

Objection Reviewing Officer

objections-intermtn-regional-office@fs.fed.us.

USDA-Forest Service Intermountain Region

324 25th Street

Ogden, UT 84401

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT
OBJECTION TO ASHLEY NATIONAL FOREST GRANT OF
SPECIAL USE PERMIT TO THE UINTAH BASIN RAILWAY PROJECT

INTRODUCTION

In 2019 Utah's Seven County Infrastructure Coalition (Coalition) filed a petition with the Surface Transportation Board (STB) requesting authority to construct and operate a railway connecting the national rail network with oil terminals to be built in the major oil extraction fields of the Uinta Basin. The Coalition's announced objective for building its Uinta Basin Railway project (the Railway) is to stimulate a four-fold increase in the roughly 80,000 barrels of oil per day that are currently being extracted from the Basin. It hopes that this flood of new oil extraction can be unleashed by the modest transportation cost reduction that the proposed Railway would achieve for Uinta Basin oil that would be shipped to distant refineries on the Pacific or Gulf Coast.

THE COMMERCIAL CONTEXT

It is useful, at the outset, to consider the commercial context of the Railway project. Uinta Basin crude oil is a waxy substance that is solid at room temperature and is unusually difficult to transport and refine. Because Uinta waxy crude is more expensive to transport and refine than benchmark West Texas Intermediate (WTI) crude, it usually sells at a roughly 15% discount from that benchmark.

Five refineries located in Salt Lake City are currently the only ones in the nation that are custom engineered to process Uinta waxy crude. For much of the last two decades, those refineries have operated well below their collective 200,000 barrels-per-day capacity because of the higher costs of producing, transporting, and refining Uinta waxy crude. In light of the inherently higher costs of the oil stock they refine, and the

volatile demand for crude oil that world markets have experienced in recent decades, none of the Salt Lake refineries plan to expand capacity. The Coalition assumes that the modest transportation cost reductions that its Railway project would achieve with respect to Uinta crude shipped to coastal refineries would somehow offset the larger cost disadvantages that would remain for Uinta Basin waxy crude.

THE CHARACTERISTICS OF THE PREFERRED ALTERNATIVE

The Final EIS on which the Forest Service and the STB rely selected as its preferred alternative the "Whitmore Park" route. That route is designed to connect two future oil depot sites in the Uinta Basin (near Myton and Leland Bench) with the existing Union Pacific national rail network terminus near Kyune, Utah. To accomplish this, the route would extend 88 miles beginning in the central Uinta Basin. From there it would run west toward the town of Duchesne, then turn southwest down left Fork Indian Canyon until it reaches the existing Union Pacific (UP) Provo Subdivision terminus. This route heavily impacts the terrain of steep, winding canyons, stream beds, and wetlands. It requires 55 stream realignments, 443 stream crossings, affecting 61 miles of streams.

Twelve miles of the route cross Ashley National Forest land, some of it inventoried roadless area. The physical impact on the steep terrain of the Forest Service portion would be particularly heavy, requiring three tunnels, five bridges, and roughly one mile of stream bed channeling. The visual impact would be heavy as well, due to need to use extensive cut and fill roadbed construction methods, rails, ties, and power lines.

Recently the Ashley National Forest granted the project a Special Use Permit (SUP) allowing it a right of way over a dozen miles of Forest Service lands. The STB also granted the project a construction permit. The Forest Service is entertaining objections to its granting of the SUP because it acknowledges that the project violates the Visual Quality Objectives of the Ashley Forest's Land and Resource Master Plan (LRMP). It is modifying its LRMP standards to allow the visual damage that the project would cause. The Forest Service does not consider this change to the LRMP to be "significant."

NEPA IMPLEMENTING REGULATIONS REQUIRE A COMPARATIVE EVALUATION OF THE IMPACTS OF THE PREFERRED ALTERNATIVE TO THE "NO ACTION" ALTERNATIVE WHICH THE FOREST SERVICE HAS REFUSED TO PROVIDE

In its comments to the STB earlier in this proceeding, Utah Physicians for a Healthy Environment (UPHE) demonstrated that the Uinta Basin airshed which the entire Ashley National Forest shares, is currently heavily polluted, and the local oil and gas extraction industry is the source of the vast majority of those pollutants. For that reason, a nearly four-fold increase in the amount of oil extracted from the Basin can be expected to cause a roughly proportionate increase in air pollution in the Basin. None of

the comments in this proceeding dispute that if the Railway project achieves its commercial objectives, it will nearly quadruple the concentration of pollution in the Uinta Basin, including the Ashley National Forest that lies within it. UPHE's previous comments to the STB also noted that the fracking activity that the proposed oil train is intended to stimulate consumes, contaminates, and discards prodigious amounts of fresh water—a major environmental liability in this region which remains in the grip of a 20-year megadrought. If the Railway project meets the Coalition's commercial expectations, the resulting explosion of fracking operations will impose major stresses on the Basin's dwindling water resources.¹

Both the STB and the Forest Service have confined their analysis of environmental impacts to those that construction and operation of the Railway trains themselves would have. But these environmental effects are dwarfed by the devastating environmental impacts that a commercially successful Railway would have on the Basin's and the Ashley National Forest's air quality. These induced effects on the Basin and the Forest's air quality will have profound regional public health consequences, yet the Final EIS ignores them.

It is as though the Federal agencies involved agreed to analyze the environmental impact of building and operating the oil train in a vacuum, to ignore the Basin-wide environmental effects the Railway project would induce, and to offer no explanation for this omission. As we explain below, this omission is an abdication of the Forest Service's resource management responsibilities, since the induced effects of the Railway project will heavily impact the Ashley National Forest's ecological and recreational resources. Ignoring the induced effects of the Railway project violates the implementing regulations of the National Environmental Policy Act (NEPA). By analyzing the environmental impacts of the Railway project in a vacuum, the Final EIS achieves the opposite of NEPA's underlying goal.

THE FOREST SERVICE'S ISSUANCE OF A SPECIAL PURPOSE PERMIT TO THE OIL TRAIN IS INIMICAL TO NEPA'S FUNDAMENTAL PURPOSE

NEPA has been the Magna Carta of the environmental movement for the past 40 years. It adds to the normal business practices of the Federal government the goal of achieving a sustainable environment for present and future generations of Americans. It mandates that Federal agencies inform themselves of the environmental consequences

¹ Utah's Department of Environmental Quality acknowledges that "Increased oil and gas development in the Uinta Basin have led to environmental issues regarding air quality, water quality, and management of drilling wastes." See <https://deq.utah.gov/air-quality/ozone-in-the-uinta-basin>. The Railway project is designed for the sole purpose of expanding an inherently polluting activity (oil and gas extraction) four fold. Consistent with this purpose, the Railway's sponsors have designed it to access only two points in the Basin—both of them future oil depots--rather than any towns or sites of other mineral deposits. Under these circumstances, the causal chain between the operation of the Railway, the expansion of oil extraction, and the increase in Basin-wide pollution is clear and direct.

of the actions that they initiate or approve, that it consult with other agencies, document the analysis, and make the information available to the public prior to making a decision. The Final EIS on which the Forest Service relies studiously avoids doing this, especially with respect to the Railway's foreseeable impact on the quality of the air in the Uinta Basin.

NEPA section 101(a) [42 USC § 4231] establishes the following as the basic environmental duty of the Federal government:

The Congress, recognizing * * * the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government * * * to foster and promote the general welfare, *to create and maintain conditions under which man and nature can exist in productive harmony*, and fulfill the social, economic, and other requirements of present and future generations of Americans. (emphasis supplied)

NEPA section 101(b) lists the goals that the Federal government is to pursue in fulfilling its basic environmental duty established in section 101(a). The Federal government is to administer its programs in a manner that will

- 1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- 2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- 3) attain the widest range of beneficial uses of the environment *without degradation, risk to health or safety, or other undesirable and unintended consequences*; (emphasis supplied)

* * *

The air quality of the Uintah Basin is already in crisis. As UPHE pointed out in its previous comments to the STB, its ozone levels can exceed the peak ozone concentrations found in Los Angeles. The Uinta Basin is already designated a NAAQS nonattainment area for ozone, and, Utah's Department of Environmental Quality (DEQ) acknowledges that recent monitoring results will obligate the EPA to designate the Uinta Basin as a an ozone "moderate nonattainment zone." This will require the DEQ to prepare a State Implementation Plan to mitigate the hazardous levels of ozone already plaguing the Basin.² As UPHE explained in its comments to the STB, ozone in the Uinta Basin is formed primarily from precursor pollutants (Nitrogen oxides and Volatile

² See <https://deq.utah.gov/air-quality/ozone-overview-and-standard-moderate-area-ozone-sip#:~:text=The%20Uinta%20Basin%20nonattainment%20area,moderate%20classification%20in%20early%202022>.

Organic Compounds or VOCs), and the emissions of the oil and gas extraction industry are the source of the large majority of those precursors.

VOCs themselves are not NAAQS criteria pollutants, but they pose health risks at least as serious as ozone. Benzene and Toluene, for example, are powerful carcinogens. VOCs, too, are at crisis levels in the Uinta Basin. A study conducted in the Basin during the winter of 2012-13 measured VOC levels associated with oil production at the rate of 65,000 barrels per day, which is comparable to current production rates. The VOC levels estimated ranged between 200 and 300 times background levels, equal to what 100 million cars would emit.³

If the Railway project meets its proponents expectations, it would roughly quadruple VOC and ozone concentrations, filling the Basin with dense smog, and exacerbating what is already an air pollution health crisis.⁴ If this is the outcome of the permitting process at STB and the Forest Service, how can it possibly be reconciled with the fundamental purposes of NEPA such as that expressed in §101(a) “to create and maintain conditions under which man and nature can exist in productive harmony,” or the goal expressed in §102(b)(3) to make “beneficial uses of the environment *without degradation, risk to health or safety, or other undesirable and unintended consequences*”? While NEPA isn’t intended to compel substantive decisions for or against project permits, *it is intended to force those decisions to be made after a full investigation of a project’s major environmental impacts*. That clearly didn’t happen here.

THE FOREST SERVICE’S ISSUANCE OF A SPECIAL PURPOSE PERMIT TO THE OIL TRAIN VIOLATES 40 CFR § 1502.14(c)

³ Helmig D, et al. Highly Elevated Atmospheric Levels of Volatile Organic Compounds in the Uintah Basin, Utah. *Environ. Sci. Technol.* 2014, 48, 4707–4715

⁴ It could be argued that even though issuing an SUP that will have the known and certain effect of drastically degrading the air quality of the entire Uinta Basin, this should not be the Ashley National Forest’s concern, since the EPA, rather than the Forest Service, is explicitly responsible for enforcing the health standards established under the Clean Air Act. This ignores the reality that the EPA’s enforcement mechanism (State Implementation Plans) is not activated until many years after the violation is officially acknowledged, and, once acknowledged, it takes a long period of delay before any remedial plan can take effect. The Utah Department of Environmental Quality concedes that a minimum of six years elapse between the confirmation of violation and the implementation of mitigation steps. See <https://deq.utah.gov/air-quality/ozone-in-the-uinta-basin>. Appeals of the adequacy of the SIP developed can stretch the process out for an entire decade. Thus, if the Forest Service issues this SUP while turning a blind eye to the harm to air quality that will result in the Forest Service’s own environs, the harm will persist for up to a decade afterward. Given the approval of the construction permit by the STB, no other agency is in a position to prevent six to ten years of clear and certain injury to the ecological and recreational resources of the Ashley National Forest, and the health of the citizens that use it.

The regulations implementing NEPA require that the agencies preparing the Environmental Impact Statement analyze and compare the environmental impact of all reasonable alternatives, including a “no action” alternative. See 40 CFR § 1502.14(c). Neither the STB nor the Forest Service compared the environmental impact of any evaluated Railway construction route with the “no action” alternative.

It is noteworthy that they did not attempt to justify their failure to evaluate the “no action” alternative by arguing that it would be “unreasonable” within the meaning of §1502.14. For example, the STB and Forest Service might have argued that it would have been “unreasonable” for them to evaluate the “no action” alternative because it was outside of the authority or jurisdiction of the Federal agencies drafting the Final EIS. Such an argument, however, would have failed.

The STB operates under a statutory presumption that any expansion of railway infrastructure serves the “public convenience and necessity,”⁵ but that presumption is rebuttable. The statute authorizes the STB to find that the Railway would be “inconsistent with the public convenience and necessity.” Findings that would have supported such a conclusion in this instance would be the Railway project’s massive induced environmental damage, or its likely commercial non-viability. The STB conceded as much in its recent order granting a construction permit to the Railway. The majority of Commissioners based its approval on its conclusion that the potential economic benefits of the project outweigh its environmental harm, while the dissenting Commissioner reached the opposite conclusion. In doing so, both sides confirmed their understanding that the STB has jurisdiction and authority to deny the requested permit, based on the weight that it gives these competing factors. The STB, therefore, has the authority to examine the environmental impact of a “no action” alternative under § 1502.14(c).

The STB’s statutory duty is conspicuously narrow--to see that the national railway network develops in an economically rational way. It has only incidental authority for ensuring that the nation’s environmental protection laws are observed when permits for Federal rail projects are processed. The Forest Service’s statutory duties, in contrast, are broad. They are to comprehensively manage the lands under its stewardship to maintain their ecological, recreational, and commercial value. For this reason, the scope of the STB’s authority to evaluate environmental impacts of rail projects under NEPA should not determine the scope of the Forest Service’s authority to evaluate those same impacts.

While the Ashley National Forest was not chosen to act as the lead agency for purposes of drafting the Final EIS, it clearly has the authority to investigate the environmental impact of a “no action” alternative. It has found it necessary to carve out exceptions to the current Ashley Nation Forest Master Plan in order to issue a Special Use Permit (SUP) allowing a hazardous substance (crude oil) to be regularly

⁵ See 49 U.S.C. § 10901(c).

transported across its land.⁶ However, it clearly had the authority to adhere to its Land and Resource Master Plan (LRMP) if, in its view, doing so would protect the ecological and recreational resources over which it has stewardship.

Protecting the ecological and recreational resources under its stewardship are among the Ashley National Forest's core duties. The broad scope of those duties is reflected in the comprehensiveness of the LRMP that it is obligated to develop and follow. To responsibly carry out its stewardship duties, it must fully investigate and evaluate the both the direct and the induced harm to the air, water, and land under its stewardship that would be enabled by authorizing the operation of a private oil train on its land.

Such an analysis is required here where the potential harms to the Forest Service's own lands from granting the SUP are massive and obvious. The preamble to NEPA's implementing regulation 40 CFR §1502.14 states

The alternatives section should present the environmental impacts of the proposed action and the alternatives *in comparative form* based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). (emphasis supplied)

In plain terms, §1502.14 directs agencies to "include the no action alternative" among those that must participate in the comparative evaluation that the section requires. See 40 CFR §1502.14(c). The Final EIS on which the STB and the Forest Service rely makes no attempt to comply with this requirement.⁷ That

⁶ The exceptions that the Forest Service found necessary to carve out from its Master Plan to allow the Railway project to proceed relate to the substantive requirement in 36 CFR 219.10(a)(1) that Visual Quality Objectives regarding scenic values applicable to the portion of the oil train right of way that would cross the Forest Plan's inventoried roadless area. Those areas that had been designated "Retention" and "Partial Retention" of their scenic values have been exempted from these Master Plan requirements with respect to the Railway project. The Record of Decision, at 22, finds that the Forest Plan's scenic values objectives can still be met because "the overall affected area is 258 acres identified as "Retention" and 51 acres as "Partial Retention," which are only .05% and .02% of those designations across the plan area." Although it is not the core of UPHE's objection to the SUP, UPHE does object to use of this nonsensical criterion for evaluating scenic degradation. It is like analyzing the scenic impact of placing a billboard in the middle of Mirror Lake by calculating what percentage of the total square feet of the lake would be occupied by the billboard, rather than calculating from what vantage points, and from what distance, the billboard intrudes on the view of the lake. In the case of this Railway project, 12 miles of power lines and cut and fill scars can (and will) visually disrupt an entire otherwise-natural landscape. This belies the Forest Service's finding that the project's visual impact will be not be a "significant" modification of its Master Plan.

⁷ The Forest Service's Draft Record of Decision, at 16, says only this about the "no action" alternative

Under the No Action Alternative, the USFS would not issue ROW grants or SUPs and the Project would not be constructed. The Ashley National Forest Plan would not need to be amended if the No Action Alternative is selected.

Final EIS, therefore, cannot provide a valid basis for the permits granted by the STB and the Ashley National Forest.

As noted, it was clearly within Forest Service's authority to withhold an SUP on the grounds that the direct or induced effects of the Railway project would unreasonably harm the forest over which it has stewardship. Therefore, failure to evaluate the "no action" alternative cannot be justified on the ground that the Forest Service lacked the authority to act on the results of such an evaluation,

Nor could the Forest Service justify refusing to evaluate the "no action" alternative on the ground that it is commercially unreasonable. If it had tried, it would have been a difficult case to make. There are commercially feasible alternatives for transporting Uinta crude oil under the "no action" alternative. The status quo is commercially feasible. According to the "Banks" feasibility study sponsored by the Coalition, the cost of transporting Uinta crude by truck to Salt Lake City refineries would be less than the cost of transporting it there via the Railway project, if it were built. According to that study, from a commercial standpoint, using the Uinta Railway would actually be less commercially feasible than continuing to send it to Salt Lake refineries by truck.⁸ Furthermore, for decades, a very substantial portion of the oil extracted from the Basin has been transported by truck along essentially the same route as the Railway would follow (Highway 191), where the trucks connect with the Union Pacific national rail network at essentially the same place that the Railway project proposes to do. Over the last decade, amounts transported beyond the Salt Lake crude oil

The Forest Service made no attempt whatever to satisfy Sections §1502.14(a) and (c), and compare the environmental impacts of the "no action" alternative with those of the three route alternatives that were analyzed in depth.

⁸ The commercial expectations for Railway project are unrealistic for several reasons. As explained in its comments on the STB's Draft EIS, it will always be difficult for Uinta Basin drillers to compete with the larger, lower-cost fracking plays that are well established in the Permian and Bakken basins. The Coalition naively believes that the mere availability of the Railway would be enough to overcome Uinta crude's cost disadvantages and unleash the floodgates of oil extraction there even though the cost of transporting Uinta waxy crude via the Railway to distant refineries on the Pacific or Gulf Coast would exceed the current cost of trucking it to the Salt Lake City refineries. Furthermore, the Coalition estimates that it would take at least two distant refineries processing 65,000 barrels of Uinta Basin waxy crude per day for more than a decade to recoup the cost of building the Railway. The cost of modifying distant refineries to process 130,000 bpd of Uinta waxy crude is likely to exceed the cost of constructing the railway itself. If it were reasonable to expect that there will be a decade of steady demand for 130,000 additional barrels of Uinta waxy crude above breakeven prices, the Salt Lake refineries would be expanding their capacity to meet the untapped demand.

market using the already available truck-to-train option have ranged from roughly 10,000 barrels per day to 100,000 barrels per day.⁹

By refusing to compare the environmental impact of building the preferred route with the clearly reasonable “no-action” transportation alternative, both the STB and the Forest Service have consciously chosen to ignore the most egregious of the Railway project’s environmentally damaging effects and they have refused to even acknowledge that they are doing so. The resulting Final EIS is fatally flawed because it violates the regulations implementing the National Environmental Policy Act (NEPA), specifically 40 CFR § 1502.14(c). Because the FEIS is legally infirm, both the Special Use Permit which the Ashley National Forest has granted to the Railway, and the STB’s recent decision to authorize the Railway’s construction, are invalid.

ISSUING A SPECIAL PURPOSE PERMIT TO THE OIL TRAIN VIOLATES NUMEROUS OTHER NEPA IMPLIMENTING REGULATIONS

The basic implementing regulations for NEPA issued by the Council of Environmental Quality are presented in columnar form below, with our comments on the portions we have italicized.

§ 1502.14 Alternatives including the proposed action.

The alternatives section should present the environmental impacts of the proposed action and the alternatives *in comparative form* based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In this section, agencies shall:

(a) *Evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination.*

COMMENT--Earlier, we have shown why the “no action” alternative is a “reasonable” one to evaluate for environmental impacts as called for in §1502.14(a) because it is both commercially reasonable and well within the Forest Service’s broad authority to protect the resources under its stewardship from environmental impacts, direct or induced, that would be caused by granting its SUP to the Railway project. The preamble to § 1502.14 obligates the Forest Service to evaluate the environmental impacts of the “no action” alternative and compare those impacts with the preferred

⁹ See <https://geology.utah.gov/map-pub/survey-notes/energy-news/energy-news-crude-oil-via-rail/>.

alternative. By not evaluating the environmental impacts of the “no action” alternative, the Forest Service has failed to comply with the requirements of the preamble and subsection (a).

(b) Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

(c) Include the no action alternative.

COMMENT--The Forest Service has not included an analysis of the environmental impacts of the “no action” alternative, as subsection (c) requires. Not including the “no action” alternative frustrates subsection (b), as well, because it does not allow reviewers to evaluate the “comparative merits” of building the Railway versus the status quo.

40 CFR §1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including *the reasonably foreseeable environmental trends and planned actions in the area(s)*. The environmental impact statement may combine the description with evaluation of the environmental consequences (§ 1502.16), and it shall be no longer than is necessary to understand the effects of the alternatives. *Data and analyses in a statement shall be commensurate with the importance of the impact*, with less important material summarized, consolidated, or simply referenced.

COMMENT--The “reasonably foreseeable environmental trends and planned actions in the area(s)” with respect to the Railway project must be read to include the plan to stimulate a dramatic increase of oil and gas extraction and its accompanying degradation of the air quality over the Ashley National Forest, and the entire Uinta Basin. In light of the nonattainment status of the Uinta Basin with EPA health standards for ozone and violation of its health standard for VOCs, as well as the existing, long-run drought that the Uinta Basin is experiencing, an in depth, “hard look” at these environmental impacts would be necessary to be “commensurate with the importance” of these impacts. The Forest Service ignores the Uinta Basin’s twin crises of air quality and water scarcity which would be dramatically worsened by enabling the Railway project to go forward.

40 CFR § 1502.16 Environmental consequences.

(a) The environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. This section should not duplicate discussions in § 1502.14. The discussion shall include:

(3) The relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

COMMENT--If the Railway project meets its sponsors' expectations, burning the oil it extracts will add at least 53 million tons of carbon dioxide to the atmosphere each year. This will contribute to the dramatic warming and drying of the Rocky Mountain region being caused by climate change. These greenhouse-gas-induced increases in heat and drought are dramatically increasing the susceptibility of mid-elevation pine forests of the Rocky Mountains to fire, raising the projected burn area by 500% by mid-century by some estimates. This threatens not just the "long-term productivity" of timber production in the Ashley National Forest, it threatens the long-run existence of its forests. Evaluating short-run benefits (extraction of non-renewable oil) against their long-run costs (climate change and forest degradation) cannot be evaluated as required by subsection (3) where there is no evaluation of the "no action" alternative.

(5) Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned. (§ 1506.2(d) of this chapter)

COMMENT--The Clean Air Act's health and environmental quality objectives are all in direct conflict with the Coalition's goal of quadrupling of oil and gas production and its associated pollutants. The Uinta Basin airshed, which the Ashley National Forest shares, already violates of the Clean Air Acts health standards for ozone and VOCs. This dramatic increase in pollutant concentrations that would be unleashed by the Railway project can also be expected to increase the concentration of small particulates (PM2.5) by increasing their nitrate and sulfate precursors. Small particulates scatter light effectively, impairing visibility and scenic values for those seeking recreation in the High Uinta Wilderness or the Flaming Gorge Recreation Area, both of which lie within

the Ashley National Forest. Reducing small particulate pollution and regional haze are specific objectives of the Clean Air Act that are jeopardized by the construction and operation of the Railway. Such conflicts cannot be evaluated by reviewers and the public if there has been no investigation of the “no action” alternative.

(6) Energy requirements and conservation potential of various alternatives and mitigation measures.

(7) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

* * *

10) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.

COMMENT—Internal Combustion Engine (ICE) vehicles comprise two-thirds of the market demand for oil. There is a growing consensus among economists and investment bankers that there is an impending shift away from ICE vehicles to electric-, and hydrogen-powered vehicles. Many expect this shift to accelerate by 2025 which is just two years after the target completion date of the Railway project. After that, demand for crude oil and its price are expected to decline rapidly, likely leaving the Railway project unable to cover its costs. A comparison of the “energy requirements and conservation potential” of oil-powered versus renewable-powered transportation, therefore, was highly relevant and urgently needed before the agencies decided to authorize the Railway project, because the project’s viability, or lack thereof, depends on the result of such an evaluation. Subsections (6) and (10) require such a comparison, but there is none in the Final EIS, which does not compare the “build” alternative with a “no build” alternative.

The Forest Service’s Record of Decision cites the jobs that the Railway project would generate as one of its reasons for awarding an SUP allowing the Railway project to occupy Forest Service land. The major criticism of the Railway project from an economic and sociological standpoint is that oil and gas extraction industry is not sustainable in two ways—it depends on a resource that depletes over time, and it forces climate warming which imposes ever-higher costs associated with ever greater weather and ecological disruption. In searching for a project that would serve as a source of energy and jobs in the Uinta Basin, it would be highly instructive to reviewers and the public to compare the Railway project to reasonable alternatives such as a utility-scale solar farm, and to apply the subsection (7) criteria of whether either of these alternatives has “conservation potential” or would be based on a “depletable resource.” These alternatives might prove to have comparable societal benefits, but very different societal costs. The “economic and technical considerations, including the economic benefits of

the proposed action” mentioned in subsection (10) are relevant to such a comparative evaluation. Such a comparison is exactly what NEPA intends government officials and the public to engage in. This didn’t happen in the Final EIS because it omits the “no action” alternative.

THE RAILWAY PROJECT IS CONFLICTS WITH THE ASHLEY NATIONAL FOREST LAND AND RESOURCE PLAN

The Ashley National Forest Land And Resource Master Plan (ALRMP) of 1986 has, in descending order, Goals, Objectives for achieving those goals, and Standards and Guidelines for achieving those objectives. At Page IV-40, the ALRMP states the following

Goal 2:

Improve and conserve the basic soil and water resources.

Objective 2:

Maintain or improve soil stability, site productivity, and repair or stabilize damaged watersheds.

Standards and guidelines:

Avoid channelization of natural streams. Where necessary for flood control or fisheries enhancement use stream geometry relationships to re-establish meanders, width/depth ratios, etc. All dredged material shall be removed above the high water line or stabilized with armor such as riprap.

In the Forest Service’s Record of Decision, Appendix H, Biological Evaluation for the Uinta Basin Railway Project, at page 8, the Appendix says

Bridges, Culverts, and Stream Realignments

The Project and associated access roads and road relocations would require bridges and culverts to cross streams, rivers, and drainages, as well as existing roadways. Within ANF, one bridge and 49 culverts would be required to cross streams along the Indian Canyon Alternative and Whitmore Park Alternative. *Construction of the Project would also require realignments of stream segments to accommodate permanent project features, including portions of the rail bed and areas of cut and fill. Within*

ANF, there would be 0.9 mile of stream realigned along the Indian Canyon Alternative and Whitmore Park Alternative. [emphasis supplied]

The preferred alternative (Whitmore Park) appears to violate the ALRMP's "avoid channelization" standard with its nearly mile-long "realignment" (channelization) of Indian Creek. This appears to be a very substantial channeling of Indian Creek, one that requires an exception to the ALRMP in the same way that the Railway project's violation of the ALRMP's visual standards and guidelines does.

Under the ALRMP's main heading "Soil, Water, and Air, it lists

Objective 4: Control and minimize air pollutant impacts from land management activities.

Standards and objectives:

Detect and monitor the effects of air pollution and atmospheric deposition on forest resources.

Monitor air pollutants when Forest Service goals and objectives are at risk.

Preserve and protect air quality related values (AQRV) within the Flaming Gorge NRA and High Uintas Wilderness. [emphasis supplied]

Determine the amount of acceptable human-caused change in the ecological and social factors (Limits of Acceptable Change) of the Flaming Gorge NRA and the High Uintas Wilderness without loss of the present character.

Determine the air quality or AQRV condition (base level) from which increments of limits of acceptable change will be measured.

Review permits for proposed pollutant emitting facilities, their potential effect on the AQRV, and make recommendations to the State air regulatory agencies.

The key standard in the ALRMP that was violated when the Forest Service granted its SUP to the Railway project is the directive to "[p]reserve and protect air quality related values (AQRV) within the Flaming Gorge NRA and High Uintas Wilderness. As noted above, the Uinta Basin is a "marginal nonattainment area for ozone" under the EPA's NAAQS health standard and will soon be downgraded to a "moderate nonattainment area." We also noted that a four-fold increase in oil and gas extraction the Coalition expects the Railway to induce will likely carry with it a roughly four-fold increase in ozone, nitrates, VOCs and fine particulates.

An increase of that magnitude would be transformational for the Ashley National Forest. It can be expected to significantly degrade the visual character of the High Uinta Wilderness and the Flaming Gorge vistas, and put the health of those using those recreational resources at risk. It also can be expected to weaken and sicken those conifer populations in the Ashley National Forest that are known to be highly susceptible to ozone damage, and to significantly acidify highly susceptible high-altitude lakes in the High Uintas, disrupting their aquatic food chains. In all these ways, a four-fold increase in the precursors of ozone and fine particulates can be expected to substantially impair the recreational experience obtainable there.

Neither the High Uinta Wilderness nor the Flaming Gorge Recreation Area are within the Railway project's National Forest right of way, but the ALRMP charges the Forest Service with managing its overall resource in a manner that protects the visual integrity and the health of those seeking to enjoy those natural features as part of the overall master plan. In its Record of Decision, the Forest Service acknowledges that building the Railway within the Ashley Forest portion of the right of way violates the ALRMP's visual standards (its Visual Quality Objectives). What the ROD ignores is the fact that the Railway project's induced effects on air quality also violate the ALRMP's general air quality standards. Those standards require the Air Quality Related Values and the ecological integrity of the High Uinta Wilderness and the Flaming Gorge National Recreation Area not be degraded by massive increases in smog that will be brought about by the SUP that the Forest Service has granted the Railway project. The Final EIS that the Forest Service relies on to grant its SUP ignores these dominant environmental consequences of awarding permits to the Railway project. The cause of this fatal omission is the Forest Service's refusal to compare the environmental impacts of the Railway project with the status quo, i.e., the "no action alternative," as required by 40 CFR §1502.14.

APPLICABILITY OF LEGAL PRECEDENTS

Courts agree that NEPA requires Federal agencies to follow certain procedures when making decisions that adversely impact the environment but it does not require that they reach a particular conclusion. But they also agree that federal agencies must take a reasonable "hard look" at their proposals in light of available information, analysis, and the potential for environmental impacts, in making informed decisions to implement an action or alternative, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). Inherent in the "hard look" that courts require is that agencies examine relevant issues using the most appropriate expertise and methodology available. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The Final EIS here does not take a hard look at the most obvious and severe environmental impacts that building and operating the Uinta Basin Railway will induce.

The Council on Environmental Quality first adopted regulations implementing NEPA in 1978. For more than 40 years, those regulations required that an EIS be comprehensive. An EIS was required to address both "direct" and "indirect" effects on the resource under review. (See old 40 C.F.R. § 1508.8). It was also required to

address “cumulative impacts” on that resource. Cumulative impacts were defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” (See old 40 C.F.R. § 1508.7).

On September 14, 2020, the former Trump Administration’s CEQ revised the CEQ’s NEPA implementing regulations.¹⁰ Among other things, the revisions narrowed the scope required of an EIS. They no longer mention requirements that an EIS address the “indirect” and the “cumulative” environmental effects of the action under review. Instead, the new regulations state that effects “should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.” See new 40 C.F.R. § 1508.1(g).

The Coalition’s whole purpose in promoting its Railway project is to induce a massive increase in oil production in the Uinta Basin. This is not a side effect or indirect effect of building the Railway, it is the project’s *raison d’etre*, its explicitly targeted effect,¹¹ and the effect upon which its financial viability depends.¹² As explained earlier, the massive increases in oil production that the Railway is expected to induce will almost certainly cause equally massive increases in concentrations of nitrogen oxides, VOCs, and PM2.5 in the Uinta Basin. These are effects that the Final EIS must address under either the broader definition of covered effects in the old CEQ regulations or the narrower definition of covered effects in the revised CEQ regulations.

It is beyond argument that the Railway project’s Basin-wide impact on air quality is encompassed by the “direct and indirect,” and “cumulative impact” language of the old CEQ regulations. But is also clear that this impact on air quality is covered by the language of new CEQ regulation 40 C.F.R. § 1508.1(g) as well. The air quality impact is not “geographically remote” from the Railway. The Railway is being routed through

¹¹ See R.L. Banks and Associates, Prefeasibility Study of a Prospective Railroad Connecting the Uinta Basin to the National Rail Network, a Submission to the Seven County Infrastructure Coalition, dated August 9, 2018, (Banks Study) at pages at xiv, 1-2, and 14. The Seven County Infrastructure Coalition relies almost entirely on this study for its cost, volume, and revenue estimates, and as its public policy rationale for building the Railway, namely, the increase in oil production that it is expected to induce. A heavily redacted copy of the Banks Study is available at https://www.biologicaldiversity.org/programs/public_lands/pdfs/RL-Banks-SCIC-full-pre-feasibility-study.pdf.

¹² For example, see page 14 of the Banks Study, which says

The need to achieve and sustain a high volume of traffic and revenue is even more critical in the case of a railroad such as that investigated herein *because the financial performance of the Uinta Basin Railroad will be tested further by the need to overcome the extremely high capital costs that are a necessary element of a railroad being constructed in excess of 126 miles.* (emphasis added)

In evaluating the economic feasibility of the Railway project, the Banks Study estimates only the impact that transporting crude oil will have on its volumes and revenues.

the heart of the Basin. Neither is building and operating of the Railway “remote in time” from its foreseeable impacts on air quality. Reduced crude oil transportation costs, increased oil production, and degraded air quality will be contemporaneous. Finally, there is no “lengthy causal chain” between the cost savings that rail transport will make available, the increase in oil production that will result, and the increased pollution that increased production will generate. This causal chain is simple and direct. There is no basis, even under the revised NEPA implementation rules, for this draft EIS to ignore the massive increase in pollution in the Uinta Basin that is the unavoidable consequence of building the Railway.

The Trump CEQ’s revised NEPA regulations exclude from NEPA coverage “effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.” See new 40 C.F.R. § 1508.1(g)(2). This change purports to codify a holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (*Public Citizen*). This revision does not provide grounds for ignoring the air quality impacts that the Railway project will cause.

In *Public Citizen*, the Federal Motor Carrier Safety Administration (FMCSA) had authority to issue the safety permits that Mexican trucks needed if they were to carry freight into the United States, as allowed by NAFTA. The direct Congressional purpose of this permitting requirement was highway safety. The indirect purpose was not to disadvantage American truckers who would otherwise bear the burden of meeting more stringent American safety standards. In separate legislation, Congress had given the President authority to embargo freight hauling in the U.S. by Mexican trucks as long as American trucks were not given certain corresponding privileges to haul freight within Mexico.

The FMCSA recognized that by issuing permits to Mexican truckers, it might increase overall highway freight traffic and associated emissions in the United States. It decided against preparing a full EIS to address this potential impact, however, reasoning that the connection between its permitting activity and such increases in emissions was too tenuous to require analysis in a full EIS.

The Court in *Public Citizen* agreed. It concluded that FMCSA’s permitting duties were essentially ministerial, and that it did not have authority to withhold permits to prevent increases in freight traffic and associated pollution. It characterized the President’s decisions to use or not use his authority to embargo Mexican truck traffic as an “intervening cause” that more directly affected levels of Mexican truck traffic and pollution. The Court held that an EIS need not address effects that the reviewing agency has no authority to prevent or that would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action. The Court, in effect, applied the familiar tort law concepts of “intervening” or “superseding” causes to determine the appropriate scope of Environmental Impact Statements.

In its Notice adopting its Final Rule, the Trump CEQ asserted that *Sierra Club v. FERC*, 827 F.3d 36, 47-48 (D.C. Cir. 2016) incorporates the principle announced in *Public Citizen*. In *Sierra Club*, the Federal Energy Regulatory

Commission (FERC) had authority to permit the reconfiguring of a natural gas terminal to export LNG. The court did not require FERC's EIS to address the domestic environmental impact that might result from producing additional natural gas for export because its parent agency (the Department of Energy) had the authority to grant permits to export natural gas. The court said "[C]ritical to triggering that chain of events is the intervening action of the Department of Energy in granting an export license. The Department's independent decision to allow exports—a decision over which FERC has no regulatory authority—breaks the NEPA causal chain and absolves the Commission of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.'" (quoting *Pub. Citizen*, 541 U.S. at 769))

Public Citizen and Sierra Club v. FERC might appear to cover the fact pattern underlying the draft EIS in this docket. In this docket, the STB and the Forest Service are evaluating the environmental impacts of building and operating the Railway, but are declining to evaluate the environmental impacts of the massive increase in oil production that the Railway is intended to stimulate.¹³

It is clear that the STB does not have authority to grant or withhold permits to drill new oil wells in the Uinta Basin, or directly control oil production or the emissions that they cause. In this regard, the regulatory posture of the Railway project resembles, in a superficial way, the fact patterns in *Public Citizen* and *Sierra Club v. FERC*. However, there are several important differences between the permitting authority that the STB and the Forest Service exercise in this docket and the permitting activities of the FMCSA and FERC that were reviewed in *Public Citizen* and *Sierra Club*.

As noted above, the STB has the authority to withhold railway construction permits if it finds the project to be "inconsistent with the public convenience and necessity." Similarly, the Forest Service has broad authority to protect and maintain the ecological, recreational, and commercial resources over which it has stewardship, a broad authority reflected in the Master Plan that it is obligated to develop and follow. If it determines that granting a right of way to a private commercial activity will conflict with its Master Plan, or set in motion the degradation of the airshed, watershed, and recreational resources it has a duty to protect, it may withhold the enabling Special Use Permit requested.

¹³ Air pollution is not the only serious environmental impact that would result from the massive increase in oil production that the Railway is designed to induce. Such an increase would require correspondingly massive increases in water consumption in the arid Uinta Basin. Most new oil and gas drilling in the Uinta Basin will use hydraulic fracturing technology. Anywhere between 1.5 million and 16 million gallons of water is consumed to frack a single well, according to the United States Geological Survey (USGS), depending on the type of well and type of rock formation. Water used for hydraulic fracturing is typically fresh water taken from groundwater and surface water resources. See https://www.usgs.gov/faqs/how-much-water-does-typical-hydraulically-fractured-well-require?qt-news_science_products=0#qt-news_science_products. Spills of water contaminated with fracking chemicals are common. A study of the Bakken region in North Dakota found that nearly half of its oil wells suffer such spills, resulting in widespread contamination of surface and ground water. See <https://www.zmescience.com/ecology/fracking-caused-contamination-in-north-dakota-new-study-finds/>.

The Eighth Circuit's decision in *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (2003) (*Mid States*) is instructive on the question of what environmental impacts the Final EIS in this docket is obligated to address. In *Mid States*, a railroad was seeking approval from the Surface Transportation Board to construct and refurbish hundreds of miles of new track to boost its capacity to haul coal. The project was expected to make an additional 100 million tons of coal available for annual usage, yet the Board declined to incorporate the environmental effects of that known increase in coal usage into its analysis. *Id.* at 532.

The *Mid States* court ruled that the STB's Final EIS was legally insufficient. It said, "even if the full extent of the environmental impact of the increased coal usage was not known, the nature of the ensuing environmental effects plainly was—in fact, it had been identified by the Board itself." The court concluded that "[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not," an agency "may not simply ignore the effect" in its NEPA review. (emphasis in original) *Id.* at 549.

Relying on the Banks Study, the Coalition offers highly specific estimates of the additional oil production that the Railway will induce,¹⁴ as well as very specific estimates of the oil industry activity that would be required to support that added production.¹⁵ If the Forest Service and the STB had consulted the un-redacted Banks Study, they would find highly specific estimates of the impact that the Railway is expected to have on oil production volume. They could have taken the increased well counts and production volumes that proponents of the Railway forecast and multiply them by standard emissions factors developed by the EPA, or more specific ones developed by the BLM's Vernal Office, to estimate the increase that they would likely cause in concentrations of specific pollutants in the Basin.

In this docket, both agencies had available to them considerably more detail than was available in *Mid States* about the volume of freight that would be induced by the project under review and its related economic and geographical impacts. In *Mid States*, the court held that the STB had enough information to evaluate the *nature* of the increase in emissions caused by the project under review, and was, therefore, obligated to address it. In this docket, there is enough information available to the cooperating agencies to evaluate both *the nature* and *the extent* of the air quality degradation that the Railway project is likely to cause. Under these circumstances, the STB and the Forest Service had an even greater obligation than the STB had in *Mid States* to produce a Final EIS that evaluates the impact that freight volume induced by the Railway project will have on regional air quality.

¹⁴ See Banks Study at 15-16.

¹⁵ See, e.g., transcript of radio interview of Rio Grande Pacific Senior Vice President Mark Hemphill and 7 County Infrastructure Coalition Executive Director Mike McKee on Newstalk KVEL AM 920 at <https://basinnow.com/article.php?id=6321>. Mr. Hemphill estimated that building the Railway would induce production of an additional 250,000 barrels of oil a day, which would support 10 rigs working consistently and about 1,500 permanent oil industry jobs, generating additional economic activity of \$2 billion dollars a year in wages, services, and materials. .

Brian Moench, MD

President

Utah Physicians for a Healthy Environment