No. 22-703

IN THE

Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Petitioners,

v.

ENVIRONMENTAL DEFENSE CENTER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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February 27, 2023

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INTEREST OF THE *AMICUS CURIAE*[1]

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

Many of the Chamber's members operate in industries that require federal permits that are subject to environmental review under the National Environmental Policy Act ("NEPA"). These members have an interest in agencies utilizing available means to organize and expedite their review processes to ensure timely, effective permitting decisions. The Ninth Circuit in this case adopted an expansive definition of "final agency action" under the Administrative Procedure Act ("APA") that sweeps in agency programmatic review that is merely a step in an agency's decision-making process, a step that does not create any legal consequences, rights, or obligations. The Ninth Circuit's decision subjects preliminary, internal agency assess-

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[1] No party or counsel for a party authored any part of this brief, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties received timely notice of *amicus*'s intent to file this brief.

ments to premature judicial review and threatens to undermine the widely recognized efficiencies of programmatic reviews that benefit the Chamber's members and society more generally.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit held that any programmatic NEPA document is final and reviewable—even if the agency has not yet granted or denied any permit (or made any other concrete decision) in reliance on the NEPA review—because any such document marks the culmination of the programmatic NEPA review itself. That circular logic is deeply flawed, and the Ninth Circuit's mistaken rule warrants this Court's review.

First, the federal respondents' environmental review did not "mark the consummation" of the Department of the Interior's decision-making process. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted). By issuing its programmatic Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"), the Department did not grant any drilling permits; it merely took one step in a lengthy process that could lead to its approving permits sometime in the future. And before the Department makes any final permit determination, it will conduct *further* environmental review of each project. This Court has repeatedly held that a preliminary agency determination that is part of a multi-step decisional process, and precedes the conclusion of that process, is not a "final" agency action under the APA. *See, e.g.*, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241-42 (1980).

Second, the Department's reviews also did not "determine[]" any "rights or obligations" or produce "legal consequences." *Bennett*, 520 U.S. at 178. The Ninth Circuit leaned on the fact that the Department's reviews make it *possible* for future permits to be granted. But making future action *possible* does not itself "determine[]" any "rights or obligations." *Id.* Final agency action must produce "direct consequences," *Dalton v. Specter*, 511 U.S. 462, 469 (1994), and here that entails the actual approval or denial of a permit.

The Ninth Circuit's error is exceptionally important and warrants review, not least because of the disproportionate number of NEPA cases decided by the Ninth Circuit. From 2006 to 2021, fully half of all NEPA opinions by the courts of appeals came from the Ninth Circuit. And if plaintiffs are able to characterize their NEPA challenges as attacking a programmatic decision rather than an individual permit, they will be more likely to claim venue in the Ninth Circuit. Particularly litigious groups that oppose the use and development of land and natural resources are already exploiting the NEPA process (and the Ninth Circuit) to transform a procedural rule into a substantive cudgel designed to halt development on a large scale. The decision below will only make that problem worse.

The decision below will also further subvert the well-recognized efficiency benefits that come from programmatic environmental reviews. That form of review allows agencies to conduct an initial evaluation of the environmental effects of potential future projects (or aggregations of projects), which can then be used as the foundation for more focused, project-specific reviews later on. Programmatic review thus performs the immensely important function of organizing and

streamlining agency review for maximum effectiveness, and enabling more timely decisions at the project level.

The Ninth Circuit's decision will erode those substantial benefits. Agency review under NEPA is already a years-long and expensive process burdened by constant litigation. By deeming agencies' *preliminary* environmental reviews "final," the Ninth Circuit's decision all but guarantees a barrage of additional lawsuits that promises to interfere with agencies' ongoing decision-making processes, increase the cost and timeline of environmental reviews, and even deter agencies from undertaking programmatic reviews in the first place.

ARGUMENT

I. Programmatic environmental review is not "final agency action" because it is only the first step in the agency's decision-making process and carries no legal consequences.

The APA authorizes judicial review only of "final agency action." 5 U.S.C. § 704. All other agency actions, such as "intermediate" and "preliminary" actions, are not subject to review until after "final agency action." *Id.*

The Ninth Circuit's decision here goes far beyond any credible conception of "finality" by authorizing review of *preliminary* agency deliberations that produce no legal consequences for any party. The court of appeals held flatly that "[f]inal NEPA documents constitute 'final agency action,'" because they finally determine the supposed right "to further environmental review"—regardless of whether any permit applicant will ever actually be authorized to take the actions that

would be the subject of any further NEPA review. Pet. App. 22a, 23a. And the effects of that error will be far-reaching because of the Ninth Circuit's outsized role as a destination for NEPA litigation: it handed down *half* of the total NEPA opinions decided by all the federal courts of appeals between 2006 and 2021. *See* National Association of Environmental Professionals, *2021 Annual NEPA Report* 27-28 (July 2022).[2] The decision below will only invite future NEPA challenges to be brought in that circuit whenever possible. The Court should grant the petition to prevent the lower court's error from doing widespread damage.

This Court has correctly taken a "'pragmatic' approach" to determining finality. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016). But pragmatism is not blanket permission. Two conditions must be satisfied for agency action to be considered final, and the Ninth Circuit's holding misapplies both prongs in fundamental ways. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177-78 (citation and quotation marks omitted). The Ninth Circuit's circular reasoning—that the NEPA documents were final because the NEPA work was done—ignores that the NEPA process was merely a *procedural* step to inform the agency's completion of a *substantive* decision. Second, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (quotation marks omitted). These NEPA documents were directed only to the agency itself; they did not determine the

[2] https://naep.memberclicks.net/assets/annual-report/NEPA_Annual_Report_2021.pdf.

substantive rights of any permit applicant, or any private party at all.

1. The Department of the Interior's programmatic EA and FONSI do not constitute final agency action because they do not "mark the consummation" of the Department's decision-making process. *Bennett*, 520 U.S. at 177-78 (quotation marks omitted). The Ninth Circuit wrongly concluded that the only process that matters is the NEPA process. Pet. App. 22a, 23a. That gets the denominator wrong. *See* Pet. 16. NEPA is a purely procedural statute that "does not mandate particular results": it only requires that an agency's decision about whether to undertake major federal action is an informed one. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). In other words, the NEPA document is not the agency's decision; it *informs* the agency's decision. It is the federal action itself, not the associated NEPA paperwork, that is the "consummation" of decisionmaking.

Here, the relevant agency decision is the drilling approval or denial, not the NEPA review that precedes such decisions. A business that wants to conduct drilling activities on the Pacific Outer Continental Shelf must apply for a permit from the Department and have that permit approved. Pet. App. 13a-14a (citing 30 C.F.R. §§ 250.410-465). But a lot must happen before the Department may grant that approval. Environmental review under NEPA is one step—but hardly the only one. Here, the Department produced a programmatic EA—an environmental analysis covering multiple potential projects, *see* pp. 13-14, *infra*—to evaluate whether to "continue to review" permit applications involving well-stimulation treatments. Pet. App. 72a. It found that future approvals of such permits would not,

at the program-wide level, cause significant environmental effects. *Id.*

The Department did not, however, *approve* any permit applications. *See* Gov't Reh'g Br. 6-7 ("Interior did not issue a permit or take any other action to authorize the use of treatments"). Nor did the outcome of the NEPA review foreordain the outcome of any permit application. Instead, the Department merely decided to "continue to review applications," Pet. App. 72a, and left open the *option* of approving or denying permits at some later time. *See* Gov't Reh'g Br. 7 (noting that the Department's FONSI "does not constrain the agency's discretion in any way"). And no approval will be automatic. Indeed, the programmatic NEPA review itself appears not even to be the final *environmental* step. Before approving any permit, the Department must conduct environmental review of the specific project at issue, which may entail revisiting previous findings. *See* Pet. 15. And if a permit is approved, a plaintiff alleging injury traceable to that approval may challenge the adequacy of any aspect of the NEPA process, including both programmatic and site-specific review.

The Department's programmatic EA and FONSI were thus mere "interlocutory" steps in the Department's ongoing process of assessing whether to grant permits to conduct well-stimulation treatment on the Outer Continental Shelf. *Bennett*, 520 U.S. at 177-78. By definition, a preliminary step in an ongoing decision-making process is not the "culmination" of that process. *Id.*

The Ninth Circuit recognized the preliminary nature of the Department's determinations, acknowledging that "well stimulation treatments will not occur in practice until an individual permit application has

been approved." Pet. App. 21a. Even so, the court purported to identify finality because "no further *programmatic* environmental review … will be conducted." Pet. App. 21a (emphasis added). But that rationale obliterates the distinction between completing a preliminary agency determination and taking a *final* agency action. After all, *every* preliminary step in an agency's decisionmaking must eventually come to an end and "not be revisited." Pet. App. 21a. Yet the APA itself and this Court's cases make crystal clear that such preliminary steps *are not* final agency action. *See* 5 U.S.C. § 704. Completion of NEPA review alone, as one stage within the agency's decisionmaking process, is no more a "final" agency decision than the resolution of a discovery dispute (or some other interlocutory proceeding within a litigation) would be a "final" district-court decision. Review of such interlocutory decisions is routinely deferred until the process culminates. *E.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).

Indeed, the Court rejected a rationale much like the Ninth Circuit's in *FTC v. Standard Oil Co. of California*, where the Court held that the Federal Trade Commission's complaint reflecting the agency's belief that the defendant was violating the law was not final agency action. 449 U.S. at 241-42. The Court acknowledged that "the issuance of the complaint" was "definitive" on the specific issue of whether the "Commission avers reason to believe that the respondent … [was] violating the [law]," but the Court refused to slice finality so thin: Because the complaint was merely a "prerequisite" to the Commission's ultimate decision on guilt, it was not "final" action. *Id.*

Here, as in *Standard Oil*, the Department's actions, though complete in themselves, merely set the stage for potential future action; they do not constitute the Department's final determination on any matter. *See also Dalton*, 511 U.S. at 469 (holding that the Secretary of Commerce's "tentative recommendation" to the President was not final agency action); *Franklin v. Massachusetts*, 505 U.S. 788, 796-98 (1992) (holding that the Secretary's report to the President was not final agency action because "its effect … is felt only after the President makes the necessary calculations and reports the result to Congress").

2. The Department's EA and FONSI also do not satisfy the second prong of *Bennett* because they do not "determine[]" any "rights or obligations" or produce "legal consequences." 520 U.S. at 178.

The Ninth Circuit postulated that the Department's programmatic EA and FONSI "affect[ed] … legal rights" because they "lift[ed] … the moratorium on well stimulation treatments in the Pacific Outer Continental Shelf." Pet. App. 23a. (By "moratorium" the Ninth Circuit was referring to the Department's agreement in a prior settlement to temporarily pause permit review until it had completed a programmatic EA. *See* Pet. App. 16a.) But just because the Department will "continue to review applications," Pet. App. 72a, does not mean it will grant any. An environmental analysis that does not grant or guarantee approval, but merely can be used later to support *possible* future approval, does not "determine[]" anyone's legal rights. *Bennett*, 520 U.S. at 178. The plaintiffs here have no right to an ongoing freeze on permit review; to the contrary, federal policy explicitly favors the "expeditious and orderly development" of the Outer Continental Shelf. 43

U.S.C. § 1332(3). That the Department's review may *indirectly* affect future permit applicants by supporting the *possibility* that their applications may be granted is far from sufficient; final agency action must produce "direct consequences," *Dalton*, 511 U.S. at 469, and in this context the actual approval or denial of a permit is the only action that meets that standard. Plaintiffs with standing can raise their objections to the agency's NEPA process at that time, not before. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Respondent alleges that violation of the law is rampant within this program—… [including] failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.").

The Ninth Circuit also reasoned that legal consequences flow from the Department's action because it affects, in some sense, what materials companies include in their permit applications—apparently meaning that *if* the agency had decided after the NEPA review to impose some new limitation on permits, then applicants would thereafter need to conform their applications to those new limitations in order to win approval. Pet. App. 23a. But applications do not determine a party's rights; it is the subsequent grant (or denial) of the application that does that. To be sure, what must be included in an application has *some* effect on interested parties, but that effect is not enough by itself to make immediately reviewable an agency

action that does not otherwise qualify as "final."[3] The Commission's complaint in *Standard Oil*, for example, imposed "substantial" burdens on the respondent, but this Court nonetheless held that those were not the kind of consequences that matter for purposes of finality. 449 U.S. at 242. Here, the Department's programmatic EA and FONSI may inform the Department's substantive decisionmaking about what to require before granting an approval, which in turn would influence what materials businesses include in their applications, but that is simply not the kind of "legal consequence[]" that produces finality for purposes of the APA. *Bennett*, 520 U.S. at 178.

The "legal consequences" that the Ninth Circuit hypothesized "because the agencies have not imposed" certain new limitations, Pet. App. 23a, are not real-world consequences at all. Nothing that the Ninth Circuit posited will become a reality unless and until an

[3] For instance, a final rule setting the procedural requirements for all applications to the agency, conducted pursuant to notice and comment, could potentially be a final agency action, if the issuance of the rule conclusively resolved the agency's decision-making process on that subject. *See* 5 U.S.C. §§ 551(13) (rule is "agency action"), 704; *cf. Lujan*, 497 U.S. at 891-92 ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."); *id.* (noting the exception that "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is "'ripe' for review at once" (citations omitted)). The NEPA documents here, which merely find that *not* imposing new requirements would create no significant environmental impact, do not reflect any such procedural standard-setting decision.

application is approved without those limitations. By holding that a supposedly easier-to-file *application* is a "legal consequence[]," the Ninth Circuit authorizes NEPA plaintiffs to end-run the requirement of *final* agency action.

* * *

The Ninth Circuit's decision thus dramatically expanded the APA's conception of final agency action to reach essentially every NEPA document, whether or not it has any direct effect on any legal rights or even represents the agency's last word on environmental considerations. That error will have far-reaching consequences if not corrected. The Ninth Circuit decides a disproportionate number of NEPA challenges. *See* p. 5, *supra*. The lower court's decision thus has the potential to distort fundamental principles of finality in a significant portion of the NEPA cases involving programmatic review. The Court should grant certiorari to avoid such widespread distortion of its finality jurisprudence.

II. The Ninth Circuit's decision will undermine the benefits of programmatic review and hamper agencies' ability to efficiently process permitting applications.

The Ninth Circuit's misguided conception of final agency action not only will damage the orderly application of the APA, but will undermine the widely recognized efficiency benefits from conducting environmental review on a programmatic basis, rather than piecemeal. By opening the floodgates to lawsuits challenging programmatic review just because the agency leaves open the *possibility* of later action, the Ninth Circuit's decision invites a barrage of burdensome law-

suits targeting preliminary agency action. That precedent will interfere with agencies' ongoing decision-making processes, delay the completion of environmental reviews, and potentially deter agencies from undertaking programmatic reviews in the first place.

NEPA and its implementing regulations require federal agencies to prepare either an Environmental Impact Statement ("EIS") or, when appropriate, a shorter EA before undertaking a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C)(i); 40 C.F.R. § 1501.5; *see* Pet. 7. Under either approach, agency review may occur either at the "project-specific level" or at the programmatic level. *See* Memorandum of Michael Botts, Council on Environmental Quality, *Effective Use of Programmatic NEPA Reviews* 6 (Dec. 18, 2014) (hereafter "CEQ, *Effective Use*").[4]

Programmatic review is an important mechanism for agencies to efficiently conduct environmental assessments. Unlike project-specific review, programmatic review is used to "address the general environmental issues relating to broad decisions, such as those establishing policies, plans, programs, or suite of projects." CEQ, *Effective Use*, *supra*, at 9-10. Through this high-level review, an agency can "effectively frame the scope of subsequent site- and project-specific Federal actions," including by analyzing possible alternatives and the potential cumulative effects of multiple potential projects. *Id.* at 10, 13. Once this programmatic review is completed, the agency can then build

[4] https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_ Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf.

(or "tier") off the programmatic review to "analyze narrower, site- or proposal-specific issues." *Id.* at 10; *see* 40 C.F.R. § 1501.11(c) ("Tiering" is appropriate when the agency is moving from "programmatic" review to review of a "program, plan, or policy statement or assessment" that is "narrower [in] scope or [] site-specific"); *id.* § 1502.4(b)(2) ("Agencies may tier their environmental analyses to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for final agency action."); *id.* § 1508.1(ff) (defining "Tiering").

This process offers substantial efficiency gains. Without a programmatic review, "[t]here is significant potential for the duplication of work" as the agency prepares separate environmental analyses for each proposed project. Rayan Sud, et al., *How to Reform Federal Permitting to Accelerate Clean Energy Infrastructure: A Nonpartisan Way Forward*, Brookings Institution 6 (Feb. 14, 2023).[5] A programmatic review obviates the need to "repeat[] information that has already been considered at the programmatic level" and allows an agency to "focus and expedite the preparation of" its project-specific environmental analysis. CEQ, *Effective Use*, *supra*, at 41; *see* Domenic A. Cossi, *Getting Our Priorities Straight: Streamlining NEPA to Hasten Renewable Energy Development on Public Land*, 31 Pub. Land & Resources L. Rev. 149, 166 (2010) ("Tiering from a [programmatic EIS] allows for many decisions to be made at the programmatic level …, which reduces time and saves money in completing the environmental reviews"); 40 C.F.R. § 1501.11(b) (providing that a "tiered document needs only to sum-

[5] https://www.brookings.edu/wp-content/uploads/2023/02/20230213_CRM_Patnaik_Permitting_FINAL.pdf.

marize and incorporate by reference the issues discussed in the broader document" and "shall concentrate on the issues specific to the subsequence action"); *id*. § 1500.4(k) (encouraging agencies to "[use] programmatic, policy, or plan" review and to "tier[] from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues"). For example, one agency utilized "programmatic NEPA review" to help "cut its average drilling permit decision time to just 49 days, as compared to 106-220 days at other offices." Sud, *supra*, at 6.

In short, programmatic agency review "yield[s] substantial efficiency gains in the long run." Sud, *supra*, at 6. For this reason, agencies have utilized programmatic review in connection with numerous energy projects, including wind,[6] solar,[7] geothermal,[8] and oil and gas[9] projects.

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[6] U.S. Dep't of Interior, Bureau of Land Mgmt., Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States (June 2005), https://windeis.anl.gov/documents/fpeis/maintext/Vol1/Vol1Complete.pdf.

[7] U.S. Dep't of Interior, Bureau of Land Mgmt., Final Programmatic Environmental Impact Statement (EIS) for Solar Energy Development in Six Southwestern States (July 2012), https://www.energy.gov/sites/default/files/EIS-0403-FEIS-Volume1-2012_0.pdf.

[8] U.S. Dep't of Interior, Bureau of Land Mgmt., Final Programmatic Environmental Impact Statement for Geothermal Leasing in the Western United States (Oct. 2008), https://www.blm.gov/sites/blm.gov/files/Geothermal_PEIS_final.pdf.

[9] U.S. Dep't of Interior, Minerals Mgmt. Serv., Programmatic Environmental Assessment for Grid 4: Evaluation of Kerr-

The increased efficiency from programmatic review is enormously beneficial to businesses whose projects are contingent on a federal agency's providing permitting approval. Greater efficiency means more timely decisions, which can translate into significant cost savings for businesses. Even if the agency ultimately *denies* a permit (after conducting a project-specific review, for example), the business still benefits from having received a more timely resolution of its application, which allows it to plan its affairs accordingly and dedicate resources to other productive ends.

The Ninth Circuit's decision thwarts the efficiencies of programmatic review (and the resulting benefits) in the context where efficiency is desperately needed. NEPA review is already notoriously lengthy, inefficient, and burdened by litigation. Across all federal agencies, the average time to complete an environmental review is 4½ years—with a full quarter of reviews taking longer than 6 years to complete. *See* Council on Environmental Quality, *Fact Sheet: CEQ Report on Environmental Impact Statement Timelines (2010-2018)* (June 2020).[10] Litigation itself "cause[s] … significant delay[s] in federal permitting, often as a result of lawsuits challenging agency NEPA reviews." Sud, *supra*, at 17. And even the mere threat of litigation creates delay, incentivizing agencies to prepare even more lengthy environmental review documents to make them "litigation-proof." *Id*. As a result, the av-

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McGee Oil and Gas Corporation's Development Operations Coordination Document, N-7045 (July 2001), https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Assessment/NEPA/grid4ea.pdf.

[10] https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Fact_Sheet_2020-6-12.pdf.

erage length of an EIS now exceeds 500 pages, with more than 1,000 pages of appendices. Council on Environmental Quality, *Fact Sheet: CEQ Report on Length of Environmental Impact Statements (2013-2018)* (June 2020).[11] The extensive agency resources needed to generate these "litigation proof" documents is a "major factor in the long timeframe" for NEPA review. Sud, *supra*, at 17.[12]

This lengthy review process comes with a real cost. The preparation of an EA or EIS can cost anywhere from several hundred thousand to several million dollars per project. *See* Philip Rossetti, *Addressing Delays Associated with NEPA Compliance*, American Action Forum 1 (Mar. 20, 2017) (noting that in 2015 "completion of an EIS averaged 49 months and cost $4.19 mil-

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[11] https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Fact_Sheet_2020-6-12.pdf.

[12] The NEPA regulations were comprehensively updated in 2020, in part to address litigation-driven delays in the NEPA process that had arisen since the 1970s. *See generally* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,305-06 (July 16, 2020). The current Administration, which is undertaking its own comprehensive review of the 2020 regulations, has delayed the deadline for agencies to propose procedures to implement those regulations. *See* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,455-56 & n.24 (Apr. 20, 2022) (citing Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021)). Thus far, the Administration has revised only three discrete aspects of the 2020 rule, *id.* at 23,453, which do not affect the 2020 rule's provisions governing tiering and programmatic reviews.

lion").[13] And the collective cost of NEPA review for projects being assessed under EISs and EAs has exceeded $600 million. *Id*. at 2.

The Ninth Circuit's decision will only exacerbate those inefficiencies and costs by exposing *preliminary* agency reviews that *increase* efficiency to burdensome litigation. NEPA, intended as a procedural statute, is already wielded as a weapon by committed opponents of *substantive* agency action. Opening the door to NEPA challenges earlier in the process will prompt litigation-adverse agencies to waste additional time and resources in an effort to insulate each incremental step in their decision-making from challenge. The end result will be to "disrupt careful and thoughtful deliberations throughout federal agencies" and risk "discouraging agencies from conducting" programmatic reviews at all. Gov't Reh'g Br. 11-12. And as already noted, the damage from the Ninth Circuit's decision will be widespread given the disproportionate number of NEPA cases decided by the Ninth Circuit. *See* p. 5, *supra*. The Court should grant the petition to prevent these harms from taking root.

[13] https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/research/addressing-delays-associated-nepa-compliance/.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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February 27, 2023

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