 U.S.C. § 10502; 49 U.S.C. § 10101(4), (8), (14). In my view, these policy directives broadly warrant the Board’s consideration of the environmental impacts to be caused by oil development in the Basin, including downstream greenhouse gas emissions.

may well be the case that oil development “may occur, and is already taking place, without the proposed rail line,” (Final EIS T-44), and that the “actual volumes of crude oil that would move over the Line would depend on various independent variables and influences,” (Today’s Decision 17). However, the Coalition’s own position has been that trucking oil produced from the Basin to distant markets is cost prohibitive and that “the lack of rail access has effectively capped oil production in the Basin.” (Pet. 13-14.) As the Coalition puts it, a rail line would “enable local producers to increase their output under appropriate market conditions.” (Id. at 15.) It cannot be disputed that “but for” the proposed rail line, significantly less oil will be extracted from the Basin. See Mid States Coal. for Progress v. STB, 345 F.3d 520, 548-50 (8<sup>th</sup> Cir. 2003) (requiring that agency consider emissions from combustion of coal transported over rail line as it was “almost certainly true” that the line would increase the “availability of inexpensive coal” and “any adverse effects that result from burning coal”).<sup>20</sup>

Of course, a “‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA . . . .” Public Citizen, 541 U.S. at 767. Instead, “NEPA requires analysis of an effect only where there is a reasonably close causal relationship between the environmental effect and the alleged cause, analogous to the doctrine of proximate cause from tort law.” (Final EIS T-43 (citing Public Citizen, 541 U.S. at 767).) As the Supreme Court has made clear, proximate cause “*turns on policy considerations*” and where best to “draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.” Public Citizen, 541 U.S. at 767 (citations omitted) (emphasis added). Notably, in Public Citizen, prevailing policy dictated that the FCMSA could not possibly be the proximate cause of the motor carrier emissions at issue since, again, FMCSA had “no ability categorically to prevent the cross-border operation of Mexican motor carriers.” Id. at 768. That is, in Public Citizen the Court’s analysis of proximate cause turned on its conclusion that the FMCSA’s lacked authority over the traffic.

As explained above, Public Citizen does not “excuse” the Board from considering impacts from oil and gas development. Sabal Trail, 867 F.3d at 1373. And it otherwise seems well within the range of reasonable policy considerations—and frankly, the only reasonable policy consideration—for the Board to weigh these impacts when making its final decision, *at least with respect to this particular line*. As noted in my prior dissent, there is no question that increased oil production is the “singular rationale” for the Line: its potential use by other industries is ancillary to the movement of oil and not valuable enough standing alone to justify the line’s construction and continued operation. January 2020 Decision, slip op. at 14 (Board Member Oberman dissenting) (citing Pet. 13-17). That is, increased oil output, its refinement

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<sup>20</sup> The Final EIS suggests that this aspect of Mid States would not stand today, given the Supreme Court’s subsequent decision in Public Citizen. (Final EIS T-440.) But as explained above, the Court in Public Citizen grounded its holding on FCMSA’s inability to prevent the relevant environmental effect “due to its limited statutory authority over the relevant actions.” 541 U.S. at 770. Mid States did not address whether the Board had the authority to deny or condition its construction approval on the emissions it originally failed to consider. Mid States appears still to be relevant for the proposition that the Board may be the legally relevant cause of downstream impacts that would not occur “but for” the agency’s construction approval.

into petroleum, and that petroleum's ultimate sale and combustion are not only "reasonably foreseeable," they are "the project's entire purpose."<sup>21</sup> Sabal Trail, 867 F.3d at 1372.

Moreover, there can be no question about the significance of the threat that global warming poses to the environment as well as to our continued prosperity. Days after OEA issued the Final EIS, the United Nations' Intergovernmental Panel on Climate Change's (IPCC's) Working Group I released its contribution to the IPCC's Sixth Assessment Report, which presents the most up-to-date understanding of the current state of the climate.<sup>22</sup> **The report presents a dire picture**. Among other things, it concludes that: (i) it is "unequivocal" that human influence has warmed the atmosphere, ocean, and land; (ii) global surface temperature in the first two decades of the 21st century was .99°C higher than 1850-1900; (iii) human-induced climate change is "already affecting many weather and climate extremes in every region across the globe"; (iv) evidence attributing heatwaves, heavy precipitation, droughts, and tropical cyclones to human influences has strengthened in the last several years; (v) global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in greenhouse gas emissions occur in the coming decades;<sup>23</sup> and (vi) with further global warming, every region around the world will increasingly experience extreme climate events, including heavy precipitation, flooding, and droughts. IPCC 2021 at SPM-5, SPM-10, SPM-17, and SPM-32.

These effects are already being felt. July 2021 was the hottest month ever recorded, according to global data from the National Oceanic and Atmospheric Administration (NOAA), with parts of the world witnessing record high temperatures, unprecedented heat waves, floods, and other extreme weather events.<sup>24</sup> The World Meteorological Organization (WMO), an agency

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<sup>21</sup> When weighing the project's transportation merits against its environmental impacts, Today's Decision stresses that a "rail transportation option could also support the diversification of local economies in the Basin, which could support additional employment and expand the regional economy." (Today's Decision 24.) But it gives no weight to the nature of the industry the Line is meant to support and that industry's impact on climate change. While local economic development may be a reason to support the Line's construction, if the majority is to weigh the economic benefits of that development, it should weigh *all* of its harms as well. When that is done, it is apparent that the project's environmental impacts outweigh its benefits.

<sup>22</sup> See Richard Allan, et al., Summary for Policymakers in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC 2021 Summary for Policymakers) (Valérie Masson-Delmonte et al., eds., in press), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_Full\\_Report.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf).

<sup>23</sup> According to the Climate Action Tracker— an independent scientific analysis that tracks government climate action and measures it against the globally agreed Paris Agreement— current policies in place around the world are projected to result in 2.7°C warming above pre-industrial levels. Temperature, Climate Action Tracker, <https://climateactiontracker.org/global/temperatures/#> (last updated Nov. 9, 2021).

<sup>24</sup> See NOAA, It's Official: July was Earth's Hottest Month on Record (Aug. 13, 2021), available at: <https://www.noaa.gov/news-features>. On July 11, 2021, the National Weather

of the United Nations, has predicted that the annual mean global temperature is likely to be at least 1°C above pre-industrial levels in each of the next five years, with a 90% chance that at least one of those years will be the warmest on record. Press Release, WMO, New Climate Predictions Increase Likelihood of Temporarily Reaching 1.5°C in Next 5 Years (May 27, 2021).<sup>25</sup> The past seven years are on track to be the warmest on record. Press Release, World Meteorological Organization, State of Climate in 2021: Extreme Events & Major Impacts (Oct. 21, 2021). As detailed above, our national and state governments and many leading components of the private sector have accelerated their response to the growing environmental disaster. ***Decarbonization is national policy.***

The growing threat from global warming is too great, and its connection to the combustion of fossil fuel too obvious, for the environmental impacts of Line-induced oil and gas development in the Basin to be treated as anything other than what they are: reasonably foreseeable effects of the rail construction project itself. For the reasons explained above, the Board has the power to act on impacts resulting from that development when deciding whether to approve the petition, and can and should engage with the central question presented in this matter: whether a railroad built for the purpose of supporting oil and gas development, given the need for decarbonization and the harmful effects of global warming, is within the public interest. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989) (holding that under NEPA an agency must “carefully consider” information concerning significant environmental impacts when “reaching its decision”). Such an approach properly situates the significant environmental impacts that nobody appears to disagree are attributable to the Line’s construction and operation—among other things, impacts on surface waters and the loss of wetlands, disruption to habitat of threatened and endangered species, and disturbance of the use of otherwise pristine land—all of which are unavoidable and cannot be mitigated. (Final EIS S-8 to S-9.) Is the Line worth all of this given the activity it is intended to support? Without evidence that there is some particularized need for oil from the Basin, in the face of overwhelming evidence to the contrary, and given the irrefutable fact that this oil’s use will contribute to the global warming crisis, I cannot say that it is.

I dissent.

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Service recorded a temperature of 54°C (129.2°F) in Death Valley, which tied the record (set last year) for the hottest formally recognized daytime temperature ever. July and August also saw unprecedented heat waves in the Pacific Northwest, national high temperature records set in Spain, Tunisia, and Turkey, Germany ravaged by floods, and parts of China receiving a year’s worth of rain in just three days. Press Release, World Meteorological Organization, State of Climate in 2021: Extreme Events & Major Impacts (Oct. 21, 2021), available at: <https://public.wmo.int/en/media/press-release>.

<sup>25</sup> Available at: <https://public.wmo.int/en/media/press-release>.