No. 25-1137
Consolidated with Nos. 25-1231 & 25-1299

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAVE THE COLORADO, *et al.*,

Petitioners-Appellees,

v.

LIEUTENANT GENERAL WILLIAM H. GRAHAM, Chief, U.S. Army Corps of Engineers, *et al.*,

Respondents-Appellants,

and

CITY AND COUNTY OF DENVER,
acting by and through its Board of Water Commissioners (Denver Water),

Respondent-Intervenor-Appellant.

On Appeal from the U.S. District Court for the District of Colorado,
No. 1:18-cv-3258 (Hon. Christine M. Arguello)

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Regulations:

Rules:

Other Authorities: **Page(s)**

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members operate in many industries that directly and indirectly depend on federal permits, authorizations, or other actions subject to the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA"). Those laws apply to infrastructure and other projects across a wide range of sectors, from utilities, mining, and manufacturing, to housing, transportation, communications, and beyond. Project developers depend on predictable and durable federal permitting regimes in planning, financing, constructing, and operating projects that often require long lead-times and large up-front capital commitments.

[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2); *see* Joint Notice (Doc.47). *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

See Martin Durbin, *We Need Permitting Certainty, From Start to Finish* (Sept. 3, 2025), https://perma.cc/JHC8-QCQG (noting the "enormous private sector investment that will be needed" to "meet our nation's growing energy demand – for data centers and AI, new manufacturing, and more").

As this case illustrates, uncertainty associated with permitting processes can be exacerbated by the litigation that often follows issuance of permits or other approvals for major infrastructure and other construction projects. NEPA and the CWA are two statutes often deployed as roadblocks by parties seeking to slow down and stop projects. Litigation-driven delays can have negative downstream impacts on the ability to upgrade and construct necessary infrastructure, on the availability and cost of water, energy, and other critical resources, and on the durability and function of supply chains—to name just a few examples.

The Chamber also has a particular interest in the predictable interpretation and application of statutes and regulations. Given the breadth and complexity of the modern federal administrative state, virtually every business in America, large or small, is subject to federal regulation. Businesses have a strong interest in knowing that relevant statutes and regulations will be predictably applied, consistent with their plain meaning. That approach helps ensure that regulated parties and other stakeholders have fair notice of what relevant regulatory regimes require, promotes accountability among regulators, and improves consistency of litigation outcomes.

These concerns are particularly salient for large infrastructure projects, which often involve a complex matrix of regulatory approvals. The district court's orders in this case depart in important respects from precedent and established interpretive principles. Those errors led the district court to perceive ambiguity where the relevant texts are clear, to excessively second-guess an agency's environmental review, and to erroneously set aside a key federal permit for a critical infrastructure project on which millions of Colorado residents will rely.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decision below exemplifies the "overly intrusive" and "unpredictable" review of federal agency actions in environmental cases, which recently led the Supreme Court to intervene with a "course correction." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 179, 183-84 (2025). The Court in *Seven County* strongly repudiated lower-court decisions that had improperly turned NEPA—"a purely procedural statute"—into a "substantive roadblock" to agency actions. *Id.* at 173.

Seven County's reaffirmation of the limited scope of agency NEPA reviews and the narrow role for judicial review of the same are especially important for major infrastructure developers, who rely on predictable and durable permitting regimes in navigating the complex process of designing, financing, constructing, and operating the kinds of projects that advance the public interest and foster economic development. The district court's decisions here are stark examples of how the judicial review process can undermine regulatory stability by "excessively second-guess[ing]" environmental reviews in permitting cases. 605 U.S. at 181.

The United States and project proponent Denver Water persuasively identify various errors in the district court's orders. The Chamber focuses on four points of particular significance to the nation's business community:

First, in setting aside a critical permit on grounds that lacked a meaningful basis in statutory and regulatory texts or precedent, the district court's orders undercut the predictability and durability of the federal permitting regime. If upheld on appeal, the district court's approach would have a chilling effect on a wide range of projects in Colorado and beyond.

Second, the district court's NEPA analysis cannot be squared with *Seven County*. The district court exceeded its proper role under NEPA by second-guessing the U.S. Army Corps of Engineers' reasoned, record-grounded statement of the project's purpose and need, which appropriately accounted for the project proponent's goals. So too, the district court erred in requiring the Corps to analyze and attempt to quantify the impacts of potential future environmental changes on the project's operational and commercial viability, rather than focusing on the potential environmental effects of the project itself.

Third, the district court flipped core interpretive principles on their head by failing to exhaust the traditional tools of construction, and by inventing novel exceptions to ordinary interpretive canons in order to find ambiguity in clear regulatory texts. The court imposed its own atextual reading to justify treating two different regulatory phrases as meaning the same thing. On that basis, the court found that the Corps had improperly defined the project's purpose and need, and that the agency had improperly cabined its alternatives analysis, under the CWA.

Fourth, the district court misapplied the standard for injunctive relief, harshly criticizing Denver Water for proceeding with construction in reliance on a valid and operative federal permit during the pendency of this litigation—notwithstanding plaintiffs' decision to refrain from seeking injunctive relief until the eleventh hour. The court overreached even further by attempting to justify the imposition of a permanent injunction here as a warning to other, future project proponents against relying on federal permits.

This Court should reverse.

ARGUMENT

I. Infrastructure Developers Depend On Predictable And Durable Permitting Regimes To Attract Investments Needed For Large Projects.

To finance, build, and operate the wide range of infrastructure and other major construction projects that drive U.S. economic growth and facilitate many aspects of modern life, public- and private-sector developers depend on predictable, efficient, and durable permitting regimes. Infrastructure development, in particular, requires enormous up-front capital investments given the long lead-times and complex permitting, financing, commercial, and logistical challenges that face any major project. Ultimately, sustained U.S. economic growth depends on encouraging infrastructure investment and development across a broad range of areas—from

utilities like water, energy, and communications, to highways, airports, housing, manufacturing, and other sectors.[2]

For example, annual capital expenditures by U.S. energy utilities reached nearly $187 billion in 2024, with total expenditures eclipsing $790 billion from 2025-2028.[3] Such investment spans a range of project activities, including construction of new natural gas pipelines and LNG export terminals; oil and refined products pipelines; electric transmission lines; renewable energy projects; and capital-intensive projects to integrate technologies such as smart meters, smart grid systems, cybersecurity protocols, and energy storage solutions.[4] These projects, in turn, catalyze trillions of dollars of direct and indirect economic activity and job growth.[5]

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[2] *See* U.S. Chamber of Commerce, *How Infrastructure Impacts Business* (Sept. 15, 2021), https://perma.cc/K4E7-BYMJ (explaining that, by 2039, underinvestment in infrastructure would "lead to a loss of $10 trillion in [U.S.] GDP, $2.4 trillion in exports, and more than three million jobs"); Construction Dive, *9 Infrastructure Megaprojects to Watch* (Jan. 16, 2024), https://perma.cc/JV5Q-Z6B5 (surveying multi-billion-dollar projects from high-speed rail, bridge replacement, and levees, among others).

[3] Dan Lowrey et al., *Energy Utility Capex Projected to Eclipse $790B from 2025 Through 2028*, S&P Global (Jan. 9, 2025), https://bit.ly/4r6nsLZ.

[4] *Id.* (S&P projections).

[5] *See How Infrastructure Impacts Business*, *supra* n.2; Bob Sternfels et al., *Unlocking US Federal Permitting: A Sustainable Growth Imperative*, McKinsey & Co. (July 28, 2025), https://perma.cc/DQ89-9EFM.

The one-two punch of permitting delays and protracted litigation can sharply increase costs, elongate project timelines, and even result in the outright cancellation of major infrastructure projects—resulting in serious chilling effects on development and investment. Regulatory and litigation delays can dramatically change the financial assumptions underlying a project, whether due to increased construction costs, lag in bringing infrastructure online (which typically must occur before revenues are received), or changes in underlying markets as customers and others shift to alternative arrangements. *See, e.g.*, *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) (suspension of ongoing construction of highway expansion would cost $4.3 million per month); *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 889-91 (10th Cir. 2013) (for $500 million oil pipeline, delay would "cost hundreds of thousands of dollars each day"); Michael Bennon & Devon Wilson, *NEPA Litigation over Large Energy and Transport Infrastructure Projects*, 53 Env't L. Rep. 10836, 10843 & n.76, 10859 (2023) (freeway project's cost skyrocketed from $500 million to $2.2 billion after a decade of litigation); *Mountain Valley Pipeline, LLC*, 185 FERC ¶ 61,193, at PP 5-6 (2023) (pipeline cost increased from $3.7 to $6.6 billion due to "permitting delays caused by ongoing legal challenges to [permits]"); *Village of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 767-68 (10th Cir. 2014) (preliminary injunction improper where stopping

construction of rural drinking water project would cost approximately $750,000 per month).[6]

The prejudice from litigation-driven permitting delays is particularly acute for large, complex infrastructure projects, which are frequently subject to "numerous regulatory permits and approvals." *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1316 (10th Cir. 2017). Disruption to even one permit or authorization can have cascading effects on project development and timing. And staying or vacating a key authorization can have non-linear effects on project timelines and completion dates. *E.g.*, *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 315 (3d Cir. 2014) (cascading "disruptive effect[s]" of even short delays, if seasonal construction windows are missed); *Save Long Beach Island, Inc. v. U.S. Dep't of Comm.*, No. 25-cv-2214, 2025 WL 2996157, at *6 (D.D.C. Oct. 24, 2025) (delays "in one phase" of a project "proceeding on a sequential schedule" "will cause a ripple effect across the overall schedule").

Developers must deploy enormous resources in reliance on permits, which often come with agency-mandated timelines. That was true of the project here, which the Federal Energy Regulatory Commission ("FERC") ordered be "start[ed]"

[6] *Compare Coal. for Healthy Ports v. U.S. Coast Guard*, No. 13-cv-5347, 2015 WL 7460018, at *13 (S.D.N.Y. Nov. 24, 2015) ($1.3 billion for bridge project), *with* Laurie Cowin, *NJ's Bayonne Bridge Project Over Budget, Raising Cost to $1.7B*, Construction Drive (Dec. 11, 2017), https://perma.cc/E58T-YYVJ ($400 million increase).

no later than July 2022 "and complete[d]" no later than July 2027, and on which the Corps imposed its own additional timeline. *City & Cnty. of Denver*, 172 FERC ¶ 61,063, at P 70 (2020). Ensuring prompt completion of construction can serve salutary purposes, like limiting the period during which environmental resources are disturbed, addressing other logistical concerns raised by construction (here, improvements to an in-use dam), and ensuring that agency findings do not grow stale. Moreover, revenues, return on investment, and many public benefits come only after a project is completed and placed into service. *Cf. Mineta*, 373 F.3d at 1087 (project would increase road safety by reducing "exceedingly high accident rate"); *Logan*, 577 F. App'x at 768 (project would serve need for potable water).

Project opponents need not win their lawsuits to achieve their obstructive goals, as "delay [alone] is the coin of the realm," and developers may choose to "abandon their projects" rather than "weather the storm" of the "tidal wave of litigation from environmental groups." *Appalachian Voices v. FERC*, 139 F.4th 903, 916-17 (D.C. Cir. 2025) (Henderson, J., concurring). The 604-mile Atlantic Coast Pipeline is just one example. After spending years in the federal permitting process, in construction, and in extensive litigation over state and federal approvals, including a favorable Supreme Court ruling, *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604 (2020), the project owners cancelled the pipeline due to legal uncertainty and delays that had nearly doubled costs from $4.5 billion to $8 billion.

See Duke Energy, Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (July 5, 2020), https://perma.cc/7E78-A6WF. Similar tactics have stalled infrastructure projects across a range of sectors. *E.g.*, *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (project cancelled after it "slogged through state and federal courts and agencies for more than a decade").

When regulatory approvals are subject to protracted litigation, agencies respond by undertaking even more exhaustive up-front environmental reviews in the hope of hardening their actions against later judicial flyspecking, further delaying the permitting process. *Appalachian Voices v. FERC*, 139 F.4th at 916-17, 922-23 (Henderson, J., concurring). And increased risk of permit vacaturs, project modifications, and construction delays "make[] [the] project a less attractive [up-front] investment for outside funders and partners." *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 136 (D.C. Cir. 2019). Investors naturally look for sufficient indications that development and permitting are on track before committing the substantial capital necessary to construct and operate a project. *What is FID? Meaning, Definition and Complete Guide to Final Investment Decision*, Blackridge Research & Consulting (Apr. 17, 2025), https://tinyurl.com/blackridgefid. And uncertainty and instability can lead to higher capital costs, which translate to higher rates and prices for customers relying on projects to deliver water, energy, or other

essentials of modern life. The net effect? "Fewer projects mak[ing] it to the finish line," or even "to the starting line." *Seven County*, 605 U.S. at 184.

This case exemplifies the harms to predictability and durability that flow from "overly intrusive (and unpredictable) [judicial] review" of permits that has "slowed down or" even "blocked many projects." *Seven County*, 605 U.S. at 183. The project here ran through an 18-year, multi-agency permitting process, which included exhaustive consideration of environmental impacts and assessment of over 300 potential alternatives. Only after the agency determined that the project was the least environmentally damaging practicable alternative did the Corps issue the permit. *See* Gov't Br.14-15. Despite nearly two decades of review and massive financial and agency investments, the district court here demanded more.

If affirmed, the district court's unduly aggressive and punitive approach would exacerbate the practical, legal, and commercial harms that flow from a protracted and uncertain federal permitting regime, in Colorado and beyond. Businesses must be able to rely on operative federal permits and authorizations. *Cf. Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-57 (2012) (regulated parties should not be penalized for "past actions which were taken in good-faith reliance on agency pronouncements" (cleaned up)). This Court should restore stability, predictability, and common sense by rejecting the district court's flawed analysis.

II. The Decision Below Is Irreconcilable With The Supreme Court's NEPA "Course Correction" And The Standard Of Review For CWA Claims.

The district court's flyspecking of the agency's exhaustive analysis exemplifies the criticisms levied by the Supreme Court in *Seven County* and runs counter to the "course correction" it announced, intended to "bring judicial review under NEPA back in line with the statutory text and common sense." 605 U.S. at 184. A straightforward application of that precedent here requires reversal.

A. *Seven County* Restored The Limited Scope Of Judicial Review Over Agencies' Environmental Analyses.

NEPA is a "purely procedural" statute. *Seven County*, 605 U.S. at 177. In deciding whether to "build, fund, or approve a project," an agency is "not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.* (citation omitted). NEPA, in other words, "is a procedural cross-check, not a substantive roadblock." *Id.* at 173. Undeterred by those limitations, some courts applied NEPA "aggressive[ly]," leading to "overly intrusive (and unpredictable)" judicial review that "slowed down or blocked many projects"—turning NEPA's "modest procedural requirement into a blunt and haphazard tool employed by project opponents." *Id.* at 179, 183. Increased litigation costs and project uncertainty led to "fewer and more expensive" projects—from "railroads, airports, wind turbines, transmission lines, [and] dams," to "housing developments, highways, bridges, subways, stadiums, arenas, data centers, and the like." *Id*. at 184.

In *Seven County*, the Supreme Court directed a "course correction." 605 U.S. at 184. The Court recognized that NEPA review was causing "[d]elay upon delay" such that "[f]ewer projects ma[d]e it to the finish line," or even "to the starting line." *Id*. To reorient judicial review, the Court hammered home that NEPA is a "*a purely procedural statute*" that "imposes no *substantive* constraints on the agency's ultimate decision to build, fund, or approve a proposed project." *Id*. at 180. Courts thus should undertake only a limited role in "determining whether an agency's [environmental review] complied with NEPA." *Id.* That principle, the Court reasoned, follows from application of the "arbitrary-and-capricious standard" of review, which is distinct from the "*de novo*" review of an "agency's interpretation" of what the law means. *Id*. at 179-80.

This governing standard of review in NEPA cases, the Court emphasized, encompasses not only questions about "what details need to be included in any given [environmental impact statement (EIS)]" or the scope of environmental effects to be considered, but also an agency's formulation of a proposed project's purpose and need, and identification of "potential alternatives" and deciding whether they are "feasible." *Seven County*, 605 U.S. at 180-81; *accord Sierra Club v. FERC*, 145 F.4th 74, 87-88 (D.C. Cir. 2025) (applying *Seven County* to agency's definition of project purpose, which properly took "into account the needs and goals of the parties involved in the application" (citation omitted)).

The Supreme Court also imposed common-sense limitations on the required *scope* of environmental reviews. "[A]n agency's only obligation [under NEPA] is to prepare an adequate report," and even a "relatively brief agency explanation can be [sufficiently] reasoned and detailed." *Seven County*, 605 U.S. at 180-81. Similarly, NEPA merely requires a review of "the project at hand"—not review of other projects that are "separate in time or place" from that project, or of projects that fall outside the relevant agency's jurisdiction. *Id.* at 187-89. Finally, even if an agency's NEPA document "falls short in some respects," that does "not necessarily require" vacatur of "the agency's ultimate approval of a project." *Id*. at 185.

Lower courts, including this Court, have already started implementing this common-sense, text-based approach. Applying *Seven County*, this Court has emphasized that a reviewing court's "only role is to 'confirm that the agency has addressed environmental consequences and feasible alternatives as to the relevant project.'" *Am. Wild Horse Campaign v. Raby*, 144 F.4th 1178, 1191 (10th Cir. 2025) (citation omitted) (emphasizing "narrow review" under NEPA). So too, the Ninth Circuit has explained that "[t]he limited scope of NEPA also circumscribes the scope of judicial review." *Cascadia Wildlands v. BLM*, 153 F.4th 869, 880, 902-06 (9th Cir. 2025). And the Eleventh Circuit has recognized that *Seven County* put an end to "the potential for abuse inherent in judicial treatment of NEPA as something other than a procedural statute." *Friends of the Everglades, Inc. v. Sec'y of U.S. Dep't of*

Homeland Sec., No. 25-12873, 2025 WL 2598567, at *4 (11th Cir. Sept. 4, 2025). As the D.C. Circuit put it, *Seven County* "shut the courthouse door to NEPA nitpicking" on judicial review. *Sierra Club*, 145 F.4th at 89.

B. The District Court Overstepped Its Proper Role.

The district court issued its decision prior to *Seven County*, but that does not excuse the court's analysis; *Seven County* reaffirmed pre-existing precedent and principles that the Supreme Court had repeatedly vindicated in NEPA cases over the years. *See* 605 U.S. at 177-85. The district court "excessively second-guessed," *id.* at 181, the Corps' careful environmental review and impermissibly "flyspeck[ed]" the Corps' "environmental analys[is]" under the CWA. *Appalachian Voices v. U.S. Army Corps of Eng'rs*, 134 F.4th 410, 422 (6th Cir. 2025) (citation omitted); *Nat'l Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577, 589 (4th Cir. 2021).

1. In defining the project's purpose, the Corps appropriately accounted for the project proponent's goals.

NEPA requires agencies to evaluate the environmental effects of a "reasonable range of alternatives" that "meet the purpose and need" of a proposed action. 42 U.S.C. § 4332(2)(C)(iii). In conducting that analysis, the Corps here appropriately took account of the project proponent's goals: increasing the overall quantity of available water at a specific location in the water system, in response to operational needs. *See* Denver Br.39; Gov't Br.34-37. One of the district court's most fundamental errors, which infected multiple aspects of its analysis, was

rejecting the agency's understanding of the project's "purpose and need," and the criticisms that followed of the Corps' assessment of potential alternatives. Dct.151 at 4, 10, 64-79.

The district court's approach is incompatible with *Seven County*, which emphasized the "*purely procedural*" nature of NEPA to inform an agency's decision on matters like a project's purpose and need and identification of "feasible alternatives." 605 U.S. at 180-81. "NEPA requires no more" than an "adequate report," which can have a "relatively brief … explanation" outlining the agency's "predictive and scientific judgments" regarding a project's "relevant impacts" and "what qualifies as … feasible." *Id.* at 180-82 (citation omitted).

Even before *Seven County*, agencies appropriately gave weight to an applicant's definition of its project's purpose and need. That approach aligns with "common sense," 605 U.S. at 184; after all, "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (Thomas, J.); *accord Colo. Env't Coal. v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999) ("Agencies … are precluded from completely ignoring a private applicant's objectives."); *Sierra Club*, 145 F.4th at 88 (no NEPA violation where agency has simply "take[n] into account the needs and goals of the parties involved

in the application" in defining purpose and need and considering alternatives (citation omitted)).[7]

The district court also criticized, for related reasons, the agency's definition of the project's purpose and range of alternatives under the CWA. Dct.151 at 56-57. But when the Corps is "determining whether to issue a § 404 permit" under the CWA, it "has a duty to take into account the objectives of the applicant's project." *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004) (collecting cases). The district court wrongly read NEPA and the CWA to require framing the project's purpose at an implausibly high level of generality—again, a purpose of simply "supplying more water," Dct.151 at 71, without regard to where practically and operationally the water was needed.

If endorsed by this Court, the district court's flawed approach would have sweeping negative consequences. For one, it ignores critical aspects of what a project proponent seeks to accomplish—here, solving a specific operational problem arising from the disconnect between the South and North Systems. Requiring agencies to define a project's purpose at an artificially high level of generality would,

[7] *See also Citizens Action Coal. of Ind., Inc. v. FERC*, 125 F.4th 229, 237 (D.C. Cir. 2025) (where agency "is considering a private proposal, it 'may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project'" (citation omitted)); *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 764 (7th Cir. 2021) (per curiam) ("[A]gencies must take the objectives they are given and consider alternative means of achieving those objectives, not alternative objectives.").

in turn, require the agency to spend time and resources analyzing a vast number of supposed "alternatives," including those that would not serve the project proponent's needs. Indeed, if "an agency frame[s] its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals," then "the project would collapse under the weight of the possibilities." *Busey*, 938 F.2d at 196; *see, e.g.*, *City of Shoreacres v. Waterworth*, 420 F.3d 440, 448-49 (5th Cir. 2005) (agency need not consider "unsupported theoretical [alternatives]" for project intended to promote growth at a specific port).

For instance, if "a utility applies for permission to build a nuclear reactor in Vernon, Vermont," then defining the project's purpose at too high a level of generality ("more power") could require the agency to consider as potential "alternatives" "everything from licensing a reactor in Pecos, Texas, to promoting imports of hydropower from Quebec." *Busey*, 938 F.2d at 195. If the permitting agency were required "to discuss these and other imaginable" options, "its [environmental impact] statement would wither into 'frivolous boilerplate.'" *Id*. (citation omitted). That is because "[t]he goals of an action delimit the universe of the action's reasonable alternatives." *Id*.

The district court's approach is bad law and bad policy, and it cannot be reconciled with decisions of other courts. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (per curiam) ("When the purpose is to accomplish one

thing, it makes no sense to consider the alternative ways by which another thing might be achieved."); *Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1212 (11th Cir. 2012) (upholding agency definition of proposed bridge project's purpose under NEPA, to encompass both functional needs (improved transportation and emergency response) and geography (crossing river at southern location), given that an existing bridge already served other parts of the county); *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345-46 (8th Cir. 1994) (under CWA, rejecting project opponent's attempt to re-define agency's statement of project purpose at the higher level of generality of a housing development, rather than boat access area).

2. The district court erred by requiring the agency to quantify the potential effects of future changes in the environment on the project's viability.

NEPA requires agencies to evaluate the "reasonably foreseeable environmental effects of the proposed agency action." 42 U.S.C. § 4332(2)(C)(i). And the CWA requires the Corps to show that the proposed action is the least environmentally damaging practicable alternative, an inquiry that also focuses on the environmental effects of the proposed project. 40 C.F.R. § 230.10(a). The district court, however, inverted that analysis to require the Corps not only to consider the project's *effects on the environment*, but also to consider and attempt to quantify *the environment's effects on the project's viability*. Dct.151 at 61-63, 80-

82. Specifically, the court required the Corps to quantify potential future changes in climate and localized precipitation patterns and snowmelt, and then assess whether those changes would affect the project's ability to supply more water. *Id*. That approach lacks a basis in text or precedent.

Most troublingly, the district court used NEPA as a cudgel against the agency to second-guess a project's viability. Specifically, the district court viewed NEPA analysis as a means to force the Corps to assess whether the project would achieve its goal of increasing the amounts of water available in the North System. Dct.151 at 61-63, 80-82. But neither NEPA nor the CWA requires or authorizes the Corps—let alone a reviewing court—to substitute its views for those of the project proponent regarding a plan's viability.

Under NEPA, "agencies are not required to analyze" issues or effects "over which they do not exercise regulatory authority." *Seven County*, 605 U.S. at 188. In the CWA, Congress charged the Corps with a narrow task: analyzing the effect of dam construction and operation on jurisdictional waters and wetlands. 33 U.S.C. § 1344. The Corps' analysis shows that those impacts are limited in scope, primarily involving construction at the base of the expanded dam. Gov't Br.14, 48; Denver Br.17. Questions relating to water *quantity*, by contrast—the heart of the district court's viability concerns—are reserved to States and local governments. *See* 33 C.F.R. § 320.4(m). The district court's analysis infringes on State and local

authority regarding water allocation and control over public utilities' capital improvement projects. And if upheld, the district court's rationale would force the Corps (and other agencies of limited statutory remit) to trench on authority Congress has reserved to States or other federal agencies. *E.g.*, 49 U.S.C. § 10901(c) (authorizing the Surface Transportation Board to determine whether a proposed railway project is "inconsistent with the public convenience and necessity"); 15 U.S.C. § 717f (directing FERC to approve proposed interstate natural gas pipeline infrastructure if required by the "public convenience and necessity").

Moreover, even if consideration of water quantity were required, the district court's holding would run headlong into *Seven County*'s admonition that "NEPA is a procedural cross-check, not a substantive roadblock." 605 U.S. at 173. Courts are required to ask whether an agency action was "reasonably explained," nothing more. *Id.* at 180. Given this narrow scope, courts should not "excessively second-guess[]" agencies operating within the scope of their statutory authority and making "predictive and scientific judgments." *Id.* at 180-81.

Indeed, this case is a quintessential example of where courts should not second-guess the agency. The Corps considered commenters' contentions relating to water quantity, explaining why the additional quantitative analysis urged by those commenters could not be meaningfully performed. Gov't Br.39, 44-48, 58-60; Denver Water Br.43-44 & n.7. The Corps' explanation was reasonable and

"reasonably discern[i]ble from the record," which is all that the law requires. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 72 F.4th 1166, 1180-82 (10th Cir. 2023).

III. The Decision Below Undermines Predictability And Certainty By Misapplying Core Interpretive Principles.

The district court compounded its errors by misapplying basic principles of textual interpretation. It manufactured ambiguity where the relevant regulatory texts are clear, and ultimately misapplied interpretive principles to justify setting aside the permit. The Court should correct the district court's flawed approach, given the "greater certainty" and "greater predictability and greater respect for the rule of law" that follow when legal texts are interpreted according to their ordinary meaning. *E.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at xxix (2012); *see also New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019).

With regard to a key issue in the case—the reasonableness of the Corps' framing of the project's purpose and need under the CWA, which informed the scope of potential alternatives—the core interpretive question is simple: is the Corps required to read two different regulatory phrases ("overall project purposes" versus "basic purpose"), found in two different places, that govern two different aspects of the regulatory analysis, as having a single, uniform meaning? Applying standard interpretive tools, the answer is "no." The district court erred in concluding

otherwise, and in rejecting an agency approach that was faithful to the plain meaning of the regulatory text.[8] Two interpretive errors stand out.

First, the district court did not apply or "exhaust all the 'traditional tools' of construction," *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019), before declaring the regulation to be ambiguous. Start with the text. One part of the regulation refers to a singular "basic purpose" in determining whether a project is "water dependent," a yes-or-no question. 40 C.F.R. § 230.10(a)(3). Where projects are not water dependent, the regulation then requires the Corps to assess whether less environmentally damaging practicable alternatives exist, "in light of overall project *purposes*," plural. *Id.* § 230.10(a)(2) (emphasis added). To put a finer point on it, the regulation distinguishes between singular and plural purposes. *See Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 151 (2017). The words "basic" and "overall" also have different definitions. Gov't Br.23-25; Denver Br.27. Nowhere does the text indicate these terms "mean the same thing" and neither term supports the district court's interpretation. *See* Dct.151 at 46 (district court disclaiming reliance on dictionaries, in favor of court's "colloquial[]" view that different words "mean the same thing").

[8] On that basis, the district court required the Corps to use a single description of the project's purpose, defined at an abstract level of generality ("more water"). From that conclusion, the district court further required the Corps to re-open its alternatives analysis, and to consider other potential project alternatives, beyond the 300 options already analyzed. Dct.151 at 42-43.

So too with structure and context: different phrases are used to serve different purposes for different practical and legal considerations. *See* Gov't Br.4-5, 23. Yet the district court effectively applied a presumption *against* reading "different words" to mean different things, insisting that other supporting evidence was required before the court would agree that "word choice is material." Dct.151 at 47. That approach strays from normal interpretive principles. It also is hard to square with cases in which this Court had no difficulty concluding that a regulation was unambiguous, by starting "with the text" alone "and, if the meaning is clear, look[ing] no further" to "extra[]textual evidence." *Scalia v. Wynnewood Refining Co.*, 978 F.3d 1175, 1181 (10th Cir. 2020) (collecting cases).

Second, the district court invented certain idiosyncratic exceptions to normal interpretive rules. For one, the district court suggested that because the regulation here dates from the 1980s, a time when—in the district court's view—agency drafting standards were more "lax," courts can bypass ordinary interpretive rules, such as the canon that courts give effect to a drafter's decision to use different words in different portions of a legal text. Dct.151 at 47-48. Even more startlingly, despite recognizing that courts should avoid interpreting legal texts to render any portion surplusage, *id*. at 48, the district court embraced a reading doing precisely that, based on its apparent belief that the agency was too busy to have drafted its regulations carefully. *See id*. (rejecting normal canon of construction because, in court's view,

"EPA was created to extinguish one (sometimes literal) ecological dumpster fire after another"); *but see* Scalia & Gardner at 179 (rejecting as "ill-founded" that theory for disregarding ordinary meaning).

If courts can jettison ordinary interpretive principles based on their own subjective views about the rigor of a past era's drafting standards or overall demands on agency resources, the inevitable result will be disconnecting outcomes from plain meaning, yielding unpredictable and inconsistent outcomes. Indeed, the degree to which the district court's interpretive approach strayed well outside the norm is illustrated by the numerous well-reasoned decisions of other courts applying the distinction between "basic purpose" and "overall purposes" under the regulation at issue here. *See* Gov't Br.23, 27-28 & n.7 (collecting cases); Dct.151 at 54 n.29 (summarily rejecting approach of other courts).

IV. The District Court Erred By Enjoining Construction And Rejecting The Project Proponent's Reasonable Reliance On A Final Permit.

The district court's remedial analysis was also deeply flawed. The court permanently enjoined a nearly-complete project, notwithstanding the developer's expenditure of hundreds of millions of dollars in reasonable reliance on permits authorizing construction on a particular timeline. *See* Dct.176. The district court's remedy was untethered from the limited scope of the Corps' statutory jurisdiction, in response to plaintiffs' eleventh-hour request to stop the project.

The district court harshly criticized the project proponent for supposed "impatience" in "hastily" proceeding with construction. Dct.151 at 41-42 & n.26, 85 n.42; Dct.176 at 15-17 & n.6, 19-20. This reasoning—seemingly a central factor behind the injunction—cannot stand. The district court took the view that project proponents assume the risk that a permit *might* later be vacated, such that a court may effectively disregard as "self-inflicted" the harms to a proponent of enjoining a project. Dct.176 at 15. That makes no sense. Developers who have survived a years- or decades-long permitting process can and must reasonably rely on federal permits. *Supra* p.12.

The district court's rationale would effectively impose an automatic construction injunction any time a lawsuit is filed—without plaintiffs needing to seek, never mind meet, the standard for that extraordinary form of relief. *Compare Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (per curiam) (plaintiffs' delay in seeking relief weighs against an injunction), *and Bostick*, 539 F. App'x at 888 ("substantial[]" likelihood of success and other factors are required for injunction (citation omitted)), *with* Dct.176 at 17 ("[T]his Court will not reward Denver Water for starting construction on the Project despite being aware of the [plaintiffs' lawsuit]").

The notion that project proponents must self-enjoin based on the mere filing of a lawsuit inverts settled law. Some opposition is inevitable to a project of any

significant magnitude and requiring developers to halt projects based on the mere filing of a complaint or appeal would mire projects in intractable delays. That approach is particularly perverse where, as here, Denver Water received specific agency approval before beginning construction. *See Bostick*, 539 F. App'x at 894 (theory of "self-inflicted" harm only applies to developer "misconduct," a concern that is absent where developer "did not begin actual construction … until *after*" the Corps "approved construction"). The fallacy of the district court's approach is particularly stark where Denver Water spent ***18 years*** navigating the development and permitting process; the Corps issued a final permit following exhaustive environmental review; and project opponents, who filed this lawsuit in December 2018, declined for years to seek a preliminary injunction or stay, thereby making a tactical choice to allow construction to begin and progress. If upheld, the district court's decision would inevitably incentivize gamesmanship and sandbagging by project opponents.

Perhaps most troubling, the district court characterized its opinion as sending a warning to all "future permit applicants" to not "complete their project goals"—apparently until all litigation challenging a permit has ended. Dct.151 at 41 & n.26. That would require project proponents to wait years before breaking ground. *See* Nikki Chiappa et al., *Understanding NEPA Litigation* 3 (July 11, 2024), https://perma.cc/M2LU-792X (analyzing NEPA cases and finding that "[o]n

average, 4.2 years elapsed between publication of an environmental impact statement or environmental assessment and conclusion of the corresponding legal challenge at the appellate level"). The district court did not attempt to reconcile its approach with the views of the relevant federal agencies, which had imposed construction deadlines incompatible with years-long delays. *Denver*, 172 FERC ¶ 61,063, at P 70. And the court's approach disregards the urgent need for, and enormous public benefits that will follow from, the project.

Finally, the district court's reasoning tosses out the requirement that courts must consider "the balance of equities" and whether a plaintiff's alleged injuries "outweigh the injuries that Defendants will suffer under an injunction." *Logan*, 577 F. App'x at 767-68 (citation omitted) (economic harms to defendant from water-project construction delays outweighed harm to plaintiff). This, too, was improper.

CONCLUSION

This Court should reverse the judgment below against the Corps, and vacate the permanent injunction barring expansion of Gross Reservoir.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,474 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2026, I electronically filed the foregoing with the Clerk of the Court of the U.S. Court of Appeals for the Tenth Circuit through the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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