

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 4, 2020

Nos. 20-5197 & 20-5201 (consolidated)

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

STANDING ROCK SIOUX TRIBE, *et al.*,

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE *et al.*,

*Intervenor-Plaintiffs-
Appellees,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellant,

DAKOTA ACCESS, LLC,

*Intervenor-Defendant-
Appellant.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT,
DELAWARE, ILLINOIS, MAINE, MARYLAND, MICHIGAN, NEVADA, NEW
JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND,
VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA,
THE TERRITORY OF GUAM, AND HARRIS COUNTY, TEXAS, AS AMICI
CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing in this proceeding are listed in the Appellants' Opening Briefs and Appellees' Brief in Response in Case Nos. 20-5197 and 20-5201, except for the amici joining this brief: the Commonwealth of Massachusetts, the States of California, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, the Territory of Guam, and Harris County, Texas.*

B. Rulings

The rulings under review in this proceeding appear in the certificate to the Appellants' Opening Briefs and Appellees' Brief in Response.

C. Related Cases

Amici States are aware of no related cases in this Court or any other court involving substantially the same parties or issues.

Dated: September 23, 2020

/s/ Seth Schofield
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* No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae contributed money that was intended to fund the preparation or submission of this brief.

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GLOSSARY

Amici States	Commonwealth of Massachusetts, the States of California, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, the Territory of Guam, and Harris County, Texas
APA	Administrative Procedure Act
Corps	U.S. Army Corps of Engineers
CEQ	Council on Environmental Quality
Dakota Access	Dakota Access, LLC
NEPA	National Environmental Policy Act
Tribes	Standing Rock Sioux, Cheyenne River Sioux, Oglala Sioux, and Yankton Sioux Tribes

STATUTES AND REGULATIONS

Amici States have included the pertinent statutes and regulations cited in this brief in the attached addendum.

INTERESTS OF STATE AMICI

Amici Massachusetts, California, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, the Territory of Guam, and Harris County, Texas, submit this brief in support of the Standing Rock Sioux, Cheyenne River Sioux, Oglala Sioux, and Yankton Sioux Tribes and affirmance of the district court's merits and remedy opinions. The Tribes prevailed—for a second time—on their claim that the U.S. Army Corps of Engineers (Corps) violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-47 (2018). To remedy that second violation, the district court properly exercised its discretion to vacate the Corps's action to grant an easement, relief that required suspension of the pipeline operations the vacated easement had authorized. The Tribes sought that relief to compel the United States to fulfill the promise of environmental protection enshrined in NEPA and the United States's promise to protect the Tribes and the natural resources on which they depend—a promise far too often broken. See First Amended Complaint (ECF No. 241) at ¶¶ 11-24. The facts of this case, too, “follow a sadly familiar pattern.” *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). This Court should affirm vacatur of the Corps's NEPA-violative action and reject the Corps and Dakota Access, LLC's attempt “to elevate”

claims of economic harm “over the law.” *See id.* Doing otherwise would “reward[] wrong and fail[] those in the right.” *See id.*

Amici States have much at stake in this case. More than one hundred years ago, the Supreme Court made clear that states have significant interests “independent of and behind the titles of ... [their] citizens in all the earth and air within ... [their] domain.” *Georgia v. Tennessee Copper*, 206 U.S. 230, 237 (1907). States thus hold a quasi-sovereign interest in preventing harm to the environment and natural resources within their borders. *Massachusetts v. EPA*, 549 U.S. 497, 518-22 (2007). States, as sovereigns, also are “vested with the responsibility of protecting the health, safety, and welfare of [their] citizens.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). The potential for federal actions to affect those state interests is immense. And today—in the midst of the devastating effects of a changing climate and increasing awareness that environmental harms are disproportionately borne by our most vulnerable and historically disenfranchised communities—it is more important than ever to fully understand, evaluate, and disclose for public dialogue the environmental effects of major federal actions.

Amici States thus have an unquestionable interest in the federal government’s compliance with laws enacted to protect the environment. Of those laws, NEPA, “our basic national charter for protection of the environment,” 40 C.F.R. § 1500.1(a)

(2019),¹ is “perhaps most important,” *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1974). NEPA requires federal agencies to take a “hard look” at the potential direct and indirect environmental consequences of their proposed actions, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)), and to inform states and the public about those potential consequences *before* they take final agency action, *see* 42 U.S.C. § 4332(C). NEPA’s mandate thus seeks to ensure that federal agencies understand the potential environmental consequences of their proposed actions, *id.* § 4331, and use that knowledge to “take actions that protect, restore, and enhance the environment,” 40 C.F.R. § 1500.1(c). If a federal agency violates NEPA, as the district court twice found the Corps did here, that violation affects the Amici States’ interests in protecting their environment and natural resources, as well as their own and their

¹ On July 16, 2020, the Council on Environmental Quality promulgated substantial revisions to NEPA’s regulations, which took effect on September 14, 2020, 85 Fed. Reg. 43,304, 43,372 (Jul. 16, 2020), and, among other major changes, deleted the above quoted text, *id.* at 43,357-58. Because the new regulations mark an unlawful departure from NEPA’s text and purposes, numerous parties, including many of the Amici States, are challenging them. *E.g.*, Complaint, *California et al. v. CEQ*, No. 20-cv-06057 (N.D. Cal. Aug. 28, 2020), ECF No. 1; Complaint, *Environmental Justice Health Alliance et al. v. CEQ*, No. 20-cv-6143 (S.D.N.Y. Aug. 6, 2020), ECF No. 1; Complaint, *Wild Virg. et al. v. CEQ*, No. 20-cv-00045 (W.D. Va. July 29, 2020), ECF No. 1. Because (i) the amended regulations did not take effect until September 14, 2020, (ii) neither the Corps nor Dakota Access rely on them, and (iii) the district court’s opinions were based on the prior regulations, this brief cites exclusively to the prior regulations.

residents' rights to be informed about, and comment on, the potential environmental impacts of a proposed federal action. *See, e.g., United States v. Coalition for Buzzards Bay*, 644 F.3d 26, 36 (1st Cir. 2011) (granting Massachusetts's claim that agency violated NEPA by failing to consider increased risk of oil spills to Massachusetts's coastal waters).

The nature of the remedy for a federal agency's NEPA violation is critical to protecting the Amici States' interests. NEPA's mandatory procedures are designed to influence the agency's final action, 40 C.F.R. § 1500.1(a), and to avoid or at least mitigate the action's potential environmental harm, *id.* §§ 1500.2(e), 1502.14 (alternatives), 1502.14(f), 1502.16(e)-(h), 1505.2(c), 1505.3, 1508.20 (mitigation). As the district court here aptly stated: "if you can build first and consider environmental consequences later, NEPA's action-forcing purpose loses its bite." I Record Appendix (vol-RA:p#) 158. Indeed, a "build-first" strategy risks entirely draining NEPA of its purpose by allowing federal agencies and project proponents alike to build first and then inflate economic consequences of vacatur as a means to avoid vacatur altogether under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission's* "disruptive consequences" prong. 988 F.2d 146, 150 (D.C. Cir. 1993). Judicial decisions that decline to vacate agency action that violates NEPA incentivize federal agency decisionmakers to do the bare minimum and encourage project proponents to advance their projects as quickly as possible so that they may

later claim that the economic consequences of vacatur counsel against it. Conversely, judicial decisions that vacate agency actions encourage NEPA compliance and discourage project proponents from moving forward in the face of litigation risk to distort the remedy analysis and render the action a *fait accompli*.

Vacatur here thus protects Amici States' interests in protecting the environment and natural resources within their borders and beyond by encouraging federal agencies to fully factor the potential environmental consequences of their actions into their decision-making process *before* they act and deterring private party tactics that distort the remedy analysis. As now-Justice Breyer made clear, "the harm at stake" in NEPA cases "is a harm to the *environment*." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). "NEPA's object is to minimize ... the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project." *Id.* at 500-01. For NEPA to matter, there must be significant consequences for non-compliance. Vacatur is the means to that end since vacating an agency's action has the practical effect of preventing a private party that benefitted from the action from proceeding with a project or operating an already constructed project during remand. And the Amici States do not take that consequence lightly, as states, too, are sometimes proponents of challenged projects.

ARGUMENT

I. Agency Action Is Unlawful Without NEPA Compliance.

NEPA's text, purpose, and case law make clear that federal agency compliance with NEPA's detailed, "hard look" requirement is a prerequisite to the lawfulness of an agency's action. The Act's command attaches at the outset of the agency's decision-making process for taking final agency action, requiring evaluation of environmental effects of "*proposed*" actions. 42 U.S.C. § 4332(C) (emphasis added). And NEPA's mandate with respect to those actions is likewise clear: "to the fullest extent possible ... all agencies of the Federal Government shall ... include in every recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." *Id.* § 4332 & (C); see *Department of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004) (Federal agencies "bear[] the primary responsibility to ... compl[y] with NEPA."). By statutory default, that "detailed statement" is an environmental impact statement, which must evaluate and discuss, among other things, "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action." *Id.* § 4332(C)(i)-(iii).²

² NEPA's regulations also allow federal agencies to begin by performing a more streamlined environmental assessment to determine whether an environmental impact statement is required. 40 C.F.R. §§ 1501.3, 1508.9. And the regulations

NEPA's directive that agencies must comply "to the fullest extent possible," *id.* § 4332, "is neither accidental nor hyperbolic"; instead, it is "a deliberate command," *Flint Ridge Dev. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). And that command is two-fold. "First, it 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.'" *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983) (citation omitted). "Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.* To achieve those aims, NEPA "demands that a decisionmaker" take "a hard look" at "all significant environmental impacts *before* choosing a course of action." *Sierra Club*, 872 F.2d at 502 (emphasis added). While the Act does not dictate particular results, its procedures are intended to "affect the agency's substantive decision." *Robertson*, 490 U.S. at 350. Thus, as this Court wrote soon after NEPA's enactment, "Congress did not intend the Act to be ... a paper tiger"; instead, "the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." *Calvert Cliffs*, 449 F.2d at 1114.

allow agencies to exclude categorically from NEPA review only certain agency actions that have previously been found not normally to have significant environmental impacts. *See id.* § 1508.4.

Courts have repeatedly confirmed what NEPA's text and purpose dictate: federal agencies are required to comply with NEPA *before* they take final action. *Oglala Sioux Tribe v. U.S. Nuclear Reg. Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018); *American Rivers v. FERC*, 895 F.3d 32, 37 (D.C. Cir. 2018); *Sierra Club*, 872 F.2d at 502. "The statute [thus] does not permit an agency to act first and comply later." *Oglala*, 896 F.3d at 523. That "analyze first, act second," mandate is based on the common-sense notion that "[i]t is far easier to influence an initial choice than to change a mind already made up." *Sierra Club*, 872 F.2 at 500. NEPA thus requires that "a valid [environmental impact statement] be prepared before the agency grants [a] license," promulgates a regulation, issues a permit, or, as in this case, grants an easement. *Oglala*, 896 F.3d at 529; *see also National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1079 (D.C. Cir. 2019) (Corps had to comply with NEPA "[b]efore it could greenlight the ... project" by issuing required permits), *reh'g pet. granted on remedy*, 925 F.3d 500 (D.C. Cir. 2019). In other words, the lawfulness of such final agency actions is dependent on the agency's compliance with NEPA's "action forcing" requirements. *See Calvert Cliffs*, 449 F.2d at 1113. And, accordingly, an agency's violation of NEPA "fatally infect[s]" the agency action and renders the action unlawful. *See American Rivers*, 895 F.3d at 55.

II. Vacatur of an Agency's Action Is the Default Remedy for a NEPA Violation, and the District Court Correctly Employed It Here.

Timely and faithful agency compliance with NEPA is critical to securing the Act's mandate and protecting Amici States' interests. Indeed, this Court recognized that fact more than forty years ago, when it informed federal agencies that it would "rigorously enforce" NEPA, *Calvert Cliffs*, 449 F.2d at 1114, to ensure that agencies fulfill the Act's "important legislative purposes," *id.* at 1111; *see id.* at 1115 ("It is hard to imagine a clearer or stronger mandate[.]"). Since then, this Court has hewed closely to those early, forceful pronouncements by vacating agency actions that violate NEPA and undermine its environmental-protection purpose. *See, e.g., American Rivers*, 895 F.3d at 55 (vacating license renewal for hydroelectric dam based on NEPA violation); *American Wild Horse Pres. Campaign v. Purdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating agency decision to eliminate wild horse territory based on NEPA violation); *Sierra Club v. FERC*, 867 F.3d 1357, 1374-75, 1379 (D.C. Cir. 2017) (vacating, without discussion, FERC approval of operating interstate natural-gas pipelines based on NEPA violation). And the United States District Court for the District of Columbia has assiduously followed this Court's lead. *E.g., Public Emps. for Envtl. Resp. v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) (vacatur "is the standard remedy" in NEPA cases (citation omitted)); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D.D.C. 2010) ("vacatur[] is the presumptively appropriate remedy").

Although courts “may elect a different remedy based on ‘the seriousness of the order’s deficiencies’ and ‘the disruptive consequences’ of vacatur,” this Court has recognized that “vacatur is the default remedy.” *Semonite*, 925 F.3d at 501 (quoting *Allied-Signal*, 988 F.2d at 150-51). Thus only in “rare cases,” *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019), has this Court remanded without vacatur,³ for example, where: a state “permitting requirement independently bar[red]” the project from advancing until the agency complied with NEPA, *e.g.*, *Oglala*, 896 F.3d. at 538; vacatur would “defeat ... the enhanced protection of the environmental values” afforded by a regulation, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (citation omitted); or vacatur itself would “temporarily defeat petitioner’s purpose,” *Environmental Def. Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990).⁴ Here, however, the district court correctly rejected Dakota Access’s claim that vacatur of the pipeline easement would cause

³ In the NEPA context, as the district court stated, “to the Court’s and the parties’ knowledge, only twice has a court ... not vacated agency action that violated NEPA because of a missing or defective EIS.” I-RA:150.

⁴ Amici States do not contend that remand without vacatur is never appropriate. Indeed, Massachusetts along with some of the other State Amici have previously argued successfully for remand without vacatur where vacatur would cause actual harm to public health and the environment. *E.g.*, Joint Mot. of State, Local Gov’t, and Public Health Respondent-Intervenors for Remand Without Vacatur at 10-20, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100 (D.C. Cir. Sept. 24, 2015). Amici States thus do not ask the Court to deviate from those precedents, but instead to apply their guiding principles, as the district court did correctly here.

environmental harm because the company's claim was entirely "speculative" and based on "inconclusive evidence." I-RA:161-62. Those factors thus do not exist in this case.

And, in all events, courts should, first and foremost, evaluate vacatur's potential disruptive consequences through the lens of the relevant statute's objectives. *NRDC v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) (partially vacating rule because vacatur would not "set back" Clean Air Act's purpose); *see also American Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019) (declining to vacate where "it would 'set back' the Act's objective of offering financial services to people of small means"). After all, "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 498 (2001) (citation omitted). And here, in NEPA, Congress plainly prioritized environmental protection over all other considerations. *See Oglala*, 896 F.3d at 529 ("We know that the environmental values protected by NEPA are of high order—because Congress told us so."). The "harm at stake" when an agency violates NEPA is "a harm to the *environment*," *Sierra Club*, 872 F.2d at 504—an often irreversible harm—not the economic harm a project proponent may incur when a court finds an agency violated NEPA when it authorized a project and vacates the agency action

that unlawfully authorized it. Thus, the remedy for a NEPA violation must “protect the purpose and integrity of” NEPA. *Semonite*, 925 F.3d at 502.

Indeed, vacatur flows directly from NEPA’s mandate, which, again, requires federal agencies to take a “hard look” at the potential direct and indirect environmental consequences of their proposed actions *before* their actions are finalized. *Supra* p.8; *see also Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 43 (D.C. Cir. 2015) (“Congress[] ... require[d] environmental review and authorization in advance”). That remedy also flows directly from the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)—the act governing judicial review of NEPA decisions, *see infra* Pt.III—since it has long been held that vacatur is the standard remedy for unlawful agency action under the APA. *E.g., United Steel*, 925 F.3d at 1287 (“The ordinary practice is to vacate.”); *see Federal Power Comm’n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (agency decision unsupported by administrative record must be vacated). And, as discussed above, *supra* pp.4-5, vacatur is an important tool to disincentivize a rush to complete a project in the face of legal challenges to a federal agency’s NEPA analysis that could render the project a practical foregone conclusion or otherwise distort the analysis for determining whether vacatur is appropriate. *See Semonite*, 925 F.3d at 502 (describing as “troubling,” the Corps and private project proponent’s “attempt to use” the project’s completion to argue against vacatur for NEPA violation). That,

however, is exactly what the Corps, Dakota Access, and their amici attempt to do here. Corps Br. 33-34; Dakota Access Br. 35-36; *see also, e.g.,* Indiana *et al.* Amici Curiae Br. 1, 3-20; North Dakota Amicus Br. 1-5, 10-16.

The district court did not abuse its discretion when it employed the default remedy. Indeed, the district court was acutely aware of the negative incentives that remand without vacatur can create for agencies and project proponents alike in NEPA cases. While the district court remanded without vacatur the *first* time it held the Corps violated NEPA under *Allied-Signal*'s first "seriousness of deficiencies" prong, *Standing Rock Sioux Tribe [IV] v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 97-103 (D.D.C. 2017), the court also warned of the "undesirable incentives" that remand without vacatur based on "alleged economic harm" under *Allied-Signal*'s disruptive consequences prong can create in NEPA cases like this one, *id.* at 106. "If," the court elaborated, "projections of financial distress are sufficient to prevent vacatur ... agencies and third parties may choose to devote as many resources as early as possible to a challenged project—and then claim disruption in light of such investments." *Id.*; *see also* I-RA:158 (same); *Western Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1088 (D. Idaho 2020) (same); *cf. Sierra Club*, 803 F.3d at 44 (rejecting argument that construction of project rendered NEPA claim moot because holding otherwise would allow agencies and private parties to "merely

ignore the requirements of NEPA”). That, the district court rightly stated, would “subvert ... NEPA.” I-RA:157.⁵

Yet, back before the district court a second time, and now before this Court, the Corps, Dakota Access, and their amici seek to subvert NEPA in exactly that way by advancing as their “central” argument the economic harm that Dakota Access and industries that rely on the pipeline would allegedly suffer from vacatur and the resulting shut down of the pipeline. See I-RA:153; see, e.g., Corps Br. 34 (“profound economic harm”); Dakota Access Br. 36 (“vacatur would cause widespread and immense economic harm”). But, again, “[t]he purpose of NEPA is to protect the environment, not ... economic interests[.]” See *Nevada Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). And because preventing a project proponent’s economic injury is not one of NEPA’s objectives, I-RA:157-58, and Dakota Access “assume[d]” the “economic risk knowingly,” I-RA:162, the district court rightly discounted that argument after the Corps failed to cure its NEPA violations during the first remand, see I-RA:153-61; see also I-RA:148-53 (rejecting

⁵ The district court also noted correctly that, “[w]ithout vacatur, ... the Corps and Dakota Access would have little incentive to finish the [environmental impact statement] in a timely matter,” I-RA:157, something that is especially important here because (i) NEPA requires agencies to comply with NEPA *before* they authorize the underlying action, *supra* p.8, and (ii) the pipeline in this case has already been constructed based on a seriously deficient NEPA review. I-RA:141, 148, 153; see also *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (“[R]emand without vacatur creates a risk that an agency may drag its feet and keep in place an unlawful agency rule.”).

remand without vacatur under *Allied-Signal*'s first prong). This Court should do the same.

Indeed, the economic harm that Dakota Access and its amici claim they will suffer was entirely self-inflicted. Dakota Access chose to proceed despite the district court's prior finding that the Corps violated NEPA, its knowledge that the Tribes continued to oppose the easement and the Corps's unlawful NEPA analysis, and the fact that the Tribes had sought to halt the project before construction began. See I-RA:160 (Dakota Access "relied on the continued operation of the pipeline in the face of ongoing litigation"); see also *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 996, 998 (8th Cir. 2011) (preliminarily enjoining construction of power plant for, *inter alia*, likely NEPA violation where proponent "repeatedly ignor[ed] administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk"); *Puerto Rico Conservation Found. v. Larson*, 797 F. Supp. 1066, 1072 (D.P.R. 1992) (defendants' "assumed any monetary risks resulting from their decision" to continue after NEPA lawsuit was filed). Those cries of economic harm thus do not warrant deviating from the default, environmentally protective remedy of vacatur here.

Vacatur of the Corps's easement—and resulting pipeline shutdown—is necessary to restore, as closely as possible, the status quo before the Corps's illegal action took effect and to prevent the catastrophic, irreversible environmental harm

of an oil spill pending NEPA compliance. Indeed, vacatur is particularly justified in this case where the Corps's violation was serious and so much is at stake for the Tribes—sovereign entities in our federal system, as the district court recognized, I-RA:111, that have far too often been marginalized, *see McGirt*, 140 S. Ct. at 2482.⁶ The district court already gave the Corps one opportunity to remedy its NEPA violations without vacatur. *Standing Rock IV*, 282 F. Supp. 3d at 108. But, following that remand, the court held that Corps revised analysis violated NEPA, too, and that there was “no ‘possibility that the [Corps] may find an adequate explanation for its’” failure to prepare an environmental impact statement if given a *second* chance. I-RA:153. After finding that the Corps failed to use that lifeline to comply with NEPA with full knowledge that its attempt to do so would almost certainly be challenged again, the district court, however, still did not immediately employ the default remedy and vacate the Corps's easement. Instead, the district court requested additional briefing on vacatur, i.e., “the status of the easement — and, ultimately, the oil — in the meantime.” I-RA:146; *see also* I-RA:137. The facts that the Corps was already given one opportunity to comply with NEPA and that it failed to do so

⁶ The lake at the center of this case was created on land Congress took from the Tribes to construct a dam. I-RA:100. The Tribes now use the lake “in myriad ways, including for drinking, agriculture, industry, and sacred religious and medicinal practices,” *id.*, but those new uses of the Tribes' former lands are now themselves threatened by the risk of an oil spill from the pipeline at the heart of this case—a risk the district court correctly held had not been fully evaluated in accord with NEPA's mandate, I-RA:113-30.

amplify the need for a significant consequence for the Corps's continued NEPA noncompliance in this case.

III. An Injunction Is Unnecessary in Most APA Cases Because Vacatur, Like a Declaratory Judgment, Has the Effect of Halting the Unlawfully Authorized Activity.

This Court should reaffirm that the effect of a court's decision to vacate an agency action for violating NEPA or the APA is to annul the agency action—here, an easement granted by the Corps to Dakota Access, which is required for the legal operation of the company's pipeline—without the need for the district court to also issue an injunction ordering the Corps to abide by the law and enjoining the pipeline's operation during the remand. That well-established principle was the foundation for the parties' positions before the district court and the district court's decision to vacate the Corps's easement. For that reason, and contrary to the newfound injunction-based theory the Corps and Dakota Access attempt to introduce for the before this Court, *see* Corps Br. 34; Dakota Access Br. 42, the district court need not have taken the further step of issuing an injunction to effectuate the practical effect of what the court's vacatur order already secured—shutting down the pipeline during the remand. Indeed, the Supreme Court made that point clear in *Monsanto Co. v. Geertson Seed Farms*, where it held that courts *should not* take that further step unless an injunction is necessary to secure relief beyond the practical effect of vacatur itself. 561 U.S. 139, 165 (2010).

A claim that a federal agency violated NEPA is reviewed under the APA. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010). And the APA and longstanding precedent make clear that vacatur of a federal agency's action has the practical effect of preventing the private beneficiary of a vacated federal agency action from undertaking the unlawfully authorized activities during remand. Just as the APA "supplies the applicable vehicle for review of ... [an agency's] actions" under NEPA, *id.*, it also supplies all the authority necessary for a court to award both preliminary and merits-based relief to redress a plaintiff's Article III injuries, 5 U.S.C. §§ 705 (interim relief), 706 (merits-based relief). With regard to relief on the merits, the APA provides that "[t]he reviewing court shall ... hold unlawful *and set aside* agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* §§ 706(2) & (2)(A) (emphasis added). Congress's command in § 706—that the reviewing court "shall ... hold unlawful and set aside [the] agency action"—and a court's execution of that command through vacatur voids the offending agency action and thereby renders unlawful the private activity the agency action had authorized, without the need for an injunction mandating the parties' compliance. For that reason, the Supreme Court has instructed that courts should not issue injunctions in APA cases "[i]f a less drastic remedy (such as partial or complete vacatur ...) [i]s sufficient to redress" a plaintiff's injury. *Monsanto*, 561

U.S. at 165-66; *see id.* at 165 (noting respondents’ representation that injunction would not have had “any meaningful practical effect independent of ... vacatur”). Thus, while Congress did not preclude plaintiffs from relying on other forms of relief, like preliminary and permanent injunctions, *see* Attorney General’s Manual on the Administrative Procedure Act 107 (1947), plaintiffs, like the Tribes here, need not avail themselves of those alternative modes of relief to secure effective and complete relief for an agency’s NEPA violation.

That principle applies equally to any action arising under the APA including, as was the case here, an action for declaratory judgment. First Amended Complaint (ECF No. 241), Prayer for Relief ¶ 9, at 69-70 (“[d]eclare ... easement” violated NEPA), ¶ 10, at 70 (“[v]acate ... easement”). As the APA makes clear, absent a special review statute, “[t]he form of proceeding for judicial review is ... any applicable form of legal action, including actions for declaratory judgments” 5 U.S.C. § 703. While the APA also refers to “writs of prohibitory or mandatory injunction,” *id.*, a “declaratory judgment is, in a context ... where federal officers are defendants, the practical equivalent of specific relief such as [an] injunction ..., since it must be presumed that federal officers will adhere to the law as declared by the court.” *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985); *see Committee on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008)

(“declaratory judgment is the functional equivalent of an injunction”).⁷ The only relevant distinction between the two remedies is that “[a] declaratory judgment cannot be enforced by contempt,” but, in all other respects, “it has the same effect as an injunction.” *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010).

There are certainly cases where special circumstances may necessitate an injunction as well,⁸ but in cases like this one, a court’s decision that the agency violated the law and the resulting vacatur of the agency action affords all of the relief necessary to vindicate the prevailing party’s successful claim because, again, courts may assume that “federal officers will adhere to the law” and conform to the law both their conduct and the conduct of any third-party their action authorized. See *Sanchez-Espinoza*, 770 F.2d at 208 n.8; see *Public Emps. for Envtl. Resp. v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (vacating environmental impact statement to ensure private construction would not begin before agency complied with NEPA).

⁷ See also *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 197 n.16 (D. Mass. 2015) (courts “assume[] that [government] will ‘do [its] duty when disputed questions have been finally adjudicated’ and can ‘rightly be expected to set an example of obedience to law’” (citation omitted)).

⁸ Such cases, however, are rare. *E.g.*, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-2242-PLF, 2020 WL 3034854, at *3 (D.D.C. June 5, 2020) (vacating agency decision and enjoining agency where vacatur would not independently bar agency action that would cause irreparable harm to plaintiff during remand); *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 675-77 (S.D.N.Y. 2019) (similar), *aff’d in part, rev’d in part sub nom. Department of Com. v. New York*, 139 S. Ct. 2551 (2019).

Indeed, that conclusion is supported by *Allied-Signal* itself. 988 F.2d at 151 (vacating regulation would require agency to refund fees without injunction ordering agency to take that action).

Allied-Signal's "disruptive consequences" prong would in fact make little sense if vacatur did not have the practical effect of halting the activity authorized by the agency action. Courts have thus repeatedly recognized that vacatur under the APA has the natural effect of stopping both federal agency and private party activities authorized by an agency's unlawful action. *See, e.g., Public Emps.*, 827 F.3d at 1084 (vacating environmental impact statement to "halt[]" the private party's construction of project); *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854-55 (D.C. Cir. 1987) ("the present rule will be vacated and conditions returned to the *status quo ante*, before the ... rule took effect"); *Sierra Club*, 719 F. Supp. 2d at 79-80 (issuing "partial vacatur" of water permit to block third-party construction of multi-use real estate project during remand but allowing party to manage stormwater system to prevent environmental harm); *cf. Massachusetts v. U.S. Nuclear Reg. Comm'n*, 924 F.2d 311, 336 (D.C. Cir. 1991) (declining to vacate nuclear power plant's operating license where the violation was likely to soon become "moot" and vacatur would have "immensely disruptive" consequences because it would shut down the private electricity generating plant). Indeed, in *Oglala*—a NEPA case—this Court forcefully rejected a federal agency's attempt to

require parties to demonstrate irreparable harm at the agency level before the agency would stay its own action and thus halt the project where the agency itself had already identified a NEPA violation. 896 F.3d at 529-30. “[O]nce” a “significant” NEPA violation is identified, this Court confirmed, agencies may not normally “leave in place” the underlying permit or other agency authorization and “permit a project to continue.” *Id.* at 538. Doing so, this Court emphasized, “violates” NEPA and “vitiates” its “requirements.” *Id.* at 523.

This Court’s recent rehearing grant regarding remedy in *Semonite*, 925 F.3d 500, turned on that principle, too. While ultimately leaving the remedy to the district court on remand, this Court made clear that it, like the parties, understood that vacating the federal permit that authorized a private party to construct electric transmission line towers would likely necessitate the towers’ removal. *See id.* at 501-02. And on remand the district court understood this Court’s opinion in exactly that way. *National Parks Conservation Ass’n v. Semonite*, 422 F. Supp. 3d 92, 96 (D.D.C. 2019) (equating vacatur with removal of towers); *see also id.* at 100 (“[I]f vacatur were ordered, that decision would have serious impacts beyond the mere procedural step of saying that the permit is revoked.”). The same was true in this Court’s 2017 opinion in *Sierra Club*, where it vacated, without discussion, FERC’s orders authorizing the construction of a pipeline because the agency violated NEPA. 867 F.3d at 1379. There, the pipeline company argued in its petition for rehearing

regarding remedy that the Court’s decision to vacate the FERC-issued approval would “[h]alt[] pipeline service” while FERC completed a court-ordered environmental impact statement. Pet. of Duke Energy Fla., LLC for Panel or En Banc Reh’g at 14, *Sierra Club v. FERC*, Nos. 16-1329 & 16-1387 (D.C. Cir. Oct. 6, 2017).⁹ And the federal government, prior to this case, has itself consistently espoused a similar view. See, e.g., *Semonite*, 925 F.3d at 501 (reciting Corps’s position that “the permit could be vacated and the towers correspondingly removed” if respondents’ prevailed on their NEPA claim); Motion of Corps for Partial Stay Pending Appeal at 17, *Northern Plains Res. Council v. U.S. Army Corps of Eng’rs*, No. 19-cv-44-BMM (D. Mont. Apr. 27, 2020), ECF No. 131 (Corps stating that “vacatur of Nationwide [Clean Water Act permit] ... prevents private parties from relying on the [p]ermit”).

In fact, until the stay proceedings in this Court, both the Corps, Dakota Access, and their amici here—just like the parties in the cases cited above—litigated the remedy for the Corps’s “serious” NEPA violation based on those bedrock

⁹ Dakota Access claims wrongly that vacatur of an agency action that shuts down an “operational pipeline” ... is literally unprecedented,” Br. 35-36, but that was the outcome in *Sierra Club*, 867 F.3d at 1379, see also Order, *Sierra Club v. FERC*, Nos. 16-1329 & 16-1387 (D.C. Cir. Jan. 31, 2018) (denying rehearing petitions), a point that the pipeline company in that case emphasized, Pet. of Duke Energy Fla., LLC at 3-5, 14-15.

principles.¹⁰ They thus acknowledged in the district court that vacatur of the Corps's easement to Dakota Access would shut down the pipeline, and they relied on that fact to argue that the district court should not vacate the easement under *Allied-Signal's* "disruptive consequences" prong. Corps Remedy Br. (ECF No. 507) at 1-2 (arguing that vacating easement "could impose extremely disruptive consequences," including the possible need to remove the pipeline), 14-15 (same); Dakota Access Remedy Br. (ECF No. 510) at 3 (focusing on "the disruptive consequences of shutting down DAPL"), 8 ("halting operation of the pipeline would impose severe hardship"), 31 ("Remand without vacatur is ... warranted by the 'disruptive consequences' of shutting down DAPL."). And they took those positions on the question of vacatur, not the issuance of an injunction. I-RA:137 (ordering parties to brief "the issue of vacatur"); see *Standing Rock IV*, 282 F. Supp. 3d at 103-04 (recounting in first remand opinion Corps and Dakota Access's positions that vacatur would result in shutdown of pipeline during remand); see *id.* at 94 ("Without

¹⁰ In fact, while the Corps now hedges, Br. 33-34, and Dakota Access takes seemingly inconsistent positions on the issue, Br. 35-36 (acknowledging that vacatur would "shutter[]" the pipeline and arguing that the economic consequences of vacatur justify remand without vacatur), 42 (arguing that court was required to issue injunction to "shut down the pipeline"), amici supporting them readily concede that vacatur of the Corps's easement would result in the pipeline's shutdown, *e.g.*, American Fuel & Petrochem. Mfrs. *et al.* Br. 18-19 (vacatur would result in "[t]ermination of [pipeline] operations"); Indiana *et al.* Br. 3 (urging Court to "permit the ... [p]ipeline to remain operational in the interim, *i.e.*, to order remand without vacatur"); North Dakota Br. 3 (same); North Dakota Farm Bureau Br. 7 (same).

such an easement, the oil cannot flow through the pipeline.”).¹¹ Their positions before the district court thus correctly recognized that (i) the United States and its agencies commit to abide by court orders without requiring (and to avoid) additional coercive injunctive relief, *supra* pp.19-20, and (ii) precedent from this Court and others confirms that vacating an unlawful agency action prevents the private-party conduct that the agency action authorized, *supra* pp.20-22.

This Court should confirm, once again, that where a court vacates a federal agency’s action because the agency violated NEPA, the consequence is that any private-party activity authorized by that agency action cannot proceed. A contrary result would upend this Court’s precedents on the effect of vacatur, render *Allied-Signal*’s disruptive consequences test largely meaningless, and leave successful plaintiffs’ injuries unaddressed despite a clear violation of law unless they can then separately secure the “extraordinary remedy” of an injunction. *Monsanto*, 561 U.S. at 165. That result certainly cannot have been what this Court had in mind when it rejected the notion that “Congress ... intend[ed]” NEPA to be “a paper tiger,” and recognized that “NEPA was meant to do more than regulate the flow of papers.”

¹¹ This Court should reject the Corps and Dakota Access’s attempts to re-write the record. As the Supreme Court recently emphasized, “our adversarial system of adjudication ... follow[s] the principle of party presentation[,] ... ‘premise[d]’” on the fact “that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.” *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (brackets & citation omitted).

Calvert Cliffs, 449 F.2d at 1114, 1117. Amici States, like the Tribes, rely on NEPA to protect the environment and the Nation's natural resources. But for NEPA's promise to be fulfilled, NEPA violations must have consequences—including, except in rare cases, vacatur halting the activity the agency authorized in violation of the statute.

CONCLUSION

This Court should affirm the district court's opinions.

Dated: September 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) and Fed. R. App. P. 29(a)(5), because this brief contains 6,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1); and.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point, Times New Roman-style font.

Dated: September 23, 2020

/s/ Seth Schofield
Seth Schofield
*Counsel of Record for the
Commonwealth of Massachusetts*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on September 23, 2020, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: September 23, 2020

/s/ Seth Schofield
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Commonwealth of Massachusetts*

Addendum

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§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94-574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such

conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

(a) monitor progress and advise the Chairman of CEQ on agency performance and implementation of this order;

(b) lead the development of programs and policies to assist agencies in implementing the goals of this order; and

(c) chair, convene, and preside at meetings and direct the work of the Steering Committee.

SEC. 7. *Duties of Heads of Agencies.* In implementing the policy set forth in section 1 of this order, the head of each agency shall:

(a) within 45 days of the date of this order, designate an agency Chief Sustainability Officer—who shall be a senior civilian official, compensated annually in an amount at or above the amount payable at level IV of the Executive Schedule—and assign the designated official the authority to perform duties relating to the implementation of this order within the agency; and

(b) report to the Chairman of CEQ and the Director of OMB regarding agency implementation and progress toward the goals of this order and relevant statutory requirements.

SEC. 8. *Revocations.* Executive Order 13693 of March 19, 2015 (Planning for Federal Sustainability in the Next Decade) [formerly set out above], is revoked.

SEC. 9. *Limitations.* (a) This order shall apply only to agency activities, personnel, resources, and facilities that are located within the United States. The head of an agency may provide that this order shall apply in whole or in part with respect to agency activities, personnel, resources, and facilities that are not located within the United States, if the head of the agency determines that such application is in the interest of the United States.

(b) The head of an agency shall manage agency activities, personnel, resources, and facilities that are not located within the United States, and with respect to which the head of the agency has not made a determination under subsection (a) of this section, in a manner consistent with the policy set forth in section 1 of this order, and to the extent the head of the agency determines practicable.

SEC. 10. *Exemption Authority.* (a) The Director of National Intelligence may exempt an intelligence activity of the United States—and related personnel, resources, and facilities—from the provisions of this order, other than this subsection, to the extent the Director determines necessary to protect intelligence sources and methods from unauthorized disclosure.

(b) The head of an agency may exempt law enforcement activities of that agency, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection, to the extent the head of an agency determines necessary to protect undercover operations from unauthorized disclosure.

(c) The head of an agency may exempt law enforcement, protective, emergency response, or military tactical vehicle fleets of that agency from the provisions of this order, other than this subsection. Heads of agencies shall manage fleets to which this paragraph refers in a manner consistent with the policy set forth in section 1 of this order to the extent they determine practicable.

(d) The head of an agency may exempt particular agency activities and facilities from the provisions of this order, other than this subsection, if it is in the interest of national security. If the head of an agency issues an exemption under this subsection, the agency must notify the Chairman of CEQ in writing within 30 days of issuance of that exemption. To the maximum extent practicable, and without compromising national security, each agency shall strive to comply with the purposes, goals, and implementation steps in this order.

(e) The head of an agency may submit to the President, through the Chairman of CEQ, a request for an exemption of an agency activity, and related personnel, resources, and facilities, from this order.

SEC. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further 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, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated 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.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically 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;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to

the preservation and enhancement of the environment.

(Pub. L. 91-190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE
AMERICAN FUTURE

Pub. L. 91-213, §§1-9, Mar. 16, 1970, 84 Stat. 67-69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information or assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91-213.

EXECUTIVE ORDER No. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER No. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibility

ities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.¹

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91-190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94-83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104-88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: "The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

"(1) the Department of the Army has issued a permit for the activity; and

"(2) the Army Corps of Engineers has found that the activity has no significant impact."

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to

use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114-94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112-141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114-94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter

¹ So in original. The period probably should be a semicolon.

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.

1500.1 Purpose.

1500.2 Policy.

1500.3 Mandate.

1500.4 Reducing paperwork.

1500.5 Reducing delay.

1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains “action-forcing” provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of en-

vironmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act)

§ 1501.2**§ 1501.2 Apply NEPA early in the process.**

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment,” as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary

40 CFR Ch. V (7–1–19 Edition)

if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

Council on Environmental Quality**§ 1502.16**

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 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. The descriptions 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. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This 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 which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in §1502.14. It shall include discussions of:

(a) Direct effects and their significance (§1508.8).

(b) Indirect effects and their significance (§1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See §1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under §1502.14 will be based on this discussion.

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

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

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(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in §1502.18(d) and unchanged statements as provided in §1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise

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with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

§ 1505.2**§ 1505.2 Record of decision in cases requiring environmental impact statements.**

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

- (a) State what the decision was.
- (b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.
- (c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

- (a) Include appropriate conditions in grants, permits or other approvals.
- (b) Condition funding of actions on mitigation.
- (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which

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were adopted by the agency making the decision.

- (d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

- 1506.1 Limitations on actions during NEPA process.
- 1506.2 Elimination of duplication with State and local procedures.
- 1506.3 Adoption.
- 1506.4 Combining documents.
- 1506.5 Agency responsibility.
- 1506.6 Public involvement.
- 1506.7 Further guidance.
- 1506.8 Proposals for legislation.
- 1506.9 Filing requirements.
- 1506.10 Timing of agency action.
- 1506.11 Emergencies.
- 1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement,

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which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

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AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6**§ 1508.6 Council.**

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is 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. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact

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statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in §1508.9 (environmental assessment), §1508.11 (environmental impact statement), §1508.13 (finding of no significant impact), and §1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not

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(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative

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means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental