

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

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

EAGLE COUNTY, COLORADO,

Petitioner,

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Petitioner

v.

SURFACE TRANSPORTATION BOARD, et al.,

Respondents,

SEVEN COUNTY INFRASTRUCTURE COALITION, et al.

Intervenors.

On Petitions for Review of Decisions of the Surface Transportation Board

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

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

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

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

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

CORPORATE DISCLOSURE STATEMENT

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

RULE 29 STATEMENT

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

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

CIRCUIT RULE 29 CERTIFICATE

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

TABLE OF CONTENTS

	Page(s)
Glossary of Terms	viii
Identity and Interests of the Amici Curiae	1
Introduction and Summary of Argument	10
Argument.....	11
I. The Board Arbitrarily Ignored Impacts to the I-70 Corridor and Union Pacific Rail Line by Classifying Them as “Downline” Impacts	11
II. The FEIS Failed to Take a Hard Look at Elevated Risks to the I-70 Corridor Caused by the Board’s Decision.....	15
A. The Board Failed to Take a Hard Look at the Elevated Risk of Derailment.....	16
B. The Board Did Not Evaluate the Increase Risk of Wildfire and Socioeconomic Impacts in the I-70 Corridor.....	20
Conclusion	25
Certificate of Compliance	27
Certificate of Service	28

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>City of Phoenix v. Federal Aviation Administration</i> , 869 F.3d 963 (D.C. Cir. 2017).....	21, 22
<i>Friends of the Earth v. Haaland</i> , 583 F. Supp. 3d 113 (D.D.C. 2022).....	14
<i>Gerber v. Norton</i> , 294 F.3d 173 (D.C. Cir. 2002).....	16
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	15, 16
<i>Sierra Club v. FERC</i> , 827 F.3d 36 (D.C. Cir. 2016).....	11
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017).....	11, 12, 13
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs</i> , 985 F.3d 1032 (D.C. Cir. 2021).....	18
<i>Transactive Corp. v. U.S.</i> , 91 F.3d 232 (D.C. Cir. 1996).....	19, 21
<i>Vill. of Barrington v. Surface Transp. Bd.</i> , 636 F.3d 650 (D.C. Cir. 2011).....	14
<u>Statutes</u>	
42 U.S.C. § 4332(C).....	10, 11
49 U.S.C. § 10901	14
<u>Regulatory Authorities</u>	
40 C.F.R. § 1500.3	11
40 C.F.R. § 1508.8	11

49 C.F.R. § 1105.7	13
PHMSA, Recommendations for Tank Cars Used for the Transportation of Petroleum Crude Oil by Rail, 79 Fed. Reg. 27,370 (May 13, 2014)	24
<i>Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah, FD 36284, slip op. (S.T.B. served Jan. 5, 2021).....</i>	12
<u>Other Authorities</u>	
<i>About the Forest</i> , U.S. FOREST SERV., https://bit.ly/3yQIeXa (last visited Oct. 14, 2022).....	1
Anderson & Barkan, <i>Railroad Accident Rates for Use in Transportation Risk Analysis</i> , 1863 TRANSP. RSCH. REC. 88 (2004)	24
Bruce Finley, <i>Rain Triggering Rock, Mudslides Forces I-70 Shutdowns in Colorado as New Safety Norm</i> , DENVER POST (August 22, 2022, 6:00 AM), https://dpo.st/3VQn9pZ	24
CITY OF GLENWOOD SPRINGS, GLENWOOD SPRINGS WATER AND RESILIENCY AFTER THE GRIZZLY CREEK FIRE (2021), https://bit.ly/3ETpvOK	2
Dan Boyce, <i>Colorado’s Grizzly Creek Fire Shows Climate Change’s Threat to Transport Routes</i> , NPR (Sept. 29, 2020), https://n.pr/3DaUXqw	2
<i>Fund Your Free Five</i> , TOWN OF VAIL, https://bit.ly/3Dieu70 (last visited Oct. 27, 2022).....	6
GARFIELD CNTY., COMMUNITY WILDFIRE PROTECTION PLAN (2022), https://bit.ly/3SEBL8R	23
<i>Glenwood Canyon and Debris Flows</i> , U.S. GEOLOGICAL SURV. (Dec. 16, 2021), https://on.doi.gov/3CJ8cx1	3
<i>Glenwood Springs</i> , VISIT GLENWOOD SPRINGS, https://bit.ly/3CIRi1E (last visited Oct. 27, 2022).....	4

<i>July 3, 2021: Grizzly Creek Flooding and Debris Flows</i> , U.S. GEOLOGICAL SURV. (Aug. 24, 2021), https://bit.ly/3yTRqdA	3
<i>June 26 and 27, 2021: Grizzly Creek Flooding and Debris Flows</i> , U.S. GEOLOGICAL SURV. (Aug. 24, 2021), https://bit.ly/3ETuAXd	4
Liu et al., <i>Analysis of Derailments by Accident Cause: Evaluating Railroad Track Upgrades to Reduce Transportation Risk</i> , 2261 TRANSP. RSCH. REC. 178, 182 (2011)	17, 18
Robert Sanchez, <i>The Stretch of I-70 Through Glenwood Canyon Is 30 Years Old. Will It Survive Another 30 Years?</i> , 5280 MAG. (Oct. 2022), https://bit.ly/3yW7riZ	25
<i>Town Statistics and History</i> , TOWN OF MINTURN, https://bit.ly/3COWWPE (last visited Oct. 27, 2022)	5

GLOSSARY OF TERMS

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

IDENTITY AND INTERESTS OF THE AMICI CURIAE

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

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

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

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

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

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

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



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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

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

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

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

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

The Board's Decision is the "legally relevant cause" of increased rail traffic on the Union Pacific Line and all effects stemming from that increase via derailments, wildfires, and economic losses. The Board admits it had the authority to "deny the proposal[] or grant it with conditions (including environmental mitigation conditions)" after analyzing "the environmental impacts associated" with its proposed authorization of the Railway. JA28.

Moreover, the "Union Pacific Railroad Company [] mainline from Kyune to Denver, Colorado [is] the *only* practical route for all rail traffic moving eastward from the Uinta Basin Railway"; therefore, "*all* rail traffic heading east would use this route." JA1231 (emphases added); *see also id.* (noting that 90% of the Railway's trains will travel east). The Board also acknowledges that the Kyune-Denver line "would experience more than two times the risk of an accident than under baseline (existing) conditions," this segment will see roughly one new accident per year "involving a loaded crude oil train," and "one in four accidents involving loaded trains would result in a release of crude oil." JA899-900.

Yet, while the Board purported to analyze and mitigate a broad spectrum of risks *in Utah* (the project study area), including wildfires, soil erosion, landslides, and avalanches, *see* JA963, JA1024, it did not give the I-70 corridor in Colorado

the same consideration. This, the Board accomplished by shunting the Union Pacific Line to its “downline” study area. *See, e.g.*, JA900 (asserting that “downline impacts would occur on existing rail lines that are not owned or operated by” the project proponent such that “any potential increase in the risk of accidents in the downline study area would be beyond the Board’s control”). By labeling these impacts “downline,” JA810—rather than actual effects of the agency’s Decision—the Board arbitrarily relieved itself of the legal duty to examine in-depth anything besides noise, air pollution, and roadway traffic. *See* 49 C.F.R. § 1105.7(e)(11)(v) (restricting the Board’s analysis of “down-line” impacts to noise, air pollution, and traffic concerns); JA1188 (citing 49 C.F.R. § 1105.7 in circumscribing the Board’s scope of review for the Railway’s downline impacts).

Regardless of whether the Board has jurisdiction or “control” over the Union Pacific’s Kyune-Denver line, NEPA does not excuse scrutiny of impacts along this corridor. *See Sierra Club*, 867 F. 3d at 1372-73 (holding that an agency’s lack of jurisdiction over downstream effects “d[oes] not excuse [an agency] from considering these indirect effects”). Nor can the regulations governing the Board’s licensing decisions under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10901, negate the obligations imposed by NEPA and CEQ’s binding regulations. This is because “NEPA sets a floor that agencies must comply with even if an agency’s underlying statute . . . could be construed to set a lower one.”

Friends of the Earth v. Haaland, 583 F. Supp. 3d 113, 216 (D.D.C. 2022) (citing *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665-66 (D.C. Cir. 2011)).

Not only will communities along Union Pacific's Kyune-Denver line receive virtually all of the new traffic utilizing the Railway, *see* JA1231, but they will experience more accidents than communities inside the project study area. *See* JA899-900 (predicting 0.62-1.78 new annual accidents on the Kyune-Denver line, compared to 0.22-0.60 annual accidents in the project study area). Despite the serious risks to communities in the I-70 corridor, the Board flouted NEPA by disclosing and analyzing the impacts of its action in one affected location (the project study area in Utah) but not the location that will be *most affected* by the Board's Decision to authorize a massive increase in the number of flammable crude oil trains jostling through rugged, fire-prone Colorado terrain.

The interdependency of the Board's Decision and impacts to the Union Pacific Line and I-70 corridor is further evident from the Board's discussion of the "No Action Alternative." The Board explains that under the No Action Alternative, the "probability of a rail-related accident on existing rail lines in the downline study area would not change from current conditions," because there would remain "a low volume of [downline] rail traffic relative to the predicted traffic on the proposed rail line." JA901, JA899, JA894. Hence, the substantial increase in rail traffic on the Union Pacific Line, and the consequent increased risk of accidents,

wildfires, and economic losses in the I-70 corridor, is *entirely contingent* upon the Board granting the petition.

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

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

NEPA is a procedural statute, meaning the Act “does not mandate particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.* In this sense, an agency need only identify, evaluate, and disclose to the public the foreseeable effects of its decision. This duty, commonly referred to as the “hard look” doctrine, realizes NEPA’s core policy goals of ensuring that the agency has “available, and will carefully consider, detailed information concerning significant environmental impacts” and that “the relevant information is made available” to the affected public. *Id.* at 349.

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

i. Crude Oil Cars vs. All Others

In its purported analysis of derailment risks and impacts to railway safety in the downline study area, the Board made two fatal assumptions. Over objections from commenters, the Board surmised that when calculating potential accidents, oil-laden trains are no different than others, *see* JA897, and, further, that the route-specific terrain does not affect the risk analysis, *see* JA1196-1202 (modeling rail accident rates). These invalid assumptions never gain steam.⁵

As to the former, the Board’s “Predicted Accidents” projection is based on an average incident rate lumping together *all* rail accidents across the nation during a four-year period. *See* JA1198 (utilizing “nationwide rates over the last 2 years of about 2.7 accidents per million train miles for all railroads and types of track [] as the basis for predicting accident rates”). This sleight of hand uses the law of averages to obscure the relative risk posed by the hulking oil tanker cars at issue here. For example, researchers—including those cited by the Board, JA1201—

⁵ The Board said it “considered both loaded and unloaded crude oil trains” when calculating incident rates. JA1197. Elsewhere, it backtracks this claim, asserting that “insufficient data exist on accident rates for unit trains carrying crude oil in general, or trains carrying waxy crude oil in particular, to allow OEA to calculate commodity specific accident rates.” JA1245. Regardless, evidence of the Board’s alleged consideration appears nowhere in the FEIS. “Stating that a factor was considered—or found—is not a substitute for considering or finding it.” *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (cleaned up).

have established that “train length and train weight are likely to affect derailment rate, derailment severity, and the corresponding risk in a route-specific risk analysis.” Liu et al., *Analysis of Derailments by Accident Cause: Evaluating Railroad Track Upgrades to Reduce Transportation Risk*, 2261 TRANSP. RSCH. REC. 178, 182 (2011). In fact, “longer than average trains”—i.e., those comprised of 65 cars or longer on Class 3 tracks—“will have higher car mile train derailment probabilities.” Anderson & Barkan, *Railroad Accident Rates for Use in Transportation Risk Analysis*, 1863 TRANSP. RSCH. REC. 88, 92, 96 (2004).

The record demonstrates that most trains using the proposed Railway will be “longer than average” trains that entail a substantially heightened incident risk compared to national averages. *Id.*; *see also* JA861 (anticipating crude oil trains “composed of 110 tank cars each, on average”). Likewise, as the federal agency with relevant expertise has concluded, these oil-laden railcars—weighing 143 tons on average, *see* JA231—are “heavier in total [and] more challenging to control” than other trains, “which affect[s] train stability” and “increase[s] the risk of derailments.” JA618-19 (citing PHMSA report).

Yet, the Board neither disclosed nor analyzed these elevated risk factors, relying instead on apples-to-oranges national averages that are inapplicable to these longer, heavier trains. This major oversight cannot be sustained. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1046-47 (D.C. Cir.

2021) (rejecting reliance on generic averages where record evidence demonstrated that such averages did not apply to the proposed action).

ii. Study Area Terrain vs. Downline Terrain

The Board compounded its failure to disclose relative risks between train-types by disregarding the risks associated with the terrain along the Railway versus the Union Pacific Line. In contrast to the terrain along the proposed Railway, the Union Pacific Line is extremely treacherous. *See* JA1274 (“Between 1992 and 1998, the [Union Pacific] Central Corridor was among the locations in Utah and Colorado that experienced seven derailments that caused releases of diesel fuel, taconite, and sulfuric acid into rivers adjacent to the railroad serious enough to trigger enforcement of the Clean Water Act.”).

The FEIS implicitly acknowledges that derailments are functionally related to route terrain; in rejecting from further consideration alternative Railway routes, the Board repeatedly cites the presence of “steep slopes” and “narrow canyons” as factors that will “substantially increase the risk of derailment and accidents” and the “potential for significant environmental impacts.” JA835-45; *cf.* Liu et al., *supra*, at 182 (finding that to estimate accident probability, “operational and infrastructure information should be incorporated into the model” to account for “route-specific risk analysis”).

Despite this, the Board’s accident projection model in the downline study area does not address terrain-specific factors, or elucidate what effect those might have on incident rates. Rather, the Board’s analysis hinges entirely on “track class,” which is merely a function of maximum-allowable track speed due to the “standards to which [those tracks] are built and maintained.” JA1197. In essence, the Board’s view is that accident probability is purely a matter of speed, and therefore higher rates of speed are inversely correlated with derailment rates. *Id.* (“[A]ccident rates increase with lower track classes due to lower track standards/quality.”).

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

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

The Board also failed to take a “hard look” at increased wildfire risks in the I-70 corridor. The Board found that “the downline wildfire impact of the proposed rail line would not be significant” because its Decision “would not introduce a new ignition source for wildfires” on the Union Pacific Line, and because “the area along the downline segments consists of very low, low, [and] nonburnable” habitat classes. JA992. These justifications never even leave the station.

The Board’s contention that the Decision does not portend “new ignition source[s] for wildfires” is facially irrational. The Board concluded that 90% of the Railway’s trains will travel the Union Pacific Line, *see* JA1231, which presently “has a low volume of rail traffic relative to the predicted traffic on the proposed rail line.” JA899.⁶ In other words, new oil trains, which elsewhere the Board admits *are* “an ignition source,” JA991, will use the Union Pacific Line, meaning there will, of course, be “new ignition source[s] for wildfires” as a result of the Board’s Decision. Remarkably, the Board’s review of potential wildfire impacts

⁶ The Decision authorizes up to 185,000 new crude oil cars that may utilize Union Pacific’s Kyune-Denver line each year. This comes from multiplying: (1) the number of operating days (365), JA861; (2) the average number of cars/train (110), *id.*; and the number of oil trains/day that will utilize the Union Pacific Line (4.46). JA1188; JA1190-91 (stating that up to 9.92 trains/day will enter and leave the Railway; assuming that half (4.96 trains/day) will be oil-laden departures, 90% of those (or, 4.46 trains/day) will travel east on the Kyune-Denver line).

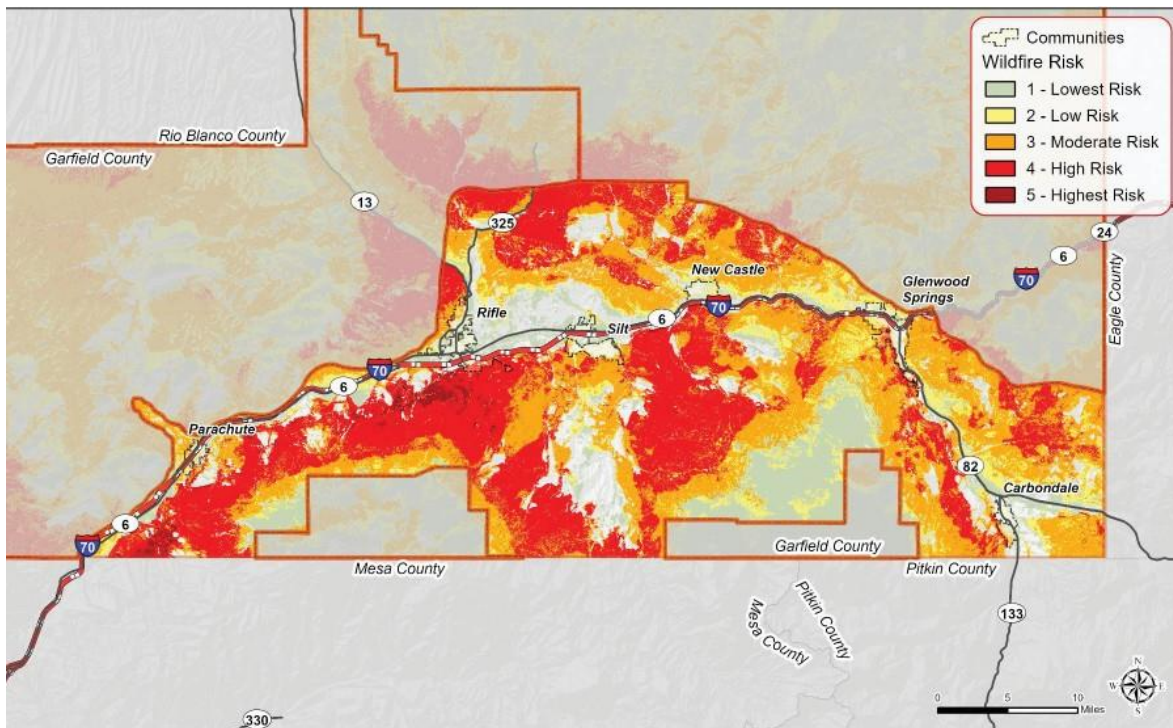
inside the study area acknowledges this positive correlation between increased rail traffic and wildfire risk. JA981 (“[M]ore trains could increase the risk of sparking a wildfire[.]”). The Board’s contrary position as applied to the exact same impact in the downline area is, therefore, arbitrary and capricious. *Transactive Corp.*, 91 F.3d at 237.

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

The Board’s second justification for downplaying wildfire risk in the I-70 corridor—i.e., one map suggests it is at low risk for wildfires, JA965, JA992—is

equally arbitrary and ignores real-world evidence. While the Board claims wildfire risk in the downline area is “not significant” because “88 percent of the combined downline segments’ study areas are associated with very low, low, nonburnable, and water [] classes,” JA965, “[c]ommon sense reveals otherwise.” *City of Phoenix*, 869 F.3d at 972. At the same time the Board was evaluating wildfire potential, the Grizzly Creek Fire was scorching Glenwood Canyon. *See* JA763 (noting this in comments). In fact, one month before the Board published its FEIS, Amici were combating the fire’s aftermath, fighting extensive debris flows, dealing with I-70 closures, and taking steps to preserve water quality. Given this real-time rebuke of the Board’s reliance on an inaccurate wildfire hazard map, it is manifestly illogical for the Board to insist that the risk of wildfire in this fire-prone area is “not significant.”

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



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

In any event, the Board’s (flawed) risk assessment concedes that the downline study area, including Glenwood Canyon, will see roughly one new rail accident each year as a result of the Decision. JA900. Where railcars holding combustible crude oil are involved, one accident—or even one spark—is enough to cause far more catastrophic consequences than the havoc wreaked by the Grizzly Creek Fire. *See* PHMSA, Recommendations for Tank Cars Used for the Transportation of Petroleum Crude Oil by Rail, 79 Fed. Reg. 27,370 (May 13, 2014) (“[R]isk of ignition is compounded in the context of rail transportation

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

because petroleum crude oil is commonly shipped in unit trains that consist of over 100 loaded tank cars.”). Yet, the Board never grappled with comments on this issue, instead assuming insignificant fire risks despite being faced with red-hot evidence of a cataclysmic wildfire in Glenwood Canyon. *See, e.g.*, JA761-65 (urging the Board to take into consideration recent wildfires along the Kyune-Denver line, including the Grizzly Creek Fire); JA546 (same).

By the same token, the Board did not examine the predictable effects to the local economy from oil train derailment and wildfires. As the Grizzly Creek Fire proved, wildfires cause disastrous effects during, and years after, a burn event. Moreover, I-70 (especially near Glenwood Canyon) is highly susceptible to long closures, resulting in grave economic costs. Bruce Finley, *Rain Triggering Rock, Mudslides Forces I-70 Shutdowns in Colorado as New Safety Norm*, DENVER POST (August 22, 2022, 6:00 AM), <https://dpo.st/3VQn9pZ> (“The economic cost to the nation” will carry a price tag of “\$1 million an hour” where a train derailment or wildfire forces closures of I-70.). Yet, while acknowledging its Decision will cause roughly one accident per year “involving a loaded crude oil train” on Union Pacific’s Kyune-Denver segment, JA900, the Board neither analyzed the profound economic harm these accidents will induce nor considered (or adopted) *any* mitigation measures to lessen these calamitous impacts in the I-70 corridor.

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2022, I caused true and correct copies of the foregoing *Final Brief of Amici Curiae City of Glenwood Springs, Town of Minturn, Town of Avon, Town of Red Cliff, Town of Vail, Routt County, Boulder County, Chaffee County, Lake County, and Pitkin County in Support of Petitioners* to be served via electronic mail upon all counsel of record, by operation of the Court's ECF system.

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