No. 25-579

IN THE

Supreme Court of the United States

DEPARTMENT OF THE AIR FORCE, *et al.*,

Petitioners,

v.

PRUTEHI GUAHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FOUNDATION FOR AMERICAN INNOVATION AND CHRISTOPHER KOOPMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TIM HWANG
Counsel of Record
FOUNDATION FOR
AMERICAN INNOVATION
2443 Fillmore Street,
#380-3386
San Francisco, CA 94115
(973) 960-4955
tim.hwang@thefai.org

Counsel for Amici Curiae

132185

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INTEREST OF AMICI CURIAE[1]

Amici are a public-policy organization and a scholar of regulatory policy whose work concerns the architecture of federal regulation—in particular, how the government's general procedural obligations interact with the specific substantive regimes Congress designs to govern discrete activities. They share an interest in the institutional question this case presents: when a federal entity applies for a permit under a regime Congress has assigned to a separate permitting authority, which actor holds the operative environmental decision, and whether NEPA review nonetheless attaches to the federal applicant. Amici's concern is not the merits of any particular project but the structural rule the decision below would impose across every such program.

The Foundation for American Innovation is a public-policy organization that champions the technology, talent, and ideas essential to American prosperity, security, and flourishing. Its work spans the domains most critical to the vitality of the American republic, including governance and state capacity, energy and infrastructure, science and innovation, and technology and statecraft.

Christopher Koopman joins in his personal capacity. He serves as Chief Executive Officer of the Abundance Institute, was previously executive director of the Center for Growth and Opportunity at Utah State University, and formerly directed the Technology Policy Program

1. No counsel for any party authored this brief in whole or in part. No party, counsel, or person other than Amici and their counsel contributed money to fund the preparation and submission of this brief.

at the Mercatus Center at George Mason University. His scholarship addresses the National Environmental Policy Act and the procedural burdens it imposes on federal agency action. His institutional affiliation is listed for identification only; the views expressed are his own.

Amici file this brief because the Ninth Circuit's holding would invite duplicative environmental review whenever a federal entity participates as an applicant in a state, tribal, or territorial permitting scheme. That result conflicts with the specific-over-general canon, with NEPA's own limits on legal control and causation, and with Congress's assignment of the operative environmental decision to the permitting authority.

SUMMARY OF ARGUMENT

The government is right that RCRA's specific permitting scheme controls over NEPA's general procedures. That result is no RCRA-only quirk or judge-made exemption. It follows from ordinary statutory ordering, from NEPA's own limits on control and causation, and from the choice Congress made to give the operative environmental decision to the permitting authority, not to the applicant.

Four points follow. First, functional equivalence is a court-recognized doctrine that reflects ordinary statutory ordering, nothing more. Courts reach it when NEPA's general procedures overlap a specific decision process Congress supplied for the same activity and the same decision.

Second, the line between applicant and regulator confirms the doctrine, because it marks who controls the

decision. The Ninth Circuit thought the Air Force fell outside *Siegelman* because the agency was applying for the permit rather than issuing it. That understanding is backwards. RCRA gives the decision to the permitting authority; the applicant only asks to enter the process. Control therefore rests with Guam EPA.

Third, NEPA case law has always tied the duty to prepare an environmental document to legal control and causation. A document can inform only a major federal action the agency can lawfully make. As the Air Force cannot make this one, the duty does not apply.

Fourth, NEPA's current text confirms the same structure. The 2023 amendments need not decide this case, but they do serve to confirm the threshold inquiry the cases already performed.

Construed properly, the consequences of this Court confirming the functional equivalence doctrine are narrow. It leaves ordinary NEPA review in place and does not require ruling on any other permitting regime. The judgment should be reversed.

ARGUMENT

I. The specific-over-general canon is only the starting point.

Amici agree with the government that functional equivalence is ordinary statutory ordering rather than a special environmental-law exemption. The government shows that the "specific governs the general," that RCRA comprehensively regulates hazardous-waste treatment

from cradle to grave, and that RCRA is therefore the "equivalent and more specific counterpart of NEPA" for that decision. Pet. Br. 36–38 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504–05 (11th Cir. 1990)). Amici do not repeat that showing. We address only what the canon leaves open.

The canon tells us that the specific governs the general. It does not tell us why RCRA is the specific scheme that controls a NEPA challenge aimed at the applicant rather than the permitting authority. The Ninth Circuit thought RCRA flunked the comparison because it carries no NEPA-style alternatives clause, with review occurring only after the application is filed. See Pet. App. 37a-39a. That reasoning confuses difference with inequivalence—the error the Ninth Circuit rejected in *Merrell v. Thomas*, 807 F.2d 776, 779–80 (9th Cir. 1986)—and it measures the wrong thing. Equivalence is an expression of Congress's allocation of duty, not a tally of procedures. It turns on whether Congress assigned the relevant environmental decision to a specific review process, and on which actor controls that decision. That is the question the canon leaves open, and it is the subject of the Parts that follow.

II. The applicant-regulator line confirms the doctrine, because it marks who controls the decision.

A. RCRA gives Guam EPA the permit decision; the Air Force only asks for it.

The Ninth Circuit placed this case outside the functional-equivalence line because the Air Force is a non-environmental agency applying for the permit

instead of the environmental agency issuing it. Pet. App. 40a–41a. That reverses the meaning of the line. Applicant versus regulator matters precisely because it marks who holds legal control. RCRA gives the operative decision to the permitting authority, with the federal applicant's submission being only a step inside that process—a step identical to that of any other private applicant. That operative decision-making power is why the application is not final agency action, and it is also why the application is not the point at which NEPA attaches.

Functional equivalence instead attaches to the permitting structure Congress assigned. Sometimes the federal actor is the permitting authority, as EPA was in *Siegelman*. Sometimes, as here, the federal actor is a regulated applicant before another authority. Both are governed by the same question: which actor controls the environmental decision a NEPA document would inform?

RCRA answers that question for hazardous-waste treatment. The permit is the operative authorization for such activities. 42 U.S.C. § 6925(a). The applicant supplies technical information and asks to enter the process; but the permitting authority has the power to issue, deny, modify, renew, or condition the permit. Id. § 6925(b), (c)(1)–(3), (d). Congress built no separate federal track. It placed the United States in the regulated-party role "to the same extent as any person" under the same code. Id. § 6961(a). This Court confirmed as much in *Dep't of Energy v. Ohio*, 503 U.S. 607, 627–28 (1992), explaining that § 6961 subjects the United States to RCRA's substantive permitting requirements. Congress later amended § 6961 to supersede the separate sovereign-immunity holding as to penalties, but not the Court's recognition that federal

facilities are subject to RCRA's substantive permitting requirements. See Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a), 106 Stat. 1505, 1505–06. And where EPA has authorized a State or territorial program, that authority's action carries the same force as EPA's. 42 U.S.C. § 6926(d). Guam EPA, not the Air Force, holds the permitting power here.

B. NEPA duties run to the actor with decisional control, not to the applicant seeking permission.

The Ninth Circuit ran two questions together: who conducts the environmental review, and which statute governs it. The answers are simple: the permitting authority conducts the review; RCRA governs it. NEPA attaches only to an action the agency can approve, deny, or shape through the information NEPA review provides. The Air Force may want to keep operating, and it may submit what RCRA requires, but it cannot issue, deny, or set the binding terms of the permit. RCRA gives that power to the Administrator or the authorized State. Therefore, those parties are the only ones potentially subject to NEPA. There would be no question that NEPA does not apply to the Air Force's application decision if the Guam EPA's RCRA procedures were not exempt from it.

The Ninth Circuit's own decisions fix the review duty on the actor who controls the decision, not the one who asks for it. In *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 651–52 (9th Cir. 2014), the court excused a consulting agency from preparing a NEPA statement on its biological opinion, because the duty fell instead on "the action agency" that would adopt and carry out the choice. An agency need not prepare its own statement, the court reaffirmed, where another agency will authorize or

implement the action that triggers NEPA. *Sierra Club v. FERC*, 754 F.2d 1506, 1509 (9th Cir. 1985). The limit is a proxy for control, not a test of agency identity: the consulting agency in *San Luis* was an environmental agency, yet the duty turned on who held the decision. The Air Force stands where the consulting agency stood. It supplies information and asks Guam EPA to act; Guam EPA holds the decision and will carry it out.

Nor does the doctrine exclusively apply to the EPA. The Ninth Circuit has applied it to the Fish and Wildlife Service for Endangered Species Act critical-habitat designations, *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1501–08 (9th Cir. 1995), and again in *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015); and to the National Marine Fisheries Service in *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1035–36 (9th Cir. 2015). A district court reached the same result for the Maritime Administration in *Basel Action Network v. Mar. Admin.*, 285 F. Supp. 2d 58, 63 (D.D.C. 2003), treating that agency's reports to Congress under a National Defense Authorization Act pilot program as the functional equivalent of a supplemental environmental assessment for four specified ships. What unites these cases is Congress's choice to vest the environmental decision in a decisionmaker bound by substantive environmental standards. Congress made that choice here. RCRA assigns the operative decision to EPA, and § 6926(d) gives Guam EPA's action the same force and effect.

The contrary cases prove the same rule. In *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996), the agency that issued an incidental-take statement had to prepare

a NEPA document only because no other federal actor would; states, not a federal agency, issued the fishing rules the statement made lawful, so review would otherwise have escaped NEPA entirely. Review escapes nothing here, because RCRA channels the decision to Guam EPA, whose process supplies the equivalent. In *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1247–48 (9th Cir. 1984), the Forest Service could not borrow EPA's pesticide registration to excuse NEPA review, because the effects to be studied were those "of its [own] spraying program." And even *Jones v. Gordon*, 792 F.2d 821, 828–29 (9th Cir. 1986), which required NEPA for a Marine Mammal Protection Act permit, placed the duty on the agency that issued the permit, not on an applicant. The Air Force issues nothing; the permit is Guam EPA's to grant, deny, or condition.

Prutehi Guahan counters by claiming that RCRA and NEPA operate at different stages, so both can apply. That claim mistakes timing as the relevant axis. The true axis is how and to whom authority was allocated by Congress. It is whether NEPA is being fastened to the decisionmaker and the decision that Congress chose. The government explains why the relevant allocation in this case means the renewal application is not final agency action, and amici do not repeat that showing. The point here is narrower: the actor who lacks control over the decision is not the actor a NEPA document would inform. Part III develops that control principle.

III. NEPA case law has long tied the document duty to control and causation.

NEPA's document requirement attaches only to a proposed action that the responsible agency has legal power to control and decide. "Functional equivalence"

is just the name courts give that result when Congress has assigned the environmental decision to a specific process. The doctrine is carefully cabined by three lines of authority: this Court's causation cases, its cases on what an environmental document is for, and the lower-court decisions that apply both.

A. Causation requires a close link among the action, the agency's authority, and the effect.

NEPA review has always carried causal limits. In *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), the Court read "environmental effect" and "environmental impact" to require "a reasonably close causal relationship between a change in the physical environment and the effect at issue," a limit it compared to "the familiar doctrine of proximate cause." A bare but-for link will not do; where the chain grows "too attenuated," the effect falls outside NEPA. Id. at 774–75.

In *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004), this Court fixed what that limit means when the asserted effect lies beyond the agency's power: "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." Causation tracks authority. Simple enough. *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168, 181 (2025), re-emphasized that NEPA must stay fixed on the project and the federal action before the agency rather than reaching decisions or effects beyond the agency's regulatory reach. That is the flaw in Prutehi Guahan's theory. It uses the Air Force's application as a hook to compel review of a decision Congress gave to Guam EPA.

B. A NEPA document must benefit a decision the acting agency can lawfully make.

Public Citizen did more than trim the scope of effects analysis. It also explained why environmental documents exist: to inform an agency's own choice. If the agency cannot prevent the effect, the document cannot inform its decision in the way NEPA contemplates. 541 U.S. at 768. A statement no decisionmaker can act on therefore serves no NEPA purpose.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352–53 (1989), and *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 788 (1976), both confirm the point. *Robertson* held that NEPA does not require an agency to present a complete mitigation plan for effects that other governments will regulate. In that case, because offsite mitigation lay with state and local authorities, demanding that the federal agency finish that work in advance was held to be "incongruous" with NEPA's purpose. 490 U.S. at 353. *Flint Ridge* held the more general rule that NEPA's statement requirement yields where it would create an "irreconcilable and fundamental conflict" with another scheme. 426 U.S. at 788. In both cases, the Court refused to fasten NEPA to the legally operative agency where it was not capable of benefiting from the review.

C. Functional equivalence applies the same control principle to specific environmental statutes.

The functional equivalence doctrine is a logical application of this more general principle. In *Portland*

Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384–87 (D.C. Cir. 1973), the D.C. Circuit treated Clean Air Act § 111 rulemaking as the "functional equivalent of a NEPA impact statement" because the statute already required environmental study in a form suited to that decision; accord *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 431 (D.C. Cir. 1973); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 749–50 (D.C. Cir. 1974). The same court set the limit in *Env't Def. Fund, Inc. v. EPA*: "where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." 489 F.2d 1247, 1257 (D.C. Cir. 1973). The court added that it was "not formulating a broad exemption from NEPA." Id.

The doctrine has been applied across the environmental permitting landscape. *Maryland v. Train*, 415 F. Supp. 116, 121–22 (D. Md. 1976), applied it to Ocean Dumping Act permitting. It was applied to RCRA in *Siegelman*, 911 F.2d at 504–05; to FIFRA in *Merrell*, 807 F.2d at 779–80; to the Safe Drinking Water Act's underground-injection review in *Western Nebraska Resources Council v. EPA*, 943 F.2d 867, 871–72 (8th Cir. 1991); to the Clean Air Act in *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 359 (3d Cir. 1972), and *Sierra Club v. Costle*, 657 F.2d 298, 331–32 (D.C. Cir. 1981); to the Toxic Substances Control Act in *Warren Cnty. v. North Carolina*, 528 F. Supp. 276, 286–87 (E.D.N.C. 1981); and to Endangered Species Act designations in *Douglas Cnty.*, 48 F.3d at 1501–08, and *Bldg. Indus.*, 792 F.3d at 1033–34. *Merrell*'s reasoning is particularly notable. There the Ninth Circuit declined to "superimpose NEPA's procedures on top of the FIFRA

registration procedure" because Congress had chosen a different one for the same decision, stating that "Congress has made its choice"—even though FIFRA did not copy NEPA clause by clause. 807 F.2d at 779–80.

The decisions on the other side apply the same test and find the predicate missing. *Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996), required review because there, unlike in *Douglas County*, the court found that ESA critical-habitat designation was "partial fulfillment" that "is not enough," i.e., not an integrated permitting process. *Save Our Ecosystems* likewise refused to let the Forest Service borrow EPA's FIFRA registration because the registration was not a replacement for the Forest Service's own pesticide-spraying program. 747 F.2d at 1247–48. And *Jones* required NEPA review for a Marine Mammal Protection Act permit because the permit decision itself belonged to the federal agency and the statute did not provide a NEPA-equivalent substitute. 792 F.2d at 828–29. These cases reject overbroad functional equivalence. They do not reject the doctrine.

Pac. Legal Found. v. Andrus is the most instructive of these cases, because it separates the label from the principle. In the case, the Sixth Circuit did not treat ESA listing as a full NEPA substitute but ruled that NEPA still did not apply because the Endangered Species Act confines the listing decision to statutory factors that bar the Secretary from weighing the very consequences the plaintiffs wanted studied. 657 F.2d 829, 835–40 (6th Cir. 1981). The lesson is that the phrase "functional equivalence" is shorthand for operative legal control. The question is solely whether the agency holds decisional authority over

the environmental choice a NEPA document could inform and thereby modify. Here, the Air Force does not.

IV. NEPA's current text confirms the same control-based structure.

Current NEPA asks a threshold question before any document is prepared: what proposed action is before the agency, and does the agency hold the congressionally allocated control and responsibility that make a document useful? The 2023 amendments answer with the same control principle the cases applied. They need not govern the case at hand retroactively to confirm it.

A. The document duty is a threshold determination based on control.

Section 4336 is titled "Procedure for determination of level of review," and § 4336(a)—"Threshold determinations"—provides that an agency "is not required to prepare an environmental document with respect to a proposed agency action" in four situations: where the action "is not a final agency action," § 4336(a)(1); where another provision of law "exclude[s]" it, § 4336(a)(2); where preparing the document "would clearly and fundamentally conflict with the requirements of another provision of law," § 4336(a)(3); or where it is "a nondiscretionary action" for which the agency lacks "authority to take environmental factors into consideration," § 4336(a)(4). 42 U.S.C. § 4336(a). No document is due unless a proposed action clears those control screens.

Such a proposed action must also be a "major federal action." Section 4336e(10)(A) defines "major Federal

action" as one "the agency carrying out such action determines is subject to substantial Federal control and responsibility." 42 U.S.C. § 4336e(10)(A). The definition excludes categories where federal involvement gives the agency no control over the outcome—a non-Federal action "with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project," id. § 4336e(10)(B)(i)(II); enforcement actions, id. § 4336e(10)(B)(v); and "activities or decisions that are non-discretionary," id. § 4336e(10)(B)(vii). That structure is antithetical to the Ninth Circuit's identity-based move. Meeting the bar for such actions turns on the level of control, not on whether a federal entity sits somewhere in the picture.

Further still, a "proposal" itself exists only "at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects." 42 U.S.C. § 4336e(12). That is not every federal step that could possibly have environmental consequences. It is the point at which the agency tasked by Congress with managing the process prepares to choose among alternatives. A regulated party handing materials to another permitting authority has not reached that point nor is it responsible for the permit decision.

B. The statute delineates responsibilities between responsible officials and applicants.

NEPA's detailed-statement requirement directs "the responsible official" to prepare the statement for major federal actions, and provides that the statement and comments "shall accompany the proposal through the

existing agency review processes." 42 U.S.C. § 4332(2)(C). The duty tracks the acting agency's own action and its own review. That is not the Air Force's role in Guam EPA's permit decision. The Air Force may submit information; Guam EPA carries the decision through the RCRA process. NEPA directs compliance only "to the fullest extent possible," § 4332, and not where it would fundamentally conflict with the specific scheme Congress wrote. See *Flint Ridge*, 426 U.S. at 788. Here, that conflict is a usurpation of Guam EPA's congressionally mandated authority over the RCRA permitting process.

Two neighboring provisions confirm this ordering. Section 4334 provides that nothing in § 4332 or § 4333 "shall in any way affect the specific statutory obligations of any Federal agency" to meet environmental-quality standards, to consult with other agencies, or to act on another agency's recommendation or certification. 42 U.S.C. § 4334. Section 4335 further declares NEPA's policies "supplementary to those set forth in existing authorizations of Federal agencies." Id. § 4335. Thus when an agency has been granted the authority to manage a permitting process, NEPA may supplement that authority. But the authorized agency cannot grant its authority to another agency by turning that agency into an applicant.

Prutehi Guahan may answer that current NEPA lets applicants prepare environmental documents, so the Air Force can prepare one here. Section 4336a forecloses that reading. It lets a project sponsor prepare an assessment or impact statement only under the lead agency's supervision, and it requires the lead agency to "independently evaluate" the document and "take responsibility for [its] contents." 42 U.S.C. § 4336a(f). The

section addresses who may prepare a document after the lead agency has found that NEPA requires one. Here, Guam EPA has not made that finding.

C. The amendments confirm the rule; they need not apply retroactively.

The Court need not give the 2023 amendments retroactive force over a 2021 application. The point is threefold. The earlier cases already recognized the same control-and-allocation principle. Any prospective relief—an order to perform NEPA review now—would run under current NEPA. And for future applications, § 4336(a)(1) makes a finality holding dispositive on its own: if an application is not final agency action, no document is due. Old law supplies the result and the current text confirms it.

V. The rule is narrow and leaves ordinary NEPA review intact.

Functional equivalence does not erase NEPA. Formal EA/EIS procedures drop out only when four conditions hold: the other statute governs the same activity and the same environmental decision; Congress supplied a specific permitting process for that activity and decision; the challenged act is part of that process rather than a separate, consummated federal decision; and the plaintiff points to no distinct final major federal action outside the framework. Each condition is a limit from the text and case law that must be met.

So the Court need not decide Clean Water Act § 404 permitting, 33 U.S.C. § 1344; OCSLA leasing, 43 U.S.C. § 1337; FPA hydropower licensing, 16 U.S.C. § 797(e);

ESA consultation, 16 U.S.C. § 1536; NHPA § 106 review, 54 U.S.C. § 306108; federal land transfers; or federal funding today. Many of those programs turn on a federal agency's own permit, approval, consultation, funding, land-use, or licensing decision. Whether Congress has created a specific environmental decision process for those decisions that causes NEPA's generic procedure to yield can be handled individually.

The Clean Water Act's express carve-out, 33 U.S.C. § 1371(c)(1), does not change this. As Part IV explains, § 511(c) shows only what Congress chose for that Act; it does not make an express carve-out the sole route to displacement. *Flint Ridge* displaced NEPA through statutory conflict without one, and *Merrell*, *Siegelman*, and *Western Nebraska* reached the same result on ordinary specific-over-general reasoning.

NEPA thus stays fully available for separate final major federal actions—siting, construction, funding, land transfer, operational approval, federal licensing, or any other decision not subject to a separate statutory environmental decision process—over which the agency holds substantial control. But NEPA does not turn a federal applicant's entry into another statute's permitting process into an antecedent environmental review gate. The Air Force's choice to keep treating waste is not a separate action. That operation is lawful only by virtue of the permit, and § 6961(a) places the United States in the regulated-party role "to the same extent as any person." A regulated applicant cannot authorize its own hazardous-waste treatment; only Guam EPA can. The operative decision is the permit, and the permit is not the Air Force's to provide.

CONCLUSION

The Court should reverse and hold that NEPA's formal EA/EIS procedures are not required before a federal facility submits a RCRA renewal application to the permitting authority, where RCRA governs the same hazardous-waste decision and no distinct final major federal action lies outside that framework.

Respectfully submitted,

TIM HWANG
Counsel of Record
FOUNDATION FOR
AMERICAN INNOVATION
2443 Fillmore Street,
#380-3386
San Francisco, CA 94115
(973) 960-4955
tim.hwang@thefai.org

Counsel for Amici Curiae

May 2026