

# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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VOLUME 10

NUMBER 1

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## LYING BY EMISSION: WHY AGENCIES SHOULD BE REQUIRED TO DISCLOSE THE UPSTREAM AND DOWNSTREAM ENVIRONMENTAL IMPACTS OF THEIR PROJECTS

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### *I. Thesis*

In order to fully satisfy the National Environment Policy Act, the federal government should require federal agencies that engage in large scale construction projects to extensively research and disclose reasonably foreseeable and significant upstream and downstream environmental impacts and risks that may stem from the projects and operations.

### *II. Introduction*

Congress drafted the National Environmental Policy Act (“NEPA”) with the intent and aspiration to establish environmental protection on a national level, to use “all practical means,” and to achieve environmental goals “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.”<sup>1</sup> NEPA stresses accountability by requiring agencies to prepare detailed statements on the impacts of “major Federal actions

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1. 42 U.S.C. §4331(a).

significantly affecting the quality of the human environment.”<sup>2</sup> This statement is known as an Environmental Impact Statement (“EIS”).

Major inconsistencies in agency practice have led to uncertainty about NEPA’s disclosure requirements. Courts have held that NEPA requires agencies to take a “hard look” at the “environmental consequences” of their actions.<sup>3</sup> However, agencies remain unsure of what exactly is required of them to comply with NEPA. This uncertainty often allows agencies to “short-change” the public by producing an EIS containing limited or omitted research regarding an action’s level of environmental risk or significance.<sup>4</sup> Even if unintentional, agencies often limit research when they find they need to move ahead with their projects, despite uncertainty regarding the action’s environmental effects. Some effects are simply unidentifiable or unquantifiable.

If NEPA imposes strict guidelines requiring an agency to predict the precise extent of every possible effect on the environment, agency projects would grind to a halt. Projects would be delayed until overly extensive and expensive research is done—only to potentially find that some diminutive effects were still omitted. It is not effective or practical to expect agencies to use their resources to this extent. However, without some standard, agencies and their EIS could omit more and more analyses due to alleged difficulty to identify or quantify their actions’ environmental effects. Requiring an agency to disclose its environmental impacts makes the agency accountable for those impacts.<sup>5</sup> This accountability pressures the agency to mitigate or avoid adverse impacts that outweigh any benefit resulting from the project.<sup>6</sup>

To best appease NEPA, the federal government should require agencies to comply with NEPA’s “hard look” requirements by quantifying reasonably foreseeable upstream and downstream environmental impacts to the best of their capability and performing significance analysis to determine the importance of disclosing certain effects even if an exact quantification is unavailable.

This article analyzes *Eagle County, Colorado v. Surface Transportation Board*, 82 F.4th 1152, 1163 (D.C. Cir. 2023), which stems from a lawsuit

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2. *Id.* § (2)(C).

3. *E.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989).

4. Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA*, 44 *Wm. & Mary Env'tl. L. & Pol'y Rev.* 423, 428 (2020).

5. *Id.*

6. *Id.*

filed by concerned environmentalists alleging several statutory violations found in an approved EIS for a railroad construction project. This court found that, despite disclosing and discussing several environmental effects, the agency approving the project had violated NEPA by omitting the quantification or even mention of some pivotal upstream and downstream environmental impacts and failing to explain why certain information regarding actions' risks was unavailable.<sup>7</sup> This note applauds the progress this court made in raising the requirements for federal agencies and their large-scale construction projects, while also offering suggestions to further clarify the uncertainty of what should and should not be omissible on an EIS.

### *III. Background*

There are two ways a party can seek approval from the Surface Transportation Board ("Board") for the construction or operation of a railroad line.<sup>8</sup> The party may request a certificate authorizing the project by submitting an application providing information about the party and its proposed use of the railroad line.<sup>9</sup> This application must detail the project's proposed operational, financial, environmental, and energy data.<sup>10</sup> The Board may then issue a certificate if it finds that, after providing time for public comment, the proposed activities are consistent with "public convenience and necessity."<sup>11</sup> The party may alternatively request an exemption from the full application by petitioning the Board to find that compliance with the full application is not necessary to carry out the transportation policy of 42 U.S.C. § 10101, and that the transaction is of limited scope or that the application in whole is not needed to protect the public.<sup>12</sup> NEPA requires federal agencies "to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that were considered in the agency's decision making."<sup>13</sup> This review process requires the submission of an EIS detailing any significant effects on the quality of the human environment.<sup>14</sup>

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7. *Eagle County, CO v. Surface Transp. Bd.*, 82 F.4th 1152, 1195(D.C. Cir. 2023).

8. *Id.* at 1163.

9. *Id.* at 1164.

10. *Id.*

11. *Id.* (quoting 49 U.S.C. §§10901(c), 10902(c)).

12. *Id.*

13. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001).

14. *Mayo v. Reynolds*, 875 F.3d 11, 15 (D.C. Cir. 2017).

Additionally, the Endangered Species Act (“ESA”) requires federal agencies to ensure that funded activities are not likely to jeopardize endangered or threatened species, or in any way destroy or adversely modify crucial habitats as determined by the ESA.<sup>15</sup>

#### *IV. Statement of the Case*

In *Eagle County, Colorado v. Surface Transportation Board*, Seven Country Infrastructure Coalition (“Coalition”) petitioned the Board to grant the construction of a new rail line in Utah’s Uinta Basin (“Railway”).<sup>16</sup> The Board used a two-part process to exempt the Coalition from application requirements and authorize the Railway.<sup>17</sup> The Railway would be a nearly 80-mile rail line in Utah connecting two termini in the Uinta Basin to the national rail network at Kyune.<sup>18</sup> The basin contained extensive deposits of minerals including crude oil.<sup>19</sup> The Railway’s “predominant and expected purpose” was the transport of this crude oil.<sup>20</sup>

Under the two-part process, the Board assessed the Railway’s transportation benefits, then the environmental impacts of the Railway as required by the NEPA.<sup>21</sup> Part of the environmental review process requires the creation of an EIS outlining various environmental implications associated with the Railway’s construction and operation thereafter.<sup>22</sup> To construct this EIS, the Board consulted with the Fish and Wildlife Service (“Service”) to develop a Biological Opinion (“BiOp”) detailing potential impacts on endangered species and habitats.<sup>23</sup> The Board also included three reasonable Action Alternatives and identified a Preferred Alternative that it believed would result in the fewest significant environmental impacts.<sup>24</sup> The Board accepted the Coalition’s exemption petition and issued a Final Exemption Order incorporating the EIS to assist in weighing the project’s transportation benefits against its environmental impacts.<sup>25</sup> The Final Exemption Order also relied on the BiOp for its forecasted

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15. 16 U.S.C. § 1536(a)(2).

16. *Eagle County*, 82 F.4th at 1164.

17. *Id.*

18. *Id.* at 1165.

19. *Id.*

20. *Id.*

21. *Id.* at 1166.

22. *Id.*

23. *Id.*

24. *Id.* at 1167.

25. *Id.*

environmental impacts, which included impacts on “water resources, air quality, special status species like the greater sage-grouse, land use and recreation, local economies, . . . vehicle safety and delay, rail operations safety, big game, fish and wildlife, vegetation, and geology in the Uinta Basin.”<sup>26</sup> Additionally, a geological analysis found the potential for landslides or other geologic movements.<sup>27</sup> The BiOp also noted certain climate effects, such as emissions from combusted crude oil including greenhouse gases that were contributing to climate change.<sup>28</sup>

The Board exercised its authority to consider what impacts to disclose.<sup>29</sup> “Downline impacts,” or “reasonably foreseeable impacts that could occur outside the project area as a result of construction and/or operation of trains using the Line” were often omitted.<sup>30</sup> Downline impacts from rail operations along preexisting rail segments were not considered, as the Board found that a majority of trains originating or terminating on the Railway would use the Union Pacific Railroad Company rail line.<sup>31</sup> The Board did not consider various other downline effects, such as vehicle and rail safety, air quality, greenhouse gas emissions, and projected increases of oil spills and accidents.<sup>32</sup> The Board also omitted the effects of crude oil refining in already overburdened communities, such as Louisiana and Texas and upline drilling impacts on vegetation and special status species.<sup>33</sup>

Petitioners Eagle County (“County”) and Center for Biological Diversity (“Center”) filed a petition in the D.C. Circuit Court of Appeals asserting various violations of interrelated statutes and procedural requirements.<sup>34</sup> County filed a petition for review of the Final Exemption Order and the BiOp.<sup>35</sup> Petitioners argued that the Board violated NEPA by not sufficiently analyzing the Railway’s environmental impacts.<sup>36</sup> The Center raised additional challenges under the ESA regarding the Board’s allegedly faulty

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26. *Id.* at 1168.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*; Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., S.T.B. Fin. Docket 36284, 2021 WL 5960905, 18–20 (STB served Dec. 15, 2021) [hereinafter “Final Exemption Order”].

32. *Eagle County*, 82 F.4th at 1168.

33. *Id.*

34. *Id.* at 1169.

35. *Id.*

36. *Id.*

reliance on the Service's BiOp.<sup>37</sup> Both Petitioners asserted that the Board was incorrect in exempting the Railway from the full application process.<sup>38</sup>

Petitioners raised multiple objections under NEPA regarding the Board's review of the Railway's environmental impacts.<sup>39</sup> The court said "[t]o fulfill their obligations under NEPA, 'agencies must take a "hard look" at the environmental consequences of their actions, and provide for broad dissemination of relevant environmental information.'"<sup>40</sup> In this case, the Board was held to the pre-2020 regulations of the Council on Environmental Quality ("CEQ").<sup>41</sup> These regulations required evaluations of cumulative, direct, and indirect impacts of the proposed action.<sup>42</sup> Cumulative impacts are those that result "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."<sup>43</sup> Indirect impacts are reasonably foreseeable impacts, which stem from the action yet occur later in time or farther in distance.<sup>44</sup> Direct impacts are directly caused by the action at the time and place of action.<sup>45</sup>

The court had jurisdiction to review final orders of the Board through the Hobbs Act.<sup>46</sup> The Hobbs Act allows any aggrieved party to file a petition within sixty days for the court of appeals in the venue to review the order.<sup>47</sup> To obtain party status under the Hobbs Act in such informal administrative proceedings as the one present in *Eagle County*, the petitioner must make a full presentation of its views or opinions to the agency, which Petitioners had done.<sup>48</sup> Precedent also allowed the court to review the BiOp since it was relied upon in part to form the Board's Final Exemption Order.<sup>49</sup> The court reviewed the Board's Final Exemption Order, EIS, and BiOp "under

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37. *Id.*

38. *Id.*

39. *Id.* at 1175.

40. *Id.* (quoting *Pub. Emps. for Env't Resp. v. Hopper* ("PEER"), 827 F.3d 1077, 1082 (D.C. Cir. 2016)).

41. *Id.*

42. *Id.* (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)).

43. 40 C.F.R. § 1508.7 (2019).

44. *Id.* § 1508.8(b).

45. *Id.* § 1508.8(a).

46. *Eagle County*, 82 F.4th at 1173.

47. *Id.*

48. *Id.*

49. *Id.*

the Administrative Procedure Act, examining whether the agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"<sup>50</sup> The court, while disagreeing with many of the raised objections, ultimately found that the Board failed to demonstrate a valid "hard look" at the environmental consequences of the Railway.<sup>51</sup>

The court began by analyzing the ignored upstream and downstream impacts of the Railway's increase in crude oil refining.<sup>52</sup> The Board had concluded that upstream and downstream oil development impacts are not reasonably foreseeable and, in response to claims that it was intentionally limiting its geographic scope, the Board claimed it was not required to consider impacts in areas that it cannot regulate or mitigate.<sup>53</sup> The court held that although the Board need not "foresee the unforeseeable," it cannot avoid relevant impacts in the EIS and should have given either an estimate or explained more specifically why it could not do so.<sup>54</sup> As for limited geographic review, the court held that since the Board knew or could be expected to know where recipient refineries were located, it could not avoid its NEPA responsibilities on the grounds that it lacks ability to control or mitigate those areas.<sup>55</sup> Even when an agency lacks jurisdiction over the producer or distributor of a resource transported by a railway it has approved, that agency is not excused from considering any of the environmental impacts.<sup>56</sup>

The court then examined the Board's consideration of potential wildfire impacts.<sup>57</sup> The Board determined that additional trains would not lead to any more ignition sources and the Wildfire Hazard Potential Map of the U.S. Forest Service described most of the area along the downline segments as "very low."<sup>58</sup> The court held that the assertion that additional trains do not result in a higher wildfire risk was unreasoned, and relying on a generalized map not intended for determining wildfire impacts did not satisfy the "hard look" required by NEPA.<sup>59</sup> In response to the Petitioner's

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50. *Id.* at 1164 (quoting *Snohomish Cnty. v. Surface Transp. Bd.*, 954 F.3d 290, 301 (quoting 5 U.S.C. § 706(2)(A))).

51. *Eagle County*, 82 F.4th at 1175.

52. *Id.* at 1176.

53. *Id.*

54. *Id.*

55. *Id.* at 1180.

56. *Id.* (quoting *Birchhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019)).

57. *Id.* at 1182-83.

58. *Id.*

59. *Id.*

assertion that the Board had failed to take a sufficient “hard look” at which of the three proposed alternatives had the lowest risk of landslides, the court held that the Board’s explanation about the lack of information and the steps taken to address the unavailability was sufficient despite using incomplete data.<sup>60</sup>

As for County’s criticisms of the EIS not evaluating adverse impacts on water resources on sensitive parallels along the Colorado River, the court was not satisfied with the Board’s contention that the impacts to the other water resources were the same.<sup>61</sup> The court held that stating an impact was considered was not the same as considering it.<sup>62</sup> There was no evidence that the Board had considered potential impacts to downline water sources, despite the fact that 50% of these sources abut the Colorado River.<sup>63</sup> In fact, the Colorado River was omitted entirely from the final EIS.<sup>64</sup> Again, the court found this falling short of the “hard look” required.<sup>65</sup>

The County also raised objections concerning the BiOp developed by the Service and used to draft the Final Exemption Order.<sup>66</sup> The BiOp was developed after the Board undertook a consultation process including a threshold biological assessment determining species, habitats, and geographic areas located near or potentially affected by the action.<sup>67</sup> The relevant geographic area determined was known as the “action area,” and includes all areas projected to be effected directly or indirectly by the project.<sup>68</sup> The Board sought consultation of the Service after defining the action area itself as the entire project footprint, a 300-foot buffer around the footprint, and the area of the Upper Colorado River Basin affected by a depletion in water.<sup>69</sup> The Service adopted the Board’s defined action area without repeating any analysis the Board had already completed, and reasonably relied on the Board’s work when issuing the BiOp.<sup>70</sup> The Board and Service disregarded the possible water contamination from oil spills or leaks that may have harmed local protected fish and their habitat, claiming

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60. *Id.*

61. *Id.* at 1184.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1185.

66. *Id.* at 1186.

67. *Id.*

68. *Id.*

69. *Id.* at 1187.

70. *Id.*



only that trains already ran through the sensitive area and no new source of pollution would have been introduced.<sup>71</sup>

The court held that the narrowly defined action area was unreasoned and failed to show any rational connection between the facts found and the decisions made.<sup>72</sup> The court stated that the Board's determination that additional trains would not increase the risk of leaks seemed unsupported by the record and was ultimately flawed.<sup>73</sup> The court does not "simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgement," and held that without any adequate explanation or independent determination from the Service, the BiOp, EIS, and Final Exemption Order were arbitrary and in violation of both ESA and NEPA.<sup>74</sup>

In determining an exemption from the Board's full application process, the Board must weigh the Railway's transportation benefits against its environmental impacts.<sup>75</sup> In doing so, the Board relied heavily on the EIS and BiOp.<sup>76</sup> This arbitrary reliance on a flawed EIS resulted in a skewed weighing of harms and benefits.<sup>77</sup> Additionally, the court held that the Board, by omitting foreseeable and preventable repercussions such as cumulative effects within the Uinta Basin and combustion related climate effects, failed to adequately consider significant environmental impacts included in the EIS when weighing impacts against transportation benefits.<sup>78</sup> The limited and flawed weighing of environmental impacts led to the court's conclusion that the Board failed to fulfill its obligations in its issuance of the Final Exemption Order.<sup>79</sup>

The court concluded that the Board's deficiencies and NEPA violations stem from failures to quantify reasonably foreseeable upstream and downstream environmental impacts, taking a "hard look" at risks such as wildfire risks and detrimental impacts on downline water resources, and

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71. *Id.*

72. *Id.* at 1188.

73. *Id.*

74. *Id.* (quoting *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)).

75. *Id.* at 1191.

76. *Id.*

77. *Id.*

78. *Id.* at 1194.

79. *Id.* at 1195.

explain the lack of available information on local risks relating to the Railway's specific actions.<sup>80</sup>

#### *V. Argument and Analysis*

*Eagle County* made significant steps in defining a controversial area of environmental policy law.<sup>81</sup> Although the court did not provide an illustrative definition of "hard look," it did provide a weighty example of what doesn't satisfy NEPA.<sup>82</sup> Although this court raised the standard of disclosure acceptability, a long road lies ahead to fully define and mandate what NEPA requires agencies to disclose.

##### *A. Quantifying reasonably foreseeable upstream and downstream environmental impacts*

Agencies should be required to consider three types of impacts: direct effects, indirect effects, and cumulative effects.<sup>83</sup> Direct effects occur at the same time and place of the action and stem directly from it, such as emissions from trains in railway projects.<sup>84</sup> Indirect effects are also caused by the action and reasonably foreseeable, but happen at a later time or at a distance from the action, such as upstream and downstream emissions.<sup>85</sup> Cumulative effects result from the sum of the action and past, present, and foreseeable future actions.<sup>86</sup> There are two ways agencies may interpret cumulative effects: by viewing impacts of climate change as cumulative effects of the proposed project, or by focusing on resulting and reasonably foreseeable actions affecting natural resources of regional, national, or global public concern.<sup>87</sup> The former, a general description of impacts to climate change, may be useful for decisionmakers yet it does not provide much insight regarding the specific action being reviewed.<sup>88</sup> The latter, an analysis including similar actions in the state, region, or nation, is more

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Burger, supra* note 4, at 438.

84. 40 C.F.R. § 1508.1.

85. *Id.* § 1501.8.

86. *Id.* §1501.9.

87. Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act*, tbl 2-1 (1997).

88. *Id.*

consistent with the guidance of the CEQ and may result in more insightful data to facilitate decision making such proposals.<sup>89</sup>

*Eagle County* correctly identified the three types of effects and found that the Board inappropriately omitted certain environmental impacts that may stem from the construction of the Railway.<sup>90</sup> The Board used an abundance of discretion on what impacts to disclose, finding many “downline impacts” as appropriately omitted.<sup>91</sup> Downline impacts—or indirect effects—were detrimentally omitted from the Board’s BiOp used to form the EIS.<sup>92</sup> The BiOp did not address impacts along segments of the Union Pacific Railway as well as impacts to vehicle and rail safety, air quality, and greenhouse gas emissions.<sup>93</sup> The BiOp also failed to disclose any increased potential of oil spills and related accidents or effects of crude oil refining.<sup>94</sup> The only excuse the Board gave for its omission was that many oil development impacts were not reasonably foreseeable and that many of the impacts would occur beyond the geographic scope of the Board’s reach.<sup>95</sup>

Although an EIS needs to be insightful and detailed, it shall not be encyclopedic.<sup>96</sup> Instead, it should discuss impacts in proportion to their significance.<sup>97</sup> If an agency finds no significant impact, there should still be discussion to show why the agency concluded it did not warrant a more detailed study.<sup>98</sup> Until an agency can issue a finding of no significant impact, no actions may be taken that would have a negative environmental impact or limit reasonable choices available.<sup>99</sup> An agency must prepare a finding of no significance if it can determine, based on an environmental assessment, that the proposed actions will have no significant effects.<sup>100</sup>

If there is incomplete or unavailable information in an agency’s evaluation of adverse effects, an agency may not simply omit the information from an EIS.<sup>101</sup> If such information cannot be obtained due to

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89. *Id.*

90. *Eagle County*, 82 F.4th at 1152.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 40 C.F.R. §1502.2.

97. *Id.*

98. *Id.*

99. *Id.* § 1506.1.

100. *Id.* 1501.6.

101. *Id.* 1502.21.

costs or infeasibility, then an agency must provide: a statement detailing the information's lack of completion or availability; a statement explaining the information's relevance to the agency's evaluation of reasonably foreseeable adverse impacts; a summary of relevant existing credible evidence to evaluate the reasonably foreseeable significance adverse impacts; and an evaluation of impacts based on theoretical approaches or scientifically accepted research methods.<sup>102</sup> Agencies must still evaluate impacts that have even a low probability of catastrophic consequences, such as wildfires, threats to species and habitats, and economic crises.<sup>103</sup> It is also essential that agencies using estimates or generalized data find the best available data.<sup>104</sup> Using inaccurate or dated data can contort estimations and wildly misrepresent a project's potential effects.<sup>105</sup>

Although the statute does not conclusively define "significant effects," *Eagle County* correctly determined that despite the difficulty of information or casual determination that the Railway would not have certain effects, the Board must prepare a more detailed statement of why it could not determine a significant impact.<sup>106</sup> The Board in *Eagle County* omitted information from its EIS, claiming that certain upstream and downstream impacts were not reasonably foreseeable and that areas beyond the limited geographic scope were not required to be analyzed. The court correctly held that while the Board isn't required to foresee the unforeseeable, it cannot simply leave out all relevant impacts in the EIS.<sup>107</sup> NEPA requires the Board to give an estimate of impacts or explain in greater detail why this information is too costly or impossible to obtain.<sup>108</sup> There is no reason that a finding of little significant impact should prevent agencies from determining or estimating emissions. Even if a significance threshold cannot be found, some actions' emissions have a large enough effect on resources of regional, national, or global public concern to be worthy of mention in an EIS. Agencies should be responsible for assessing the potential emissions of an action and balancing these against public concern to justify excluding certain estimates from an EIS.

Agencies need not see the future, but must use reasonable forecasting and speculation to evaluate environmental impacts even if uncertain about

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102. *Id.*

103. *Id.*

104. *Burger*, *supra* note 4, at 510.

105. *Id.*

106. *Eagle County*, 82 F.4th 1151.

107. *Id.*

108. *Id.*

their possible nature and timing.<sup>109</sup> The NEPA regulations require agencies to procure obtainable information regarding impacts that are reasonably foreseeable.<sup>110</sup> NEPA also expects agencies to respond to information provided to them through public comments.<sup>111</sup> Since allowing time for public comment is required, agencies cannot in good faith avoid addressing new information provided through that process.<sup>112</sup> To determine if an agency's omitted information causes a violation of NEPA, a court must consider how useful potential new information will be to the decision making process.<sup>113</sup> If the possibility of new information regarding an action or its impacts could dramatically affect any decisions the agency or the board makes, the omission of the information should be a violation of NEPA.<sup>114</sup>

*B. NEPA's "hard look" requirement*

In addition to quantifying environmental impacts, agencies should assess the significance of direct, indirect, and cumulative effects resulting from proposed construction projects. To satisfy NEPA's "hard look" requirement, an agency must evaluate the environmental consequences of its actions. And to address the significance of effects, an agency must analyze and account for effects from related actions.

An agency must consider three types of related actions when proposing projects and developing an EIS: connected, cumulative, and similar actions.<sup>115</sup> Connected activities are closely related actions that either (1) automatically trigger other actions that trigger the requirement for an EIS, (2) cannot occur unless other actions do previously or simultaneously, or (3) are parts of a larger action that justifies the activities as closely related actions.<sup>116</sup> NEPA requires that such closely related actions be discussed in the same EIS.<sup>117</sup> Cumulative actions are those which have significant impacts when viewed with other actions.<sup>118</sup> As such closely related actions, agencies should also include cumulative actions in the same EIS.<sup>119</sup> Similar

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109. 40 C.F.R. § 1502.21.

110. *Id.*

111. *Burger, supra* note 4, at 456.

112. *Id.*

113. *Id.* (quoting *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)).

114. *Id.*

115. 40 C.F.R. § 1501.9.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

actions are those which have similarities that provide a basis to evaluate environmental consequences, such as common geography.<sup>120</sup> These actions are helpful in assessing the combined impacts of similar actions and may be included in an EIS as a significance determination.<sup>121</sup>

Perhaps a more effective way of assessing related actions is to think of them as “links in a chain” to describe what actions are inextricably connected and should be reviewed together in an EIS.<sup>122</sup> Various stages of a project and its actions upon completion, such as the construction of a railway and its later transportation, processing, and consumption of crude oil, should be thought of as links in a chain connected with the project and thus should be analyzed together.<sup>123</sup>

Agencies should assess significance by considering both context and intensity.<sup>124</sup> When considering the significance of a proposed action’s effects, NEPA recommends analyzing the affected environment and the action’s degree of effects.<sup>125</sup> Agencies should consider the affected national, regional, or local area and its resources including critical habitats and species specified in the ESA.<sup>126</sup> When considering the degree of effects in these areas, NEPA advises agencies to consider (1) short-term and long-term effects, (2) beneficial and adverse effects, (3) effects on public health and safety, and (4) effects violating any Federal, State, Tribal, or local environmental laws.<sup>127</sup>

The level of significance will vary depending on the proposed action, but for a 90-mile railway near sensitive waterways such as the Upper Colorado River Basin, the affected area will likely be geographically large.<sup>128</sup> Its impacts along the stages of the Railway’s construction as well as any impacts stemming from the running, maintenance, and development of the Railway should be analyzed together as links of a chain. This includes the aforementioned possibility of water contamination, increased wildfire risks, and accidents occurring on or near the Railway. Each of these effects, as well as others omitted by the Board, have the potential to affect a critical habitat as well as public health and safety. These effects should not be in

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120. *Id.*

121. *Id.*

122. *Burger, supra* note 4, at 456.

123. *Id.*

124. *Id.* at 506.

125. 40 C.F.R. § 1501.3.

126. *Id.*

127. *Id.*

128. *Eagle County*, 82 F.4th 1151.

any way downplayed or omitted and instead should be fully addressed with potential mitigation options and plans communicated.

*C. Establishing a Regulatory Criteria to Assess Significance*

It is clear that some form of regulatory criteria is needed to reduce confusion and increase efficiency in assessing significance. There is no easy answer, but there are several strategies agencies may begin implementing that could facilitate the creation of an assessable criteria, predominantly when discussing a project's potential greenhouse gas emissions.<sup>129</sup> One option is to use estimated greenhouse gas emissions as a proxy for severity.<sup>130</sup> There are several tools available to help understand a project's emissions and their impacts, such as (1) the Social Cost of Carbon, Methane, and Nitrous Oxide metrics, which assign a dollar value to potential impacts of emissions; (2) the EPA's quantification threshold of 25,000 tons of carbon dioxide per year used to identify and report major emitters; (3) the EPA's Greenhouse Gas Equivalencies Calculator, which can be used to compare emissions from the proposal with typical emissions such as household electricity or vehicle emissions; and (4) using the context of global, national, or state carbon budgets to evaluate the proposal and its emissions.<sup>131</sup>

Another useful yet often unpopular assessment option would be to disclose a project's social cost—the cost of emissions on society as a whole.<sup>132</sup> This metric is easier for the public as well as decisionmakers to appreciate the potential magnitude of emissions' effects.<sup>133</sup> Agencies have historically pushed back on disclosing social costs because (1) they believe they were developed for a “rule-making context”; (2) NEPA does not require a cost-benefit analysis; (3) there is significant uncertainty about actual costs not fully encompassed in social costs metrics; and (4) the metrics may not be useful to decisionmakers as a range of possible values with no thresholds by which to gauge them.<sup>134</sup> However, the metrics of social costs can be used to effectively estimate actual impacts of climate change, regardless of the reason for development.<sup>135</sup> Disclosing social costs is both useful and easy for agencies, and agencies often monetize benefits

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129. *Burger, supra* note 4, at 511.

130. *Id.* at 512.

131. *Id.* at 511 (citation omitted).

132. *Id.* at 516.

133. *Id.* at 517.

134. *Id.*

135. *Id.*

and potential costs even without developing a complete cost-benefit analysis.<sup>136</sup> Social costs also measure actual, incremental impacts of projects by “specifying the incremental costs associated with an incremental increase on [greenhouse gas] emissions.”<sup>137</sup> While they may not capture all costs relating to a project’s greenhouse gas emission, they can at least capture a portion, which then allows the agency to disclose the costs not covered if necessary.<sup>138</sup> Lastly, the presentation of social costs is beneficial as it allows decisionmakers to see the bounds of foreseeable outcomes, a common forecasting used under NEPA.<sup>139</sup> The lack of a bright-line significance threshold is typical for impacts evaluated in NEPA reviews,<sup>140</sup> making discretion paramount.<sup>141</sup> A monetization of climate change impacts might, however, provide a step towards a useful standard metric for assessing significance and comparing different impacts.<sup>142</sup>

Carbon budgets provide another useful disclosure to evaluate the significance of emission impacts.<sup>143</sup> Although many courts have held that agencies are not required to use a “global carbon budget,” the use of carbon budgets has been effective internationally to help the public and decisionmakers understand the context, intensity, and significance of projects’ emissions.<sup>144</sup> A provision of the NEPA regulations requires agencies to “discuss any inconsistency of a proposed action with any approved state or local plan and laws.”<sup>145</sup> This could be interpreted as requiring an agency to disclose any inconsistency with state or local carbon budgets in states that have adopted such policies.<sup>146</sup> The most environmentally beneficial way to interpret this provision is that it requires agencies to consider and minimize inconsistencies with state policies, including greenhouse gas reduction targets and carbon budgets of the states hosting the proposed projects.<sup>147</sup>

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 518.

145. *Id.* (quoting 40 C.F.R. § 1506.2(d)).

146. *Id.*

147. *Id.* at 519.



### *VI. Conclusion*

The court in *Eagle County* ruled in favor of public policy and environmental protection, holding that agencies should not be allowed to simply omit what is difficult or too small to disclose.<sup>148</sup> That court's rationale should not only be followed but expanded upon to allow for an amplification of environmental protection. To achieve NEPA's goals, the federal government should require agencies to take a "hard look" by quantifying reasonably foreseeable upstream and downstream environmental impacts if possible; disclosing inabilities to quantify if applicable; and performing significance analyses on a project's actions and its potential effects to local, national, and global environmental and public health and safety.

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148. *Eagle County*, 82 F.4th at 1163.