

No. 25-579

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IN THE  
**Supreme Court of the United States**

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DEPARTMENT OF THE AIR FORCE, ET AL.,  
*Petitioners,*

v.

PRUTEHI GUAHAN,  
*Respondent.*

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

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

Under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, federal agencies must prepare a statement evaluating environmental effects and considering potential alternatives before taking a major federal action. The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.*, requires facilities, including those operated by federal agencies, to secure a permit to dispose of hazardous waste. Pursuant to a regulation of the RCRA permitting authority in this case (the Guam Environmental Protection Agency), a facility's submission of a permit-renewal application automatically extends the prior permit term until the permitting authority acts on the application.

The questions presented are:

1. Whether the court of appeals correctly concluded that the Air Force's decision to dispose of hazardous-waste munitions for a three-year period using particular technologies at a particular site, reflected in its submission of a RCRA permit-renewal application, constitutes final agency action.

2. Whether the court of appeals correctly concluded that NEPA applies to the Air Force's decision to dispose of hazardous-waste munitions using particular technologies at a particular site, even though that activity also requires a RCRA permit from the Guam Environmental Protection Agency.

**CORPORATE DISCLOSURE STATEMENT**

Under Supreme Court Rule 29.6, respondent Prutehi Guahan states that it is a nonprofit organization that has no parent corporation and no publicly held company has any ownership interest in it.

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## INTRODUCTION

In 2021, the Department of the Air Force decided to destroy hazardous-waste munitions by detonating and burning them on an oceanfront beach in northern Guam. The Air Force then submitted an application to a Guam permitting authority detailing where and how it will conduct that activity. The court of appeals determined that the Air Force's decision to conduct those operations for a new three-year period, formally memorialized in the permit application, constitutes final agency action. The court further determined that the Air Force was required to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, before making that decision. And the court rejected petitioners' contention that the Guam permitting authority's later analysis under a different law, the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.*, relieved the Air Force of its own NEPA obligation at the threshold. Those two holdings were correct, created no split of authority, and do not otherwise warrant this Court's review.

On the first question presented, the analysis below reflects an unremarkable application of this Court's well-trod, "pragmatic" approach to final agency action. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016) (citation omitted). Petitioners dispute whether the Air Force's decision was technically final and imposed legal consequences before the Guam authority approves the new permit. But the Air Force's decision to conduct its operations in a particular place under a certain protocol undoubtedly marked the consummation of its own deliberations.

And it is well established that agency action is reviewable even if its full implementation is contingent upon a future event. *See id.* at 599-600.

Petitioners identify no other court of appeals decision employing contrary reasoning on remotely similar facts. And because the final-agency-action inquiry is notoriously fact-dependent and lacks “one-size-fits-all heuristic[s],” *California Cmty. Against Toxics v. EPA*, 934 F.3d 627, 632 (D.C. Cir. 2019), petitioners’ dissimilar cases analyzing things like non-binding agency guidance say little about the scenario presented here. In any event, the court of appeals also properly determined that the Air Force’s submission of its renewal application had the concrete legal effect of extending the term of the prior permit. The court’s final-agency-action finding can rest on that even narrower ground—which, again, no circuit has ever disagreed with.

Petitioners’ second question presented also falls far short of the ordinary bar for certiorari. Once again, there is no split. No court of appeals has held that an agency’s NEPA obligation is superseded by the need to obtain a RCRA permit (or a permit under any other regime). Indeed, petitioners’ cited cases all adhere to the same framework the court of appeals employed here. What distinguishes those cases from this one is not the Ninth Circuit’s rule; it is the fact that those decisions evaluated whether an agency *enforcing* an environmental statute has to comply with NEPA in administering the statute’s requirements. So while those decisions speak to whether the U.S. Environmental Protection Agency (EPA) must complete a NEPA analysis when it

*approves* a RCRA application (a question not implicated here), they do not bear on whether the agency *seeking* the permit may shirk its NEPA responsibilities. Here, as the court of appeals correctly recognized, the two statutes have distinct roles to play at distinct junctures.

Nor have petitioners provided sound reason for this Court to intervene now, rather than waiting to see if disagreement ever arises. Petitioners offer little to support their vague assertion that the fact-driven decision in this case will newly burden agencies' permitting processes. Agencies, including the Department of Defense, already have procedures in place that take as a given that NEPA applies when environmental permits are needed. As a result of those procedures and other sensible efficiency measures, agencies seeking renewed permits will rarely need to complete a full-blown NEPA analysis from scratch.

On the other side of the ledger, there is substantial reason not to rush in. NEPA is much in flux. It has already been amended once, in ways that support the holding below, during the pendency of this case. But petitioners convinced the court of appeals that it could consider only the pre-amendment version of NEPA—a position that, if correct, would make this petition a terrible vehicle for deciding the interaction of NEPA and RCRA going forward. Moreover, at this very moment, Congress is considering further amendments to NEPA that may shift the landscape once again. The Court should let the legislative process play out, and the petition for a writ of certiorari should be denied.

## STATEMENT

### A. Legal Background

1. Congress enacted NEPA to protect the environment by requiring federal agencies to carefully evaluate environmental concerns and consider alternatives before carrying out major federal actions. *See* 42 U.S.C. § 4331 (2018).<sup>1</sup> When the events of this case took place, NEPA’s core procedural provision required all federal agencies to prepare a “detailed statement” for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2018). This environmental impact statement (EIS) “must address the significant environmental effects of a proposed project and identify feasible alternatives.” *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 184 (2025); *see* Pet. App. 5a-6a.

If an agency does not know whether the environmental effects of its proposed project will be significant, it must prepare an environmental assessment (EA) to help make that determination. 40 C.F.R. § 1501.5(a) (2021); *see* Pet. App. 6a. If the agency determines that the proposed action will not have significant effects, then it prepares a “finding of no significant impact.” 40 C.F.R. § 1501.6(a) (2021); *see* Pet. App. 6a. Under the NEPA regulations applicable to this case (and the law in effect today), agencies may also adopt “categorical exclusions” for actions that normally do not have a significant

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<sup>1</sup> Unless otherwise stated, citations to NEPA and its implementing regulations are to those in effect at the time of the Air Force’s 2021 decision.

environmental effect, and then issue statements invoking an exclusion for applicable projects. 40 C.F.R. § 1501.4 (2021); *see* Pet. App. 7a n.4; *see also* 42 U.S.C. § 4336c (Supp. V 2023).

NEPA is a “procedural statute” designed to “help[] agencies to make better decisions and to ensure good project management.” *Seven Cnty.*, 605 U.S. at 177. It does this by mandating that agencies “take a ‘hard look’ at the environmental consequences *before* taking a major action.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (emphasis added; citation omitted). That timing ensures that environmental impacts are not “overlooked or underestimated” by the action agency, only to be discovered “after resources have been committed or the die otherwise cast.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

2. Another federal law, RCRA, governs public and private management of hazardous waste. To treat, store, or dispose of such waste, a facility generally must obtain a RCRA permit from EPA or from a state or territorial program administrator. 42 U.S.C. § 6925. A RCRA permit applicant must submit, among other things, a description of the processes to be used for treating the hazardous waste at the facility; chemical and physical analyses of the waste; and a description of the procedures, structures, or equipment used to prevent hazards to the surrounding area and personnel. 40 C.F.R. §§ 270.13(i), 270.14(b)(2) and (b)(8); *see also* Pet. App. 9a-10a.

EPA has authorized the Guam Environmental

Protection Agency (Guam EPA) to administer Guam's RCRA permitting program. Pet. App. 10a. Guam EPA administers RCRA under its Hazardous Waste Management regulations, which incorporate some, but not all, of EPA's RCRA regulations. *Id.* Under the Guam program, a RCRA permit has a fixed three-year term. 22 Guam Admin. R. & Regs. § 30109(m). If a facility applies for renewal, the conditions of the expired permit "continue in force . . . until the effective date of a new permit." 40 C.F.R. § 270.51(a); see 22 Guam Admin. R. & Regs. § 30109(a), (o) (adopting that regulation).

### **B. Factual And Procedural Background**

1. a. Beginning in 1982, the Air Force has destroyed hazardous-waste munitions through open burning and open detonation (OB/OD) at a detonation range on Andersen Air Force Base in northern Guam. Pet. App. 12a. Andersen's detonation range is on Tarague Beach, "a multifaceted site for the wildlife and people of the island." *Id.* at 2a. The detonation range sits above Guam's sole-source aquifer, which provides drinking water to more than 80% of Guam's population. *Id.* Local residents recreate on Tarague Beach and fish offshore; communities harvest traditional medicines nearby; and the beach is a habitat for endangered green sea turtles and migratory seabirds. *Id.*

The Air Force has conducted open-detonation operations at Tarague Beach under each of its past RCRA permits but suspended its open-burning operations in the 2000s. Pet. App. 12a. The Air Force's most recent RCRA permit, issued in 2018, was set to expire on September 3, 2021. *Id.*

In 2021, the Air Force decided to continue OB/OD operations on Tarague Beach. Pet. App. 12a, 18a, 22a-23a, 27a; *see also* C.A. E.R. 93. Accordingly, on May 17, 2021, the Air Force submitted a RCRA permit-renewal application. Pet. App. 12a. The 2021 application details where the Air Force decided to conduct its operations, the design of the OB/OD units—including its plan to construct a new open-burning device to replace the decommissioned one—and the procedures for OB/OD operations. C.A. E.R. 105-08; *see, e.g., id.* at 54, 61, 65-72. The Air Force also specified the types of waste it plans to open-burn and open-detonate, including “common military ordnance material (such as black powder, white/red phosphorus, tear gas, ammunitions, propellants, and explosive materials),” bombs, mortars, antipersonnel and antitank mines, and grenades. *Id.* at 107; *see id.* at 86-89. Those specifications and representations will be binding on the Air Force if the permit issues. Pet. App. 31a.

b. As the terms suggest, “open” burning and detonation are inherently uncontrolled, and toxic by-products are released directly into the environment. C.A. E.R. 93-94, 108-09; *see* Pet. App. 11a-12a. OB/OD operations on Tarague Beach could eject unexploded ordnance and fragments into the ocean and reef. C.A. E.R. 109. Such operations also release contaminants directly into the air, and fuel used during open burning can spill onto the beach. *Id.* at 108-09. In addition, hazardous-waste constituents could reach the aquifer under the detonation range and contaminate Guam’s water supply. *Id.* at 109.

Since the time the Air Force submitted its 2018

application, new research has highlighted safer munitions-disposal technologies. C.A. E.R. 110. In 2019, the National Academies of Sciences, Engineering, and Medicine (National Academies) published a report concluding that “[v]iable alternative technologies exist . . . for almost all munitions currently being treated within the [Department of Defense] conventional munitions demilitarization stockpile via OB/OD.” *Id.* The National Academies report further explained that “there are no significant technical, safety, or regulatory barriers to the full-scale deployment of [those] alternative technologies,” all of which would have “lower emissions and less of an environmental and public health impact” than OB/OD. *Id.* at 110-11. Also in 2019, EPA issued its own report on alternatives to OB/OD, which similarly concluded that “safe alternatives exist and are being used.” *Id.* at 111.

c. Notwithstanding the known environmental hazards of conducting OB/OD operations on Tarague Beach, the Air Force made its most recent decision to treat hazardous-waste munitions on that site, and submitted its May 2021 permit application, without completing an EIS or EA. Pet. App. 12a-13a. Nor did the Air Force invoke one of NEPA’s categorical exclusions. *Id.* And while the Air Force’s 2021 application copied and pasted a brief discussion of technological alternatives to OB/OD from its 2018 application, C.A. E.R. 53-54, 61; C.A. S.E.R. 583-84, 591, it did not address the findings in the 2019 National Academies and EPA reports. Nor did the application address alternative locations.

To date, Guam EPA has not issued a decision on the May 2021 application. As a result, the Air Force has been operating under the terms of its prior RCRA permit for over four additional years. Pet. App. 13a; *see supra* at 6.

2. Respondent Prutehi Guahan is a Guam-based organization dedicated to protecting the island's natural and cultural resources. Pet. App. 2a. Respondent's members include local residents who own land near Tarague Beach, who recreate there, and who fish offshore. *Id.* at 14a, 17a n.5.

Respondent filed suit under the Administrative Procedure Act (APA), 5 U.S.C. § 704, to challenge the Air Force's failure to comply with NEPA before deciding to engage in OB/OD operations for an additional period. Pet. App. 2a-3a. The district court granted petitioners' motion to dismiss. *Id.* at 75a-91a. As relevant here, the court concluded that there was no final agency action. *Id.* at 81a. Alternatively, the court held that respondent failed to state a claim because RCRA implicitly displaces the Air Force's obligation to complete a NEPA analysis. *Id.* at 89a.

3. The court of appeals reversed and remanded for additional proceedings. Pet. App. 1a-46a.

a. Applying the two-prong test from *Bennett v. Spear*, 520 U.S. 154 (1997), *see* Pet. App. 21a, the court of appeals determined that "the Air Force's decision to engage in OB/OD operations over the next three years under particular protocols, reflected by the content of the 2021 permit application," is final agency action reviewable under the APA. *Id.* at 22a-23a (emphasis omitted).

With respect to *Bennett*'s first prong—whether the agency had reached the culmination of its decisionmaking process—the court of appeals explained that the Air Force's “‘definitive position’” was reflected in, and effected by, its permit-renewal application, which “described how the agency would carry out OB/OD activities between 2021 and 2024.” Pet. App. 22a (citation omitted). The court observed that the Air Force “has not suggested it is still in the middle of trying to figure out its position on OB/OD operations at Tarague Beach, or that the plan memorialized in its application was tentative.” *Id.* at 23a (internal quotation marks, brackets, and citation omitted). And the court noted that the possibility the Air Force might revisit some facet of its decision “at Guam EPA's request” “does not suffice to make an otherwise final agency action nonfinal.” *Id.* (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)).

With respect to *Bennett*'s second prong—whether the agency's decision “determined” “rights or obligations” or gave rise to “legal consequences,” 520 U.S. at 178 (citation omitted)—the court of appeals observed that the Air Force's decision to conduct OB/OD operations for another three-year period “commit[ed] the Air Force to a particular course of action—waste removal operations under the protocol proposed in the application.” Pet. App. 31a (citation omitted). Because the Air Force would be bound by the plans and representations in its application, submitting the application determined the Air Force's rights and obligations going forward. *Id.* at 29a. As an alternative basis for finding the second *Bennett* prong met, the court concluded that the Air Force's 2021 renewal application had the “legal consequence

of prolonging the life of its 2018 permit,” by virtue of the Guam EPA regulation. *Id.* at 31a n.9.

b. The court of appeals next held that RCRA does not excuse the Air Force’s duty to comply with NEPA before commencing a major federal action. Pet. App. 33a-46a. The court reasoned that another statute can supplant NEPA if there is “an irreconcilable and fundamental statutory conflict” between the two regimes, or if the non-NEPA statute’s provisions “displace[]” NEPA’s requirements. *Id.* at 34a (citation omitted).

The court of appeals did not identify any conflict between NEPA’s and RCRA’s provisions. Pet. App. 34a-35a. The court further determined that NEPA’s procedures were not the functional equivalent of RCRA’s because “the timing of each statute’s prescribed environmental review is entirely distinct.” *Id.* at 37a. NEPA governs the *Air Force’s* decisionmaking at the time it considers whether to undertake the waste-disposal action, while RCRA governs *Guam EPA’s* decisionmaking on any subsequent permit application. *Id.* at 37a-38a.

The court of appeals further noted that “[o]ther circuit courts have taken a similar approach” to the NEPA-displacement analysis, including the Eleventh Circuit in the only other decision to consider RCRA. Pet. App. 40a-41a. The court explained that those other decisions have exempted environmental agencies from NEPA when those agencies are performing duties under statutes that independently require them to undertake environmental inquiries. *Id.* at 40a-41a. But the court observed that because the Air Force is not such an agency, it makes good

sense for NEPA to focus the Air Force’s attention on environmental concerns at the time it makes its own decision about the course it will take. *Id.* at 41a.

c. Judge VanDyke dissented from the finding of final agency action. Pet. App. 46a-74a. He expressed no view on the majority’s holding that RCRA does not supplant NEPA’s application to the Air Force here. *Id.* at 47a n.1.

4. The court of appeals denied rehearing en banc. Pet. App. 92a. Only Judge VanDyke voted to grant the petition, and no judge requested a vote. *Id.*

## REASONS TO DENY THE PETITION

### I. No Further Review Is Warranted Of The Finding Of Final Agency Action

Petitioners first ask (Pet. 19-24) this Court to grant certiorari to review the holding that the Air Force’s decision to carry out munitions-disposal operations on Tarague Beach constitutes reviewable final agency action. But the lower court’s application of the settled legal test for final agency action—which petitioners do not ask this Court to modify—does not warrant this Court’s review. Indeed, the United States recently urged this Court to deny another petition seeking review of a “fact-bound” final-agency-action question for that reason. Br. in Opp. at 7, 13, *Jake’s Fireworks, Inc. v. Consumer Prod. Safety Comm’n* (No. 24-693). This Court likewise routinely denies review of final-agency-action disputes.<sup>2</sup> It

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<sup>2</sup> See, e.g., *Jake’s Fireworks, Inc. v. Consumer Prod. Safety Comm’n*, 145 S. Ct. 2700 (2025) (No. 24-693); *Elldakli v. Garland*, 144 S. Ct. 487 (2023) (No. 23-115); *American Petroleum Inst. v. Environmental Def. Ctr.*, 143 S. Ct. 2582 (2023) (No. 22-

should follow the same course here.

**A. There Is No Split On The First Question Presented**

1. Under this Court’s longstanding test for identifying final agency action, “[f]irst, the action must mark the ‘consummation’ of the agency’s decisionmaking process.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). “[S]econd, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* at 178 (citation omitted).

Here, the court of appeals determined that the Air Force’s decision to carry out OB/OD operations on Tarague Beach for an additional three-year period—memorialized in its 2021 RCRA application—met both *Bennett* prongs. On the first prong, the court found that the Air Force had arrived at a final internal decision about whether to conduct hazardous-waste-munitions disposal on this site under particular conditions and protocols, as evidenced by its formal application reflecting that choice. *See supra* at 10. On the second prong, the court reached two alternative holdings: (a) the 2021 renewal application determined the Air Force’s rights and obligations because it bound the agency to the application’s commitments, and (b) the 2021 renewal application had the legal consequence of extending the prior permit’s term, enabling the Air Force to continue munitions-disposal

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703); *Soundboard Ass’n v. FTC*, 587 U.S. 937 (2019) (No. 18-722); *Marquette Cnty. Road Comm’n v. EPA*, 586 U.S. 1207 (2019) (No. 18-555); *Joshi v. National Transp. Safety Bd.*, 577 U.S. 1120 (2016) (No. 15-672).

operations between September 2021 and the present. *See supra* at 10-11.

There is no conflict of authority on any of those fact-driven conclusions. Petitioners fail to identify any appellate decision holding that an agency's decision to pursue a course of action does not constitute final agency action because that course requires the agency to secure a permit from some other authority. Indeed, despite claiming a split on the first question presented (Pet. 29), petitioners do not cite a single case arising in the context of an agency seeking or renewing a permit (RCRA or otherwise). Their inability to point to any divergence of opinion on equivalent facts should doom their request for certiorari.<sup>3</sup>

Instead, petitioners argue that the decision below conflicts with decisions of other circuits “holding that agency actions are not final where a separate actor . . . must take an additional action to create any legal consequence.” Pet. 29 (emphasis, internal quotation marks, and citation omitted). But each of those cases followed a materially distinct fact pattern: an agency (specifically, EPA) issuing non-binding guidance or recommendations to other government authorities about those authorities' regulation of *third parties*. *See Chemours Co. FC, LLC v. EPA*, 109 F.4th 179,

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<sup>3</sup> Notably, when this Court most recently granted certiorari to review a final-agency-action question in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016), there was a square split regarding the specific agency action at issue (the Army Corps of Engineers' jurisdictional determination that property contains “waters of the United States” under the Clean Water Act). *See* Pet. at 11-13, *Hawkes, supra* (No. 15-290).

182-83, 185-86 (3d Cir. 2024); *Sierra Club v. EPA*, 955 F.3d 56, 59-60, 63-64 (D.C. Cir. 2020); *California Cmty. Against Toxics v. EPA*, 934 F.3d 627, 637-39 (D.C. Cir. 2019). None of those cases involved an agency submitting self-binding plans for its *own* course of action—and certainly not a circumstance where the submission itself enabled that agency to carry out its plans on the ground.

Petitioners also assert (Pet. 29), with little explanation, that the decision below conflicts with *Village of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186 (4th Cir. 2013), and *Chemical Weapons Working Group v. U.S. Department of the Army*, 111 F.3d 1485 (10th Cir. 1997). But as the court of appeals recognized, respondent does not challenge the Air Force’s day-to-day implementation of a decision already made; respondent challenges the 2021 decision itself. *See* Pet. App. 27a & n.7; *see also Village of Bald Head*, 714 F.3d at 193-94 (challenge to Army Corps of Engineers’ “physical activities in the field”); *Chemical Weapons*, 111 F.3d at 1494-95 (challenge to the Army’s ongoing operations).

Perhaps petitioners intend those citations to renew their contention (made unsuccessfully below) that, before submitting its 2021 application, the Air Force did not in fact make a decision to engage in OB/OD operations at Tarague Beach. *Cf.* Pet. App. 59a-60a (VanDyke, J., dissenting). But that would at most amount to a factual dispute that is not cognizable at the motion-to-dismiss stage and would be unworthy of this Court’s review regardless. *See* Pet. App. 4a n.2, 26a-28a; *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court does

“not grant a certiorari to review evidence and discuss specific facts”).

In sum, petitioners have not provided any reason to believe that another court of appeals would reach a different decision on these facts. To the contrary, one of their cited authorities specifically cautions against such generalized analogies in this context, explaining that courts deciding final-agency-action questions should avoid “comparing [the action] to superficially similar actions in the caselaw.” *California Cmty.*, 934 F.3d at 631-32. As explained below, the court of appeals properly conducted that context-specific analysis here and reached the right result.

### **B. The Ninth Circuit Correctly Identified Final Agency Action**

1. The court of appeals’ finding of final agency action in this case reflected a straightforward application of this Court’s precedents. In 2021, the Air Force reached a final “decision to conduct OB/OD operations” at Tarague Beach “according to specified protocols, as evidenced by the content of its RCRA permit renewal application.” Pet. App. 20a; *see also id.* at 22a. Although Guam EPA has not yet approved that plan, that does not make the *Air Force’s* decision “tentative or interlocutory.” *Bennett*, 520 U.S. at 178; *see also id.* (asking about “*the agency’s* decisionmaking process” (emphasis added)). And once the Air Force reached that decision and submitted its plan, it committed itself to a particular course of action upon the application’s approval. Pet. App. 29a (explaining that the Air Force will not be free to “deviate unilaterally” from the issued permit’s terms and conditions). Thus, submitting the application

“determine[d]” the Air Force’s “rights [and] obligations” with respect to its OB/OD operations at Tarague. *Bennett*, 520 U.S. at 178 (citation omitted).

That reasoning “tracks the ‘pragmatic’ approach [this Court] has long taken to finality.” *U.S. Army Corps. of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016) (citation omitted); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967) (emphasizing the Court’s “flexible view of finality”). And even if reasonable minds could disagree, the court of appeals’ holding can rest on the even narrower ground that, by virtue of the Guam EPA regulation, the Air Force’s 2021 application had the concrete legal effect of extending the 2018 permit’s term. Pet. App. 31a n.9. In other words, deciding to seek another term and submitting the application “afford[ed] [the Air Force] the legal right to continue disposal operations under its prior permit,” *id.* at 32a n.9—a right the agency is actively exercising to this day.

2. Petitioners’ criticisms lack merit. They contend (Pet. 19-20) that the first *Bennett* prong is absent because the Air Force could theoretically make changes to its permit application at Guam EPA’s request. But that possibility does not make the application a preliminary draft. As the court of appeals emphasized, the Air Force “has not suggested it is still in the middle of trying to figure out its position on OB/OD operations at Tarague Beach, or that the plan memorialized in its application was tentative from the agency’s perspective.” Pet. App. 23a (internal quotation marks, brackets, and citation omitted). And this Court has already rejected the argument that the “mere possibility” an agency might

change its mind in response to third-party feedback “suffice[s] to make an otherwise final agency action nonfinal.” *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *see also Hawkes*, 578 U.S. at 598 (explaining that the possibility of revision is a “common characteristic of agency action”).

With respect to the second *Bennett* prong, petitioners argue (Pet. 21) that the Air Force’s decision to conduct OB/OD operations at Tarague Beach carried no direct legal consequences absent further action by Guam EPA. But again, this Court’s precedents find the second prong met even if the practical effect of agency action is contingent on a non-preordained future event, such as an enforcement action. *See Hawkes*, 578 U.S. at 598-99; *Sackett*, 566 U.S. at 126.

Ignoring those decisions, petitioners instead rely on cases where agency officials delivered reports to the President that functioned “like a tentative recommendation.” *Franklin v. Massachusetts*, 505 U.S. 788, 798-99 (1992); *see also Dalton v. Specter*, 511 U.S. 462, 469-70 (1994) (similar). But respondent’s suit does not challenge a subordinate’s recommendation to an intra-branch superior about what that superior should do. Petitioners do not contend that the Air Force’s decision to continue OB/OD operations past September 2021 was still under review within the federal government. *See* Pet. App. 23a.

Petitioners’ attacks on the court of appeals’ alternative prong-two holding are weaker still. They barely dispute whether the triggered extension of the prior permit term counts as a legal effect (Pet. 23),

offering only a cite to *FTC v. Standard Oil*, 449 U.S. 232 (1980). But *Standard Oil* holds that agency action that merely carries automatic *procedural* ramifications—namely, an agency’s filing of a complaint that obligates the other side to respond—does not count. *Id.* at 242. That is a far cry from the situation here, where the permit-renewal application enabled the Air Force to engage in destructive operations on Tarague Beach for over four years and counting—indeed, for longer than the three-year term the application sought. *See supra* at 9.

Instead, petitioners argue (Pet. 20) that this legal effect “flow[ed]” from the 2018 permit, not from the 2021 renewal application. That is wrong: By the plain terms of the relevant regulation, the renewal application was necessary to trigger the extension of the prior permit’s term. 40 C.F.R. § 270.51(a) (“the conditions of an expired permit continue in force . . . until the effective date of a new permit . . . *if* . . . [t]he permittee has submitted a timely application [for a new permit]” (emphasis added)).<sup>4</sup> And even if this narrow point of contention were debatable, it is surely not a debate worthy of this Court’s resources.

## **II. No Further Review Is Warranted Of The Ruling That NEPA Applies Here**

Petitioners also urge the Court to grant certiorari to decide whether NEPA applies when an agency (here, the Air Force) proposes to undertake an action that it cannot carry out without first obtaining a

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<sup>4</sup> For this reason, petitioners’ complaint (Pet. 23) that respondent did not separately challenge the 2018 permit is irrelevant.

RCRA permit from a separate entity (here, Guam EPA). But this second question likewise falls far below this Court’s traditional bar for review. There is no split: Petitioners identify no court of appeals decision holding that an agency *seeking* a RCRA permit need not comply with NEPA. And there is no reason to think that this Court would be the first to break that ground, as the holding below follows from the statutory text and the well-established principle that courts should strive to read statutory enactments harmoniously. The Court should deny review of this question as well.

**A. There Is No Split On The Second Question Presented**

1. Petitioners do not cite any appellate decision holding that a federal agency is excused from complying with NEPA when deciding whether to take a major federal action that will require a RCRA permit. Instead, petitioners discuss an Eleventh Circuit case (Pet. 29-30) and list others (Pet. 30 n.6) that address whether an agency tasked with *enforcing* an environmental statute must, in the course of exercising that regulatory authority, also conduct a NEPA analysis. But those cases are in no disagreement whatsoever with the decision below. They simply reflect the understanding—“recognized” in “most circuits,” the Ninth Circuit among them—that an agency need not comply with NEPA when it administers a statute that mandates its own “examination of environmental questions” and that imposes “specific procedures for considering the environment that are functional equivalents of the [NEPA] impact statement process.” *Alabama ex rel.*

*Siegelman v. EPA*, 911 F.2d 499, 504 (11th Cir. 1990) (internal brackets omitted) (quoting *Texas Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 207 (5th Cir. 1978)); see also Pet. App. 35a-36a, 40a-41a.

Take petitioners' only case involving RCRA, the Eleventh Circuit's decision in *Siegelman*. *Siegelman* addressed whether the environmental agency tasked with *issuing* RCRA permits—not the agency applying for one—was obligated “to comply with NEPA when exercising its permitting authority.” 911 F.2d at 503; see also *id.* at 505. The Eleventh Circuit reasoned that, because RCRA’s “substantive and procedural standards [were] intended to ensure that *EPA* considers . . . environmental issues involved in the *permitting* of hazardous waste management facilities,” “Congress did not intend for *EPA*” to undertake a NEPA analysis in making that decision as well. *Id.* at 505 (emphasis added). *Siegelman* thus bears on the distinct question whether, when EPA is the RCRA permitting authority, that agency must conduct a NEPA analysis before approving an application. But that question is not implicated here. Guam EPA (a non-federal entity with no NEPA obligations) is the permitting authority, and respondent challenges a different agency’s earlier decisionmaking.

Petitioners' non-RCRA cases all fit the mold of *Siegelman*. Each concludes or suggests that environmental agencies enforcing environmental statutes with requirements functionally equivalent to NEPA’s need not also comply with NEPA.<sup>5</sup> The Ninth

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<sup>5</sup> See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 384-85 (D.C. Cir. 1973) (when EPA makes determinations under

Circuit has reached similar conclusions in prior cases.<sup>6</sup> But not one of those courts has excused a non-

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Section 111 of the Clean Air Act (CAA), it is not obligated to comply with NEPA), *cert. denied*, 417 U.S. 921 (1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 676 (1st Cir. 1974) (under a statutory exemption, when EPA takes action under the CAA, “NEPA does not apply to EPA”); *Limerick Ecology Action, Inc. v. U.S. Nuclear Regul. Comm’n*, 869 F.2d 719, 729 n.7 (3d Cir. 1989) (suggesting that if the Atomic Energy Act required the Nuclear Regulatory Commission to conduct the “‘functional equivalent’ of NEPA’s environmental review process,” the Commission need not undertake a similar review under NEPA); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 508 (4th Cir. 1973) (when EPA approves a CAA state implementation plan, EPA is not required to include an EIS), *abrogated on other grounds by Union Elec. Co. v. EPA*, 427 U.S. 246 (1976); *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 842-43 (7th Cir. 1975) (same); *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 834-38 (6th Cir. 1981) (suggesting that if the Endangered Species Act (ESA) required the Fish and Wildlife Service (FWS) to “prepare the functional equivalent” of an EIS when listing a species as endangered, the FWS need not also prepare an EIS); *Western Neb. Res. Council v. EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991) (“EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under” the Safe Drinking Water Act); *Wyoming v. Hathaway*, 525 F.2d 66, 68-69, 71-72 (10th Cir. 1975) (“an organization like EPA, whose regulatory activities are necessarily concerned with environmental consequences, need not stop in the middle of its proceedings” cancelling a chemical-toxicants registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to prepare an EIS), *cert. denied*, 426 U.S. 906 (1976).

<sup>6</sup> See *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1503-04 (9th Cir. 1995) (FWS’s ESA obligations displace FWS’s NEPA obligations), *cert. denied*, 516 U.S. 1042 (1996); *Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986) (EPA’s FIFRA obligations displace EPA’s NEPA obligations), *cert. denied*, 484 U.S. 848 (1987).

environmental agency like the Air Force from complying with NEPA before selecting a course of action that requires authorization from another entity. To the contrary, one of petitioners' favored decisions emphasizes that "NEPA must be accorded full vitality as to non-environmental agencies." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (cited at Pet. 26, 27, 30). Thus, as the court of appeals took care to underscore, its analytical approach to the NEPA-displacement issue is consistent with that of other circuits, including the Eleventh Circuit in *Siegelman*. Pet. App. 40a.

### **B. The Ninth Circuit Was Correct**

Given the absence of a conflict, petitioners once again must ask this Court to grant certiorari to correct what they believe is a mistake. They urge the Court to be the first appellate tribunal to hold that even if an agency is not tasked with enforcing RCRA's permit requirement—and indeed has no core environmental competencies at all—RCRA implicitly supplants the agency's NEPA obligation at its own decisionmaking stage. But even if the Court were in the business of splitless error correction, there was no error here.

1. Respondent's claim calls for a plain application of NEPA's text: The Air Force's proposal to dispose of hazardous-waste munitions via open detonation and open burning on Tarague Beach was a "major Federal action[]" that may have significant environmental effects. 42 U.S.C. § 4332(2)(C) (2018). So, before the Air Force "proposed" to undertake that action, it was required to examine and report on the action's "environmental impact" and to consider reasonable "alternatives," *id.* § 4332(2)(C)(i), (iii)—such as the

alternative methods for munitions disposal evaluated by the National Academies and EPA in 2019, and alternative locations. *See supra* at 7-8.

The court of appeals' conclusion that this proposed action is not exempt from NEPA merely because the Air Force also needed a RCRA permit to carry it out reflected the prevailing framework for NEPA displacement. *See supra* at 20-23. The Air Force is not "engaged primarily in an examination of environmental questions," such that its decision to conduct OB/OD operations on Tarague Beach was "necessarily infused with . . . environmental considerations." Pet. App. 41a (quoting *Siegelman*, 911 F.2d at 504 & n.11). And even if that factor were overlooked, when it comes to the permit applicant, RCRA does not mandate "specific procedures for considering the environment that [are] functional equivalents of [NEPA's] impact statement process." *Id.* (first set of brackets in original; quoting *Siegelman*, 911 F.2d at 504).

Most significantly, "[u]nder the circumstances of this case," the "timing" of each statute's prescribed environmental review is "entirely distinct." Pet. App. 37a (emphasis omitted). While NEPA requires action agencies to prepare an environmental analysis and engage with the public "*before* reaching a final decision to undertake a particular activity that may have significant environmental impact," *id.*, RCRA does not require an environmental evaluation until *after* the action agency has reached that decision, *id.* at 38a-39a. The Ninth Circuit therefore correctly reasoned that Guam EPA's evaluation of environmental factors at the permit-approval stage is

no substitute for the Air Force’s due consideration of the environmental consequences of its proposed hazardous-waste disposal project, including available alternatives, before committing itself to a permit for particular operations in a particular location. *See id.* at 37a-39a.

That conclusion accords with the ordinary rule that displacement by implication is disfavored. As this Court has instructed, “[w]hen confronted with two Acts of Congress allegedly touching on the same topic,” courts are “not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (internal quotation marks and citation omitted). When, as here, a party “suggest[s] that two statutes cannot be harmonized, and that one displaces the other,” that party “bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow.” *Id.* (internal quotation marks and citation omitted).

NEPA’s text reinforces this background rule of construction. To begin with, Congress specifically “authorizes and directs that, to the fullest extent possible . . . public laws of the United States should be interpreted and administered with the policies [that NEPA] set[s] forth.” 42 U.S.C. § 4332 (2018). In addition, Congress amended NEPA in 2023 to explicitly resolve the statute’s interaction with other laws. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, §§ 321(a)(3)(A) and (b), 137 Stat. 38-39 (codified at 42 U.S.C. §§ 4332(2)(C), 4336). As relevant here, the amended text relieves agencies

from preparing a NEPA analysis only where NEPA compliance “is *excluded* pursuant to . . . another provision of law,” or where “the preparation of [a NEPA] document would *clearly and fundamentally conflict with the requirements* of another provision of law.” 42 U.S.C. § 4336(a)(2)-(3) (Supp. V 2023) (emphasis added); *see also id.* § 4332(2)(C) (Supp. V 2023) (mandating that agencies comply with NEPA “except where compliance would be inconsistent with other statutory requirements”).

RCRA does not exclude permit-seeking agencies from the obligation to prepare a NEPA analysis. And petitioners have not carried their burden to show a clear and fundamental conflict between the two laws’ respective provisions. There are no “near-conflicts” or even “legislative cross-purposes” between NEPA and RCRA; rather, the two statutes achieve “fundamentally different, but complementary goals.” Pet. App. 45a.

2. Petitioners’ contrary arguments are unavailing.

a. Petitioners lean heavily (Pet. 4, 24-26, 28) on the specific-governs-the-general canon of statutory construction. But that principle applies only when two statutory provisions are irreconcilable. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012). As noted, petitioners have not attempted to claim a direct conflict between the two laws. For good reason: “It is possible and practicable for the Air Force to comply with both NEPA and RCRA.” Pet. App. 34a. And even if the canon were implicated here, it is not at all clear that it favors petitioners’ interpretation—since it is

*NEPA*, not RCRA, that specifically addresses the process applicable to the Air Force’s go/no-go decision. Given the slippery nature of the canon, the better course is to adhere to an “interpretation that gives effect to all of Congress’s work.” *Epic Sys.*, 584 U.S. at 524; *see also id.* at 523-24 (rejecting an invocation of the specific-governs-the-general canon).

b. Petitioners also repeatedly invoke (Pet. 4, 9-10, 26, 28) an EPA regulation stating that “RCRA . . . permits are not subject to the environmental impact statement provisions of [NEPA].” 40 C.F.R. § 124.9(b)(6). But that regulation has no bearing here for several reasons.

*First*, by its title, the EPA regulation applies only “when EPA is the permitting authority.” 40 C.F.R. § 124.9; *see* Pet. App. 42a-43a. As petitioners acknowledge (Pet. 10 n.3), Guam EPA has not adopted this regulation for its own RCRA permitting process—so it does not govern this case. *See* 22 Guam Admin. R. & Regs. § 30110(h).

*Second*, the EPA regulation speaks to the obligations of “the permitting authority” in preparing a “draft permit.” 40 C.F.R. § 124.9(a)-(b); *see also* 45 Fed. Reg. 33290, 33406 (May 19, 1980) (explaining EPA’s “position that [NEPA] does not require preparation of an [EIS] *when permits are issued* under the RCRA . . . program[]”) (emphasis added). It says nothing about the NEPA obligations of an *applicant* for a RCRA permit.

*Third*, that straightforward interpretation of the EPA regulation accords with the view—reflected elsewhere in the Executive Branch—that the fact that a proposed action requires an environmental permit

does not obviate the action agency's NEPA obligations. For instance, the Council on Environmental Quality NEPA regulations in effect during the events of this case expressly contemplate that action agencies will comply with NEPA even if the action requires a permit. *See* 40 C.F.R. § 1502.24(b) (2021) (action agency's draft EIS "shall list all Federal permits, licenses, and other authorizations that must be obtained in implementing the proposal"); *id.* § 1503.3(d)-(e) (2021) (referencing comments on action agencies' draft EISs by permitting agencies). Similarly, the Army's previously operative NEPA regulations envision that NEPA analyses will be conducted alongside environmental review required under other laws—including RCRA specifically. *See* 32 C.F.R. § 651.14(e)(9) (2021).

Department of Defense components have also adopted categorical exclusions to NEPA built on the premise that components bear NEPA obligations when they need permits. For example, at the time the Air Force applied for the 2021 permit, its own NEPA regulation specified that reliance on a categorical exclusion "does not relieve" the proponent "of responsibility for complying with all other environmental requirements related to the proposal, *including requirements for permits.*" 32 C.F.R. pt. 989, app. B, at A2.1 (2021) (emphasis added). More recently (and after the court of appeals' decision), the Department of Defense adopted a categorical exclusion for "[c]onstruction, *in accordance with applicable permits,*" of certain water crossings. Dep't of Def. NEPA Implementing Proc., app. A, § I(b)(8) (DoD NEPA Proc.) (emphasis added), *available at*

<https://www.denix.osd.mil/nepa/>; *see also id.* § I(b)(9) (waterfront-facility renovations “*in accordance with applicable permits*” (emphasis added)); *id.* § III(37) (maintenance dredging and debris disposal where “*applicable permits are secured*” (emphasis added)); 90 Fed. Reg. 27857 (June 30, 2025) (adopting those procedures). If petitioners truly believed that a permit requirement relieves components of NEPA compliance, such NEPA exclusions would be unnecessary.

*Fourth*, even if the EPA RCRA regulation were understood as expansively as petitioners urge— notwithstanding its wording and obvious tension with other Executive Branch pronouncements—it would deserve minimal weight in the analysis. Petitioners do not claim that the view the regulation reflects is entitled to deference. Federal courts, not federal agencies, have the last word on the meaning of federal statutes. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394, 401-04 (2024).

c. That leaves petitioners with policy arguments. They argue that applying the two statutes according to their text would be “redundant and a waste of resources.” Pet. 4 (citation omitted). Petitioners also contend that there is “no sound reason” to require action agencies to complete NEPA analyses if the RCRA permitting authority is not required to conduct one too. Pet. 28.

Of course, this Court requires more than “policy-talk” to “overcome a plain statutory command.” *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021). Regardless, the good reason to require an agency like the Air Force to undertake a NEPA analysis before

seeking a hazardous-waste-disposal permit is self-evident: to force that agency to consider the environmental consequences of its proposed course of action *before* it chooses that course. As the court of appeals observed, “building in environmental analyses at the planning and decisional stages allows nuanced adjustments of the proposed project by those most familiar with the project’s goals and practical limitations.” Pet. App. 38a. That timing also ensures that environmental impacts are not “overlooked or underestimated” by the action agency and then discovered, if at all, “after resources have been committed or the die otherwise cast.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Nor do the two statutes call for the same analysis. See Pet. App. 37a-39a. Most notably, one of NEPA’s touchstones (both in 2021 and now) is the requirement that agencies evaluate feasible alternatives to the proposed action. See, e.g., 42 U.S.C. § 4332(2)(C)(iii) and (2)(F) (Supp. V 2023); *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 172, 177 (2025). RCRA, by contrast, typically does not require facilities to present information on alternatives—such as different waste-treatment technologies or off-site locations—to the treatment plan they propose. See 42 U.S.C. § 6925(b); Pet. App. 39a.<sup>7</sup> And RCRA does not

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<sup>7</sup> This case happens to be a partial exception, because a RCRA implementing regulation prohibits OB/OD unless military-waste explosives “cannot safely be disposed of through other modes of treatment.” 40 C.F.R. § 265.382; see 22 Guam Admin. R. & Regs. § 30107(a). That may be why the Air Force’s 2021 application briefly dismissed the viability of alternative technologies (though the Air Force simply copied the discussion

require (for instance) Guam EPA to deny a permit on the basis that the munitions could be destroyed through OB/OD in a non-Guam location with less environmental harm.

Thus, had the Air Force undertaken a compliant NEPA analysis before deciding to seek renewal, it “might have chosen a different place or method for handling the waste munitions.” Pet. App. 3a. The court of appeals correctly recognized the statute’s crucial role in this context.

### **III. The Questions Presented Do Not Call For The Court’s Intervention At This Juncture**

Petitioners’ attempts to imbue this dispute with broader significance and urgency (Pet. 31) are likewise underwhelming. In truth, there is no compelling reason not to wait to see if any substantial disagreement arises in the lower courts. Caution is all the more prudent because this dispute took place under an outdated version of NEPA, and Congress is actively considering additional amendments that could bear on these kinds of cases in the future. At most, further percolation is warranted.

1. As an initial matter, petitioners are wrong to suggest that respondent’s case will affect the Air Force’s ability to address “potentially dangerous munitions that must be quickly destroyed” on Guam. Pet. 11. If military munitions or explosives give rise to an immediate threat to public safety or property, no

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from earlier applications and ignored recent authoritative studies on the subject). *See supra* at 8. If anything, this unusual feature makes this case an even more awkward vehicle for exploring NEPA and RCRA’s typical interaction.

RCRA permit or NEPA review is required. See 40 C.F.R. §§ 266.204, 270.1(c)(3)(i)(D); DoD NEPA Proc. pt. 3.12(a) (excusing NEPA compliance in emergency circumstances).

2. Petitioners' claims of administrative upheaval (Pet. 31) are likewise ill-founded. They vaguely assert that the decision below "threaten[s] . . . to impede" agencies' pursuit of environmental and natural-resources permits, claiming that "the Executive Branch generally has not engaged in NEPA analysis before submitting permit-renewal applications." *Id.*

But petitioners themselves cite a case where a military component completed an EIS before obtaining permits, including a RCRA permit. See *Chemical Weapons*, 111 F.3d at 1487-88 (cited at Pet. 29). Other cases present similar fact patterns.<sup>8</sup> And as discussed, the Department of Defense's own NEPA procedures (as well as prior agency regulations) take as a given that agency projects are subject to NEPA

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<sup>8</sup> See, e.g., *City of Carmel-By-The-Sea v. U.S. Department of Transp.*, 123 F.3d 1142, 1148, 1150-52 (9th Cir. 1997) (evaluating Federal Highway Administration's EIS for NEPA compliance even though the project would require a Clean Water Act permit); *Defenders of Wildlife v. U.S. Department of Navy*, 733 F.3d 1106, 1108-13 (11th Cir. 2013) (Navy completed an EIS to conduct training activity that also required ESA authorization); *Conservation Council for Haw. v. National Marine Fisheries Serv.*, 97 F. Supp. 3d 1210, 1215 (D. Haw. 2015) (Navy completed an EIS to conduct training and testing activities that required ESA and Marine Mammal Protection Act authorizations); *Sierra Club v. Gates*, 499 F. Supp. 2d 1101, 1103-04, 1132-36 (S.D. Ind. 2007) (Army complied with NEPA by, *inter alia*, preparing an EA and relying on a categorical exclusion before conducting hazardous-waste-disposal activities that required RCRA and CAA permits).

even where permits are required. *See supra* at 28-29. Petitioners' assertion that the court of appeals' understanding came out of left field is hard to square with those precedents and practices.

As for petitioners' enigmatic warning that the decision below implicates the Department of Defense's renewal of "2500 environmental permits" (Pet. 31), it is difficult to respond without the government specifying the permitting regimes it is supposedly worried about. Suffice it to say, however, that it is unusual for permit renewals to require an agency to complete a new, full-blown EIS in every permitting cycle.

Many of the underlying actions may qualify for a NEPA categorical exclusion. *See supra* at 4-5, 28-29. And even where a NEPA analysis of some kind is required, there are multiple ways for agencies to rest on prior analyses without reinventing the wheel. They can rely on "programmatic environmental documents" for actions with relevant similarities or actions occurring in a particular location. *E.g.*, DoD NEPA Proc. pt. 3.1; *see also* DoD NEPA Proc. pt. 1.8(e). If the agency prepared a NEPA analysis for the last permitting cycle and nothing material has changed since, it can incorporate the prior analysis by reference. *E.g.*, DoD NEPA Proc. pt. 3.2. And if there is overlap between the environmental factors considered in the RCRA-permitting analysis and the mandated NEPA analysis, those analyses can be consolidated and streamlined, as the Department's NEPA procedures explicitly contemplate. *See* DoD NEPA Proc. pt. 3.8 ("To the fullest extent possible, DoD will prepare environmental documents

concurrently with and integrated with analyses and related surveys and studies required by other Federal statutes.”). Compliance will not be overly burdensome or gum up the permit-renewal process.

3. Tellingly, even though the court of appeals’ decision issued nearly a year ago, petitioners do not point to any other pending case (in the Ninth Circuit or elsewhere) challenging a similar agency decision by relying on the analysis below. But if, as petitioners predict (Pet. 31), there is a sudden deluge of cases newly challenging agencies’ failure to comply with NEPA before seeking permits to carry out environmentally destructive activities, more courts of appeals will have occasion to weigh in on these questions soon. This Court need not jump at this particular opportunity.

Preemptive intervention would be all the more misguided because NEPA is an ongoing subject of congressional attention. The Air Force took the action at issue—and this case has largely been litigated—under the pre-2023 version of NEPA. But in 2023, Congress amended NEPA to explicitly provide that agencies are relieved of their NEPA obligations when another statute specifically excludes them or when the other statute gives rise to a clear conflict. *See* C.A. Doc. No. 34, at 1-2 (Sept. 8, 2023); *see also supra* at 25-26.

The court of appeals took the view, at petitioners’ urging, that the 2023 amendments cannot be considered in this case because they do not “purport to apply retroactively.” Pet. App. 5a n.3; *see also* C.A. Doc. No. 35, at 1-2 (Sept. 19, 2023). But if that is correct (which respondent does not concede), it would

be all the more reason why this case presents an awful vehicle for deciding the second question presented. At a minimum, because petitioners convinced the lower court that it could not take the 2023 amendments into account, this Court would be evaluating those changes as a court “of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

And NEPA may change further. In December 2025, the House of Representatives passed a bill that would amend NEPA in significant ways, including by exempting agencies’ compliance when “the proposed agency action is an action for which such agency’s compliance with another statute’s requirements serves the function of agency compliance with [NEPA].” H.R. 4776, § 2(b) (119th Cong., 1st Sess.) (engrossed in House Dec. 18, 2025). That bill is currently under consideration in the Senate, which of course could make different or additional changes. So this Court could end up addressing a moving target, or else issue an opinion whose shelf life has already expired. Relatedly, if petitioners’ dire predictions have any substance, there is nothing preventing them from taking their concerns across the street—especially now that legislators are acutely interested in the subject.

In short, this is the wrong case at the wrong time. Even if the Court were interested in the issues underlying either question presented, it can and should wait for a dispute that can provide more meaningful guidance.

**CONCLUSION**

The petition should be denied.

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