ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-5294

WESTERN ORGANIZATION OF RESOURCE COUNCILS;
FRIENDS OF THE EARTH,
Plaintiffs-Appellants,

v.

RYAN ZINKE, ET AL.,
Defendants-Appellees,

STATE OF WYOMING; WYOMING MINING ASSOCIATION;
STATE OF NORTH DAKOTA,
Intervenors.

On Appeal from the United States District Court
for the District of Columbia (No. 1:14-cv-01993-RBW)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a)(1), Western Organization of Resource Councils (WORC) and Friends of the Earth (Friends) hereby certify as follows:

(A) Parties and Amici. Plaintiffs-appellants WORC and Friends are not-for-profit non-governmental organizations. WORC and Friends do not have any outstanding shares or debt securities in the hands of the public, or any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Defendants-appellees are Ryan Zinke, the Secretary of the U.S. Department of the Interior; the U.S. Department of the Interior; Michael D. Nedd, Acting Director of the Bureau of Land Management, an agency within the U.S. Department of the Interior; and the Bureau of Land Management.

The State of Wyoming, the State of North Dakota, and the Wyoming Mining Association appeared before the District Court as intervenors.

No amici have appeared before this Court or below.

(B) Rulings Under Review. Plaintiffs-appellants seek review of the District Court's August 27, 2015 Memorandum Opinion and August 27, 2015 Order granting Federal Defendants' Corrected Motion to Dismiss, denying as moot the State of Wyoming's Motion to Dismiss, denying as moot the State of North Dakota's Motion to Dismiss, denying as moot the Wyoming Mining Association's Motion to Dismiss, dismissing the complaint, and ordering that the case be closed. This matter was before U.S. District Judge Reggie B. Walton.

(C) Related Cases. Undersigned counsel is unaware of any related cases before this Court.

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GLOSSARY

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
CEQ	White House Council on Environmental Quality
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
Interior	U.S. Department of the Interior
IPCC	United Nations Intergovernmental Panel on Climate Change
NEPA	National Environmental Policy Act of 1969
PEIS	Programmatic Environmental Impact Statement
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.*, promotes well-informed administrative decisionmaking and public accountability by requiring federal agencies to make an honest accounting of the environmental impacts of their decisions—including an analysis of how alternative policy choices might better protect the environment. Both the Act and its implementing regulations recognize that this accounting will often require a policy-wide or programmatic review, and that changing circumstances or new information may require agencies to supplement or reassess their environmental analyses for ongoing programs. *See, e.g.*, 40 C.F.R. §§1502.20, 1508.25, 1508.28 (regarding "scope" and "tiering" of analyses for "national program[s]"); *id.* §1502.9(c)(1)(ii) (requiring "supplements" to "final environmental impact statements if [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts").

Consistent with these requirements, the Interior Department's Bureau of Land Management (BLM) prepared a programmatic environmental impact statement (or PEIS) for its coal-leasing program in 1979—

promising repeatedly to "update[] [that PEIS] when conditions change sufficiently to require new analyses of [national and interregional] impacts." BLM, Final Environmental Statement: Federal Coal Management Program 3-9 (1979) (1979 PEIS); *see id.* at 3-7, 3-68 (same). And in 1982, when Interior amended regulations related to the program, it reaffirmed that it retained an obligation under NEPA to "revise or update the [1979] Program EIS when its assumptions, analyses and conclusions are no longer valid." 47 Fed. Reg. 33,114, 33,115 (July 30, 1982). This case arose because Interior did not honor that promise, and is now plainly violating the NEPA requirement it identified itself.

In fact, notwithstanding NEPA, its regulations, and its own explicit commitments, Interior has not "revise[d] or update[d]" the PEIS for its coal-leasing program for over three decades. Accordingly, it has never seriously accounted to itself or the public regarding the climate-change contributions of a program that singlehandedly accounts for *eleven percent* of total U.S. carbon emissions. Interior's last statement on the coal-leasing program's climate costs came in 1979, when its PEIS—in the space of one page out of 1300—declared climate change a speculative concern for the "next few centuries" with effects too "uncertain" to quantify

absent further scientific research. Thirty-eight years later, tens of thousands of peer-reviewed scientific studies have identified the causes and consequences of continued atmospheric warming and showed that coal combustion is the single greatest contributor to the growing concentration of greenhouse gases in the atmosphere. The Environmental Protection Agency has formally determined that carbon dioxide and other greenhouse gases are pollutants that "endanger human health and welfare." Simply put, the 1979 PEIS is manifestly stale, and yet Interior remains unwilling to update it, account for the "social cost of carbon" emitted as a result of the coal-leasing program, or consider how alternative, program-level approaches to its ongoing leasing decisions might affect U.S. contributions to global warming.

That is not because such an analysis would be futile or there are no remaining federal policy decisions that might be influenced by a better understanding of the coal-leasing program's environmental costs. Indeed, in 2015, while this appeal was pending, Interior Secretary Sally Jewell recognized that there had been significant changes in circumstances and the state of climate science and halted issuance of new leases under the program until a supplementary PEIS could be developed—one

that included an analysis of alternative approaches that might "address[] the coal program's impact on the challenge of climate change." BLM, Federal Coal Program PEIS Scoping Report at ES-4, ES-5 (2017) (Scoping Report) (discussing, *inter alia*, royalty increases to account for carbon externalities and leasing based on a "carbon budget"). That effort was short-circuited only because incoming Interior Secretary Ryan Zinke ordered that "[a]ll activities associated with the preparation of the Federal Coal Program PEIS shall cease," and directed BLM to immediately lift Secretary Jewell's "pause" on leasing activity. Secretarial Order No. 3348, at 1-2 (Mar. 29, 2017). Clearly, significant policy decisions remain—and are *being made*—under this important and ongoing federal program.

The question for this Court's *de novo* review is whether NEPA and the Administrative Procedure Act (APA) permit Interior's renewed and continuing refusal to update its PEIS to account for how this ongoing program may be contributing to climate change. The easy answer is no. If the law ever requires an agency to update an environmental impact statement—and the Supreme Court has made clear that it does, *see Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)—then it does so

here. When Interior last assessed the impacts of its coal-leasing program at a policy level, it thought climate change caused by carbon emissions was a speculative and unquantifiable concern. Now, many consider it the defining environmental-protection challenge of our time: It is the subject of high-profile international agreements; the U.S. government itself has declared that greenhouse gases endanger public health and the environment; and the government has even developed a metric (the "social cost of carbon") to use in quantifying the harms they cause.

Transparency about environmental costs in agency decisionmaking is NEPA's fundamental objective. And, here, asking Interior to honor its NEPA obligation requires no more than the program-level update the *agency itself promised* when it first issued this PEIS several decades ago. The district court erred in permitting Interior to escape its NEPA and APA obligations. This Court should so hold, and reverse.

JURISDICTION

The district court had original jurisdiction under 28 U.S.C. §1331. This Court has appellate jurisdiction under 28 U.S.C. §1291. This appeal from the district court's August 27, 2015, order was timely noticed on October 26, 2015.

ISSUES PRESENTED

1. Are defendants obligated by NEPA to update the PEIS for the federal coal-leasing program, for the first time since 1985, to account for the significant new information that is now available about the effects of that program on greenhouse gas emissions and climate change?

2. Are defendants obligated by the APA to honor their own repeated commitments—in multiple regulatory settings—to update the coal-leasing program's PEIS to account for such new information?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

I. Statutory Background

The purpose of NEPA is to "'foster excellent action'"—rather than "'excellent paperwork'"—through well-informed agency decisionmaking. *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017). "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."

40 C.F.R. §1500.1(c).[1] Thus, the "twin aims" of NEPA are to (1) oblige the agency "to consider every significant aspect of the environmental impact" of its actions, and (2) "ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

To meet these aims, NEPA requires an agency to prepare an environmental impact statement (or EIS) whenever it undertakes a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Each EIS must address, among other things, "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." *Id.* §4332(2)(C)(iv).

In addition to direct and indirect effects, 40 C.F.R. §1508.8, EISs must address any cumulative impact of a major federal action, defined as the overall impact that "results from the incremental impact of the action

[1] The White House Council on Environmental Quality (CEQ) has issued implementing regulations for NEPA, which are entitled to "substantial deference." *Marsh*, 490 U.S. at 372.

when added to other past, present, and reasonably foreseeable future actions." *Id.* §1508.7; *see also id.* §1508.25 (requiring EISs to address "connected," "cumulative," and "similar" actions); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308, 1319-20 (D.C. Cir. 2014).

Accordingly, the environmental impacts of a "national program" should be addressed in a program-level EIS (also called a programmatic EIS or PEIS). 40 C.F.R. §1508.28. This prevents duplication and facilitates cumulative analysis where, for example, the major federal action at issue is a general, nationwide program that also encompasses numerous localized, project-level decisions. *Id.* Regulations thus "encourag[e]" agencies to "tier" environmental impact statements by preparing a PEIS to cover "general matters" for a "national program or policy" with "subsequent narrower statements … concentrating solely on the issues specific to" particularized decisions arising thereunder, such as "site-specific statements" for localized matters. *See id.* §§1502.20, 1508.25, 1508.28.

To force agencies to consider up-to-date information on both the major federal action itself and its environmental effects, NEPA requires a supplemental EIS regarding any "significant new circumstances *or information* relevant to environmental concerns and bearing on the proposed

action *or its impacts*." *Id.* §1502.9(c)(1)(ii) (emphases added). This requirement continues to apply so long as the "remaining governmental action would be environmentally 'significant.'" *Marsh*, 490 U.S. at 372. In other words, "[i]f there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner *or to a significant extent not already considered*, a supplemental EIS must be prepared." *Id.* at 374 (quoting 42 U.S.C. §4332(2)(C)) (emphasis added). As both Congress and the Supreme Court have emphasized, this "action-forcing" requirement to keep environmental impact information fresh and timely to the decisions facing an agency "ensures that the environmental goals set out in NEPA are 'infused into the ongoing programs and actions of the Federal Government.'" *Id.* at 370-72 & n.14 (quoting 115 Cong. Rec. 40,416 (1969)).

II. Factual Background

The Mineral Leasing Act, 30 U.S.C. §181 *et seq.*, empowers Interior to lease rights to coal on public lands through a competitive bidding process. BLM has prepared two PEISs on federal coal-leasing programs implementing this authority—first in 1975, and again in 1979, when it

adopted the program in place today. Interior has repeatedly committed to updating these PEISs whenever the circumstances addressed therein might change, and it followed through on this commitment once by issuing a supplemental PEIS in 1985. Compl. ¶¶60, 73, 82. It has not issued a supplemental PEIS in the 32 years since, however, though much of course has changed. Compl. ¶¶16, 80-84.

Critically, none of these PEISs—all created near the outset of the coal-leasing program—have ever seriously addressed the cumulative impacts of extracting and burning federal coal on the phenomenon of climate change. Compl. ¶81. That is unsurprising, because scientific analysis of this issue was in its infancy at the time these PEISs were initially promulgated. The result is that much of the little they say on climate concerns is either manifestly incorrect or entirely out of date.

A. The 1975 PEIS

In 1973, following reports of rampant speculation among federal coal lessees, Interior announced a new coal-leasing program. It analyzed the environmental implications at the programmatic level, and issued a final PEIS in 1975. Interior, Final EIS: Proposed Federal Coal Leasing Program (1975) (1975 PEIS); *see generally NRDC v. Hughes*, 437 F. Supp.

981 (D.D.C. 1977). The 1975 PEIS did not consider greenhouse gas emissions caused by the mining or use of coal for any purpose. Instead, it contained only the following conclusory (and plainly incorrect) statement on "Climate and Air":

> Theoretically, properly conducted coal operation[s] should have *no irreversible or irretrievable effects upon the atmospheric resource*. Corrective measures required by coal lease terms should reduce adverse effects to a level within the natural capacity of the atmosphere to purify itself. In the interim, operating equipment will consume oxygen, and carbon dioxide and other gases will be released into the atmosphere.

1975 PEIS at 7-3 (emphasis added); Compl. ¶54.

This PEIS was later held inadequate under NEPA for unrelated reasons. *Hughes*, 437 F. Supp. at 990-91. In the interim, however, the Supreme Court recognized that a national-level, *programmatic* EIS was required by NEPA for the coal-leasing program because it "is a coherent plan of national scope" with "significant environmental consequences." *See Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976).

B. The 1979 PEIS

Shortly thereafter, Congress passed the Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083, which re-

quired BLM to consider new implementing regulations. Citing "significant changes in statutory and Presidential policy and in available data," BLM elected to prepare an entirely new PEIS, rather than supplement the 1975 PEIS. 1979 PEIS at 1-13. The 1979 PEIS analyzed the programmatic, environmental consequences of seven alternative options for a federal coal-leasing program, including a preferred alternative that was ultimately chosen and remains mostly in place today. *Id.* at 1-2; Compl. ¶58.

Beyond its environmental analysis of the coal-leasing program, the 1979 PEIS charted two separate ways BLM would maintain and continue that analysis going forward. First, consistent with the regulations discussed above, *supra* pp.8-9, and the Supreme Court's observation in *Kleppe*, *supra* p.11, BLM adopted a tiered approach, with a PEIS to consider program-wide issues, and site-specific EISs to follow, analyzing the narrower, localized impacts of individual leases. 1979 PEIS at 3-68. Second, and separately, BLM committed to "update" the PEIS itself "when conditions change sufficiently to require new analyses of [national] impacts." *Id.* at 3-9; *see id.* at 3-7, 3-68 (same).

As to substance, the 1979 PEIS contained 1300 pages of analysis, but only about one page of text in any way relevant to climate-change concerns. Predictably, that minimal discussion relied on now woefully incomplete and out-of-date information. Compl. ¶¶62-65. And it focused almost exclusively on emissions from coal extraction and transportation rather than combustion—when nearly all greenhouse emissions occur. *See* 1979 PEIS at 5-88, 5-97, 5-107.

In general, the 1979 PEIS described climate change as a merely theoretical problem of the far-distant future, needing much further scientific research before being treated as a serious concern, let alone a quantifiable one. 1979 PEIS at 5-88. Thus, while it noted that "there are indications that the rising CO_2 levels in the atmosphere could pose a serious problem, commonly referred to as the greenhouse effect," it emphasized that great scientific uncertainty remained, and treated the effects as essentially unpredictable:

> The National Research Council concluded that the primary limit on energy production from fossil fuels during the next few centuries may be the climatic effects associated with the release of carbon dioxide. Generally there are uncertainties about the carbon cycle, the net sources of carbon dioxide in the atmosphere, and the net effects of carbon dioxide on temperature and climate.

Id. at 5-88 & n.1. Importantly, the 1979 PEIS treated what was then known about such climate-change concerns only as a reason for *further study*. For example, it asserted that the "impacts of increased coal utilization should be studied on a world-wide basis since even a 2° to 3°C global temperature rise could have profound climatic effects." *Id.* at 5-107. And while that call for study allowed it to dispense with serious analysis at the time, it presumably meant that further information about the risk of "profound climatic effects" would lead to further analysis of the program's environmental consequences in the future.

Meanwhile, the limited analysis Interior did perform in 1979 shows only how little it then knew about the effects greenhouse emissions would have on the carbon cycle and the climate. *See id.* (citing "uncertainty" about the "fate … of carbon dioxide released to the atmosphere," "factors like the effects on carbon dioxide production of forest clearing and the mechanisms for carbon dioxide removal from the atmosphere," and "the extent to which greater utilization of fossil fuels, especially coal, will contribute to atmospheric carbon dioxide levels"). *Id.* Indeed, that analysis reflects not only Interior's limited understanding of the "fate" of atmospheric carbon dioxide in 1979, but also an acknowledged need for updates

in light of then-uncertain predictions about future fossil fuel consumption.[2]

C. 1982 Program Regulation Amendments

In 1982, BLM issued a final rule amending certain implementing regulations for the coal-leasing program. 47 Fed. Reg. 33,114 (July 30, 1982). These minor changes preserved the program's "essential features." *Id.* Importantly, however, in making these changes, BLM again affirmed its obligation to update the 1979 PEIS in response to changing circumstances or additional information about the coal-leasing program's environmental impacts. Responding to comments criticizing the removal of proposed language on the obligation to update, BLM explicitly affirmed that NEPA itself required the same updates and that the language change would thus have no effect on the agency's obligations:

> Regardless of whether this provision is deleted or retained, the Department *must revise or update* the [1979] Program EIS *when its assumptions, analyses and conclusions* are no longer valid. … For these reasons, the Department has decided to delete this provision in the final rulemaking, *while recognizing that its obligations under [NEPA] remain unchanged*.

[2] The 1979 PEIS also included statistics on projected regional greenhouse emissions under certain scenarios. *See id.* at 5-104, 5-111.

Id. at 33,115 (emphases added). The 1982 rulemaking thus reaffirmed the continuing applicability of the 1979 PEIS to this ongoing program and BLM's obligation to update that PEIS if its "assumptions" or "analyses" were later invalidated by, for example, new information about how the program's carbon emissions might affect the environment. *Id.*; Compl. ¶71.

D. The 1985 Supplemental PEIS

In October 1985, Interior issued the only supplemental PEIS it has ever performed for its coal-management program. *See* BLM, Final EIS Supplement: Federal Coal Management Program (1985) (1985 SEIS); Compl. ¶73. Citing both proposed changes and changed economic and environmental conditions, the Secretary determined that a supplemental PEIS was necessary. 1985 SEIS at 3. The 1985 SEIS was "prepared to analyze the cumulative impacts of managing federal coal under a modified existing program and three alternative programs." *Id.* at 15. Tellingly, however, it contained no analysis whatsoever of the cumulative contributions of the coal-leasing program to greenhouse emissions or climate change.

By preparing a supplemental PEIS, BLM acknowledged that the program was a continuing major federal action. Compl. ¶76. But while the "primary emphasis" of the 1985 SEIS was on leasing activity "within the five regions and one subregion where BLM-initiated leasing w[as] most likely … in the next few years," 1985 SEIS at 16, it did not even address the potential effects on climate from the various regional leasing alternatives at issue, let alone address the program as a whole. Instead, like the 1975 PEIS, its sole relevant statement incorrectly projected *no* irreversible or long-term impacts on air quality. *Id.* at 319.

E. Coal Leasing Today

Many of the coal-leasing program's governing regulations remain essentially unchanged from 1979. *See* 44 Fed. Reg. 42,584 (July 19, 1979); Compl. ¶¶47-51. The 1979 rulemaking set forth two primary leasing procedures. Under the first—"regional leasing"—BLM leases tracts based on recommendations from one of ten Interior regional coal teams. Under the second—"leasing by application"— industry identifies where and how much coal it wants to lease. BLM did not limit the amount of coal offered for competitive sale under the latter procedure. *See, e.g.*,

44 Fed. Reg. at 42,588, 42,594-95; *see also WildEarth Guardians v. Salazar*, 783 F. Supp. 2d 61, 73 (D.D.C. 2011) (holding that the program assessed by the 1979 PEIS includes both regional leasing and leasing by application).

While the regulations have changed little since 1979, BLM continues to make myriad decisions regarding the program's management, influenced by both the overarching regulations and its discretionary balancing of program goals. These include decisions about how much coal to lease, how to price leases, and how to balance various programmatic policy aims—including both the creation of "domestic sources of minerals" and the protection of "ecological, environmental, air and atmospheric … values." 43 U.S.C. §1701(a)(8), (12).

Accordingly, BLM continues to update its guidance and procedures under the program. For example, BLM issued new manuals and handbooks and developed additional trainings on lease valuation for its personnel in response to separate audits by the Office of the Inspector General and the Government Accountability Office in 2013-2014. *See, e.g.*, Scoping Report 2-1, 5-8, 6-3 (citing audit reports). Such changes reflect

the agency's active, ongoing management of the program and that it remains a major federal action with continuing (and evolving) economic and environmental implications.

F. Progress In Climate Science

It is difficult to overstate how far the scientific community has come since 1979 in researching and understanding the causes and effects of global climate change and greenhouse gas emissions. Countless studies now provide a robust scientific understanding of the imminence, certainty, human causation, and potentially devastating effects of climate change—as well as the causative role of coal combustion in the process. *See* Compl. ¶¶95-181.

The United Nations Intergovernmental Panel on Climate Change (IPCC), made up of climate science experts from around the world, issued its first report in 1990—five years *after* the last update to the coal program's PEIS—and it has since issued four more, each conveying greater certainty that man-made emissions are causing unprecedented warming of the world. In its latest report, issued in 2013, the IPCC found "unequivocal" evidence of global warming, primarily resulting from increased CO_2 emissions, Compl. ¶114, which are in turn primarily attributable to

fossil fuel combustion, *id.* The Panel's work was awarded the Nobel Peace Prize in 2007, and helped lead to nearly every nation on Earth joining the Paris climate accord in 2016.

Consensus surrounding the core issues of carbon pollution and climate change is not limited to international bodies. A recent U.S. National Climate Assessment, authored by over 300 experts from the public and private sectors and reviewed by the National Academy of Sciences, the 13 Federal agencies of the U.S. Global Change Research Program, and other bodies, observed that:

> Evidence for climate change abounds, from the top of the atmosphere to the depths of the oceans. Scientists and engineers from around the world have meticulously collected this evidence, using satellites and networks of weather balloons, thermometers, buoys, and other observing systems. Evidence of climate change is also visible in the observed and measured changes in location and behavior of species and functioning of ecosystems. Taken together, this evidence tells an unambiguous story: the planet is warming, and over the last half century, this warming has been driven primarily by human activity.

Compl. ¶2.

Similarly, the ever-growing scientific consensus on climate change and its causes is reflected in not only international policy, but also federal domestic policy. In 2009, EPA determined that carbon dioxide and five

other greenhouse gases constituted pollutants under the Clean Air Act because they endanger public health and the environment. *See* Compl. ¶109; 42 U.S.C. §7521(a)(1). Reviewing "thousands of individual studies on various aspects of greenhouse gases and climate change," *Coal. for Resp. Regulation v. EPA*, 684 F.3d 102, 119 (D.C. Cir. 2012) (per curiam), EPA investigated "how elevated concentrations of the well-mixed greenhouse gases and associated climate change affect public welfare by evaluating numerous and far-ranging risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure, and settlements, and ecosystems and wildlife." 74 Fed. Reg. 66,496, 66,498 (Dec. 15, 2009). "For each of these sectors," it concluded that "the evidence provides support for a finding of endangerment to public welfare." *Id.*; Compl. ¶110.

In 2010, a federal interagency working group first established a measurement for the "social cost of carbon" for use in cost-benefit and NEPA analyses, allowing agencies like Interior to quantify (or "monetize") the negative externalities that various program choices impose on U.S. citizens through carbon and other greenhouse gas pollution. *See, e.g.*, Inst. for Policy Integrity, Social Costs of Greenhouse Gases (2017),

http://policyintegrity.org/files/publications/Social_Cost_of_Greenhouse_Gases_Factsheet.pdf; Compl. ¶161.[3]

Meanwhile, it has become clear that the coal-leasing program is among the greatest single contributors to U.S. greenhouse emissions. We now know, for example, that coal combustion alone accounted for 24.4% of total U.S. carbon emissions in 2012. Compl. ¶97. Coal mined on federal lands accounted in turn for 42.1% of all 2012 U.S. coal sales. Compl. ¶100. Methodologies adopted by the IPCC, EPA, and others show that combustion of coal from the federal program in 2012 released approximately 724 million metric tons CO_2 equivalent—eleven percent of total U.S. greenhouse emissions that year. Compl. ¶101. The government's

[3] Notably, much of the foregoing information that agencies and the public would use to assess the costs of climate change has recently disappeared from EPA's website. Comparisons of the current site to the version that existed on January 19, 2017 are arresting. *Compare* https://19january2017snapshot.epa.gov/, *with* https://www.epa.gov. Among other things, "climate change" no longer appears among the site's main list of "environmental topics," *compare* https://19january2017snapshot.epa.gov/environmental-topics_.html, *with* https://www.epa.gov/environmental-topics; the preexisting page on "Climate Change Impacts," *see* https://19january2017snapshot.epa.gov/climate-impacts_.html, has been deleted, and the formal documents on the "social cost of carbon" metric are unavailable.

own, previously adopted "social cost of carbon" analysis would conservatively estimate the monetized cost of the societal damage caused by those emissions at approximately $8-$40 *billion*.

Of course, these government meta-analyses only summarize a vast body of research that was unavailable or unimaginable when the 1979 PEIS and the 1985 SEIS were issued. As a very rough metric, Google Scholar returns 837,000 entries for "climate change" since 1985.

III. Procedural History

On November 24, 2014, appellants filed a complaint alleging that BLM was violating NEPA and the APA by failing to update its PEIS for the coal-leasing program to account for significant new information about its climate-change impacts. Compl. ¶¶187-97. Relying on the latest IPCC report and the 2013 National Climate Assessment, among other studies, appellants pointed to a huge increase in the scientific information identifying the contribution that mining and burning federal coal was making to global climate change. Compl. ¶¶96-101. They also identified vastly improved information on the effects of climate change itself, including direct physical effects (¶¶123-29), human health effects (¶¶130-37), effects from higher atmospheric temperatures (¶¶138-52),

economic impacts (¶¶153-70), and national security implications (¶¶171-81). This new information causally links greenhouse emissions to human deaths and illnesses associated with increased average temperatures; increased risk of extreme weather events such as hurricanes, floods, wildfires, and droughts; increased severity of coastal storm events due to rising sea levels and warming seas; changes in aeroallergens; and increased risk of pathogen-borne diseases. Compl. ¶111. Appellants requested an order directing Interior and BLM to comply with NEPA by supplementing the 1979 PEIS and 1985 SEIS, and enjoining any action on new or modified leases under the program until they did so. Compl. pp.65-66.

In January 2015, the defendants moved to dismiss, asserting that they had no legal duty to supplement under NEPA or the APA. Doc. 13-1 at 9-12. North Dakota, Wyoming, and the Wyoming Mining Association intervened, Docs. 10, 17, 22, and likewise moved to dismiss, Docs. 18, 38, 39.

The district court (Walton, J.) granted the federal defendants' motion and dismissed. Doc. 42 (Op.). It reasoned that "because the federal coal management program has been implemented" already, appellants had not pointed to any "underlying 'proposed action'" that would "trigger

an obligation to supplement the 1979 EIS." Op. 6. Essentially, the court held that no major federal action remained subject to decision, mooting any further environmental analysis. Op. 8. Accordingly, though Interior had repeatedly pledged to update the 1979 PEIS—thereby acknowledging that this was a continuing program that could require updated analysis for new information under 40 C.F.R. §1502.9(c)(1)(ii)—the court held that "[o]nce the federal coal management program went into effect [in 1979], the proposed federal action came to an end." Op. 8. The court denied that continued leasing decisions under the program constituted "ongoing 'major [f]ederal action'" for purposes of the governing precedents, apparently believed that the sole actions remaining were "purely ministerial," and thus concluded that even "the *possibility* of major federal action remaining here was foreclosed after the [program] was implemented in 1979." *Id.* (emphasis added).

While this appeal was pending, however, Secretary Jewell issued an order providing the result appellants sought. She directed BLM to "pause" all activity on "new applications for thermal (steam) coal leases or lease modifications," while preparing a "broad, programmatic review of the Federal coal program it administers through the preparation of a

PEIS under NEPA." Secretarial Order No. 3338, at 7, 9 (Jan. 15, 2016). She noted that "the existing regulatory and programmatic scheme for leasing that coal … was established at a time when market conditions, environmental concerns, and energy infrastructure were considerably different from today," *id.* at 1, and that "[n]umerous scientific studies" since the program's PEIS was last updated "indicate that reducing [greenhouse] emissions from coal use worldwide is critical to addressing climate change." *Id.* at 4. Secretary Jewell thus determined that, although Interior had conducted "two separate comprehensive reviews of the Federal coal program"—the 1979 PEIS and 1985 SEIS, *id.* at 5—"a more comprehensive, programmatic review [wa]s in order," given the "lack of any recent analysis of the Federal coal program as a whole," *id.* at 6. While claiming that her action was "discretionary," Secretary Jewell directed that "the PEIS should examine how best to assess the climate impacts of continued Federal coal production and combustion and how to address those impacts in the management of the program to meet both the Nation's energy needs and its climate goals." *Id.* at 8-9.

After BLM published a notice of intent to prepare a PEIS, 81 Fed. Reg. 17,720 (Mar. 30, 2016), this Court granted a joint motion to hold this

appeal in abeyance. *See* ECF No. 1619174. Public participation in the subsequent "scoping process" for the PEIS was robust. BLM held several public meetings across the country and received over 200,000 comments. Joint Status Report, ECF No. 1660492 at 1-2 (Feb. 9, 2017). BLM also received five petition letters with a total of 91,567 signatures. *Id.* On January 11, 2017, it released a two-volume "Scoping Report," exceeding 1300 pages with appendices.

The Scoping Report characterized the program as a unified, continuing program begun in the 1970s. It noted that its environmental effects had not been examined in decades:

> The last time the Federal coal program received a comprehensive review was in the mid-1980s, and most of the existing regulations were promulgated in the late 1970s and have been only slightly modified since that time. The direct, indirect, and cumulative impacts of the Federal coal program have not been fully analyzed under [NEPA] in over thirty years.

Scoping Report at ES-2.

Based on the input of thousands of written and oral comments at its outreach meetings, BLM concluded that "modernization of the Federal coal program is warranted." *Id.* at ES-4. The agency noted that although "energy markets, communities, environmental conditions, and national priorities have changed dramatically, the program has remained fairly

static in its administration over the last thirty years." *Id.* As part of the review, BLM focused on "addressing the coal program's impact on the challenge of climate change." *Id.* Accordingly, the report considered "reform options" to address climate-change concerns, including: accounting for carbon-based externalities through a royalty-rate increase or "adder"; requiring compensatory mitigation for greenhouse emissions; leasing based on a "carbon budget"; incentives for methane capture; and eliminating new leasing. *Id.* at ES-4, ES-5. These various alternatives indicate Interior's active role in ongoing and continuous leasing, the Secretary's discretion in administering the program, and the remaining—indeed, persistent—"*possibility* of major federal action" under the program. *Contra* Op. 8 (emphasis added).

On March 29, 2017, however, incoming Secretary Zinke ordered an immediate halt to "[a]ll activities associated with the preparation of the Federal Coal Program PEIS" and lifted the "'pause'" on new leasing Secretary Jewell had implemented. Secretarial Order No. 3348, at 1-2. President Trump contemporaneously signed an executive order directing CEQ to rescind its guidance for federal departments and agencies on the consideration of greenhouse gas emissions in NEPA reviews, disbanding

the Interagency Working Group on Social Cost of Greenhouse Gases, and withdrawing the documents implementing the "social cost of carbon" tool for regulatory impact analysis. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

On May 26, 2017, appellants filed an unopposed motion to end the abeyance and establish a briefing schedule. ECF No. 1677083. The Court granted the motion and this appeal follows.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011). In review of a motion under Rule 12(b)(6), the court "must treat the complaint's factual allegations as true, and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

NEPA's fundamental aim is transparent and informed administrative decisionmaking regarding the environmental consequences of agency action. Interior's refusal to update the manifestly stale discussion of climate change and greenhouse emissions from its nearly four-decade-

old, 1979 PEIS is fundamentally inconsistent with that goal. Interior continues to actively manage the ongoing coal-leasing program, and continues to make important policy decisions about how to do so. NEPA, its implementing regulations, and squarely applicable Supreme Court precedent require that this ongoing management be informed by a supplemental PEIS that accounts for the program-level effects of federal coal leasing on greenhouse emissions and climate change. *See infra* Part I.

As the Supreme Court explained in *Marsh*, 490 U.S. at 371-74, NEPA's duty to supplement an EIS applies when "remaining governmental action would be environmentally 'significant,'" the agency retains an "opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment," and "new information is sufficient to show that the remaining action will 'affect the quality of the human environment' … to a significant extent not already considered." Interior's continuing management of the coal-leasing program easily brings this case within that test because—among other things—we now know that continued authorization of leases to extract (and then burn) federal coal is "affect[ing] the quality of the human environment … to a significant extent not already considered." The climate-change implications of that

ongoing action are substantial and should now be informed by 38 years of research that Interior expressly *called for* in its 1979 PEIS, but has never considered in a supplemental programmatic analysis. *Marsh* forbids this result, as does the plain text of the governing regulation, which requires a supplemental EIS to account for "significant new … information relevant to environmental concerns and bearing on the proposed action *or its impacts*." 40 C.F.R. §1502.9(c)(1)(ii) (emphasis added). Interior's multiple acknowledgements of its duty to update the 1979 PEIS further reinforce this straightforward conclusion. And the district court's contrary analysis depends on cases that do not (like this case) involve active federal management of a major, ongoing program.

Separately, Interior's unambiguous commitments to update the 1979 PEIS represent an independent basis to reverse. *See infra* Part II. Throughout the rulemaking and early PEIS process, Interior committed over and over again to updating its PEIS if new information emerged that undermined its assumptions, analyses or conclusions. Interior now plainly has such new information in hand. It cannot make such a clear commitment and then disavow it according to its whims. Interior has promised repeatedly that the 1979 PEIS would be updated to account for

situations just like this one, and the courts must hold it to that promise under the APA.

ARGUMENT

I. The Coal-Leasing Program's Ongoing Nature Requires Updating Its PEIS To Account, Under NEPA, For New Information Or Changed Circumstances.

A. NEPA's supplementation requirement applies where, as here, environmentally significant government action remains under an ongoing program.

NEPA's requirement to prepare a supplemental EIS is a central bulwark of the Act's approach to ensuring informed governmental decisionmaking and public transparency. As the Supreme Court explained in *Marsh*, "[i]t would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action." 490 U.S. at 371. Accordingly, the Court laid out a pragmatic, environmental-impacts-based test to determine when an agency is required to supplement an already-issued EIS based on new information: "[W]hen the remaining governmental action would be environmentally 'significant,'" NEPA's duty to supplement an EIS applies. *Id.* at 372. Put otherwise, the duty to supplement continues to apply "up to th[e] point"

when the agency "'would no longer have a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment.'" *Id.*; *see also TVA v. Hill*, 437 U.S. 153, 188 n.34 (1978) ("NEPA cases have generally required agencies to file [an EIS] when the remaining governmental action would be environmentally 'significant.'").

The district court's holding below, however, ignored *Marsh*'s test altogether. Instead, the court adopted the hyper-technical view that the sole "federal action" subject to NEPA analysis in the coal-leasing program was *adopting the regulations* relating to the program, rather than the continued operation of the *program* those regulations created. According to the court, BLM's program-level NEPA duties thus ended the minute BLM issued the implementing regulations in 1979—before *any* environmental effects had occurred, and notwithstanding *any* of the ways in which changing circumstances or new information about the program's operation could affect how BLM might choose to manage it.

Such a cramped view would render NEPA review the "paperwork" formality condemned by this Court, *see supra* p.6, and make it all too easy for agencies to evade the "'action-forcing' purpose" at NEPA's core.

Marsh, 490 U.S. at 371. Having long-ago blessed a program's initial implementation based on decades-old information, an agency could willfully blind itself to that ongoing program's environmental consequences, and thereby refuse to consider the environmental costs and benefits of either changing the program or exercising whatever discretion it retains in implementing it. This is exactly the restoration of environmental "blinders" that *Marsh* forbids.

Here, there are several easy ways to see that, long after the 1979 adoption of the coal-leasing program's regulations, "environmentally significant" decisions plainly remained and could have been informed by fresh environmental analysis. *Id.* at 371-72. The most vivid, however, may be the various alternatives to managing the program that BLM *itself* proposed to consider as part of the recent, voluntary review undertaken by Secretary Jewell. The changed approaches BLM proposed to analyze—including pricing leases by incorporating some of the externalized cost of carbon pollution—plainly represent the "*possibility* of major federal action," after 1979. *Contra* Op. 8. And that suffices to bring this case within *Marsh*'s test.

The district court was plainly wrong to suggest that the various choices BLM must make in whether and how to grant new leases and manage existing ones are "purely ministerial," *see supra* p.25. Likewise, both the moratorium on new leases Secretary Jewell ordered and Secretary Zinke's subsequent decision to lift it show the substantial power Interior retains in managing the program, and the active policymaking transpiring within it. So, too, do the updated guidance, manuals, and trainings BLM adopted in recent years in response to two separate audits in 2013 and 2014. *See supra* p.18. Each of these represent ways in which BLM very actively manages the coal-leasing program, rather than simply following the inexorable commands of the 1979 regulations.

Indeed, in addition to issuing new leases, BLM and other Interior agencies conduct various pre- and post-lease activities under the coal-leasing program, including (among other things) reviewing and approving operations and reclamation plans, inspecting mines on a quarterly basis, and reviewing and approving applications to modify existing leases. BLM, Coal, Background, https://www.blm.gov/programs/energy-and-minerals/coal/background; BLM, Coal, Lease Management, https://www.blm.gov/programs/energy-and-minerals/coal/lease-manage-

ment. These responsibilities, which lead directly to the mining and burning of federal coal, demonstrate the myriad "environmentally significant" steps the agency continues to take under the program, which cannot be dismissed as merely ministerial. *Marsh*, 490 U.S. at 371-72.

In fact, had the 1979 PEIS been prepared solely to address the *promulgation* of the 1979 framework regulations, as the district court held, then BLM's own commitment to update that analysis to address changing conditions would have been nonsensical. Under the court's reasoning, the 1979 PEIS analyzed a specific and non-continuing action that concluded the moment the regulations were issued—immediately extinguishing BLM's NEPA duties. But if that were true, "conditions" surrounding the 1979 PEIS could never change sufficiently to require an update. BLM clearly saw things differently, however—both in 1979, when it committed to update the PEIS, and in 1985, when it did so.

Indeed, the very text of the 1979 regulations dispels the notion that the only major federal action analyzed by the 1979 PEIS was mere promulgation of the regulations themselves. Those regulations required BLM to update the 1979 PEIS if one of a number of criteria were met, including if actual "*levels or types of environmental impacts*" differed significantly

from those "anticipated" in the 1979 PEIS. *See* 44 Fed. Reg. at 42,620 (§3420.3-4) (emphasis added); *supra* pp.15-16 (discussing BLM's commitment to update PEIS when amending this regulation in 1982). By definition, such a criterion can only be satisfied when conditions change *after* the promulgation of the regulations themselves. And, of course, later emerging evidence about a far-more-immediate climate threat than the agency could possibly have contemplated in 1979 clearly meets it.

The other criterion BLM set for supplementing its 1979 PEIS—*i.e.*, if regional production goals and leasing targets varied significantly from those analyzed in the 1979 PEIS—likewise undercuts the idea that its NEPA duties were extinguished upon promulgation of the regulations. *See* 44 Fed. Reg. at 42,620. Instead, both criteria vividly demonstrate that the agency *itself* did not believe its major action was complete in 1979.

Furthermore, the huge scale of the coal-leasing program and its continuing operations also indicate that it is an ongoing program of "environmentally significant" consequence, requiring a supplemental PEIS

under *Marsh*. As the following table shows, the federal defendants continue to issue new leases under the program (and conduct the other activities discussed above) with no end in sight.

Fiscal Year	New lease sales	Existing leases	Fiscal Year	New lease sales	Existing leases
1990	6	489	2003	2	304
1991	8	470	2004	6	297
1992	3	474	2005	9	291
1993	3	432	2006	5	289
1994	5	435	2007	5	294
1995	7	417	2008	2	297
1996	3	386	2009	3	297
1997	10	368	2010	1	296
1998	4	354	2011	4	304
1999	4	347	2012	6	308
2000	3	309	2013	2	309
2001	2	313	2014	1	308
2002	4	308	2015	2	306

BLM, Coal Data: National Coal Statistics Table, https://www.blm.gov/programs/energy-and-minerals/coal/coal-data. It blinks reality to describe such a massive, ongoing government undertaking as having been essentially "complete" over three decades ago.

In sum, rather than require BLM to consider the real-world impacts of the *ongoing* mining, transportation, and burning of coal that results

from the program created by the 1979 regulations, the district court allowed the agency to bury its head in the sand through an overly formalistic reading of NEPA's supplementation requirement. It thus ignored NEPA's objective of ensuring that an agency actually consider all relevant information so long as the agency has "'a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment.'" *Marsh*, 490 U.S. at 372. The practical realities of the program—including new leasing; active audits and changes to guidance; supervision of hundreds of active leases; and the creation and lifting of a major "pause" on agency leasing activity—make plain that major consequential decisions remain, and fresh analysis of the program's environmental effects could surely be useful in the agency's continued "'*weigh*[*ing* of] the benefits of the project versus the detrimental effects on the environment.'" *Id.* Under *Marsh*, that is enough to know that NEPA's supplementation requirement continues to apply—at least where, as here, "significant new information" has come to light showing environmental harms of an "extent not already considered" in the previous PEIS. *Id.* at 374.

This is not the only aspect of *Marsh* the district court ignored, however. *Marsh* also explicitly cautioned against agencies willfully ignoring negative environmental effects discovered after an EIS is written but prior to the completion of agency action. The *Marsh* Court noted that it would conflict with NEPA's objectives to allow the agency to blinder itself "simply because the relevant proposal has received initial approval." 490 U.S. at 371. Here, however, promulgation of the 1979 regulations is precisely the kind of "initial approval" the Court warned should *not* cut off NEPA's duty to supplement, and the agency's actions here amount to the exact kind of willful blindness *Marsh* decried. Interior cannot continue to actively manage its leasing program while freezing its consequences to those known 38 years ago. The district court thus essentially adopted the opposite approach to ongoing programs from the one the Supreme Court requires.

Nor is *Marsh* the only aspect of the law the district court overlooked; it also failed to address the plain text of the governing NEPA regulation itself. It quoted the key provision, noting that the regulation imposes a duty "to supplement an EIS only where the agency plans on mak-

ing 'substantial changes [to] the *proposed action* that are relevant to environmental concerns' or where 'there are significant new circumstances or information relevant to environmental concerns and bearing on the *proposed action* or its impacts.'" Op. 6 (quoting 40 C.F.R. §1502.9(c)(1)(i)-(ii)). But the court's misplaced emphasis on the "proposed action" simply misses the straightforward application of this governing text to this case. NEPA's regulations explicitly require updating an EIS based on "significant new … information relevant to environmental concerns and bearing on the proposed action *or its impacts*." 40 C.F.R. §1502.9(c)(1)(ii) (emphasis added). That is a concise summary of this case: Huge progress in our understanding of climate science has provided "significant new information" on the "impacts" of the coal-leasing program, and the regulation thus forbids the agency from ignoring that information in formulating its decisions about how to continue to manage a massive and ongoing federal operation with enormous climate-related implications.

To be sure, the requirement to update an EIS in light of new information is not without limitations. As an initial matter, there is the first-order requirement—undisputed and indisputable here—that the "new information" on the program's environmental impacts be "significant."

And second, as both binding precedent and the NEPA regulations suggest, the program must be sufficiently ongoing or continuing in nature that further analysis would be "useful[] … to the decisionmaking process." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); 40 C.F.R. §1508.18(a) (major federal actions include "new and *continuing* activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies" (emphasis added)). But where, as here, our understanding about the environmental consequences of an ongoing program has radically evolved, NEPA's regulations and its "action-forcing" purpose are violated when the agency attempts to blind itself to that new information and carry on with the program as though nothing has changed. *See, e.g.*, *Marsh*, 490 U.S. at 371.

Accordingly, the duty to supplement an EIS has been regularly applied to broad federal activities where an agency continues to make ongoing decisions affecting the program at a narrower level. For example, in *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000), the Ninth Circuit held that the U.S. Forest Service was required to supplement an EIS prepared for a number of timber sales within a single

national forest. The plaintiffs there sought a supplemental EIS nine years after the initial EIS based on new endangered-species listings in the area. *Id.* at 555. The court held that NEPA's duty to supplement applied because timber sales continued to be issued in accordance with the forest plan; at that point, two timber sales had received federal approval but remained uncompleted. *Id.* at 558-59. The court held that the "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.'" *Id.* at 557 (quoting *Marsh*, 490 U.S. at 374). The federal action in *Clearwater*—timber sales conducted pursuant to a forest plan—is plainly analogous to the present case, where BLM continues to lease coal pursuant to the program.

The district court found *Clearwater* inapplicable because it did not present "analogous facts where, as here, the government has implemented an EIS-supported program that requires some degree of management after its implementation." Op. 9. But far from supporting the court's reasoning, that argument shows precisely why *Clearwater* requires a supplemental EIS here. *Clearwater* held that NEPA's duty to

supplement continued to apply because two of the timber sales addressed in the EIS had not yet been completed; those two remaining leases alone constituted sufficient remaining activity to demonstrate that the entire "major federal action" would be informed by updated environmental analysis. *See* 222 F.3d at 557-58. That the coal-leasing program requires "some degree of management after its implementation" indicates a *greater* degree of remaining federal action than in *Clearwater*, and thus presents a *stronger* case for application of the supplementation duty than that case. Put otherwise, the coal-leasing program is much further from "completion" than the timber-sales plan in *Clearwater*, making this a much easier case, not a harder one.

Moreover, the *Clearwater* court's determination that only *two* not-yet-completed timber sales constituted sufficient remaining federal action (even though the timber sales had already received *approval*) is significant. Here, BLM faced *twelve* pending coal-lease applications when the complaint was filed, Compl. ¶185, at least some of which had not been preliminarily approved. Moreover, because the coal-leasing program is continuing indefinitely, there is no limit to how many more may yet be

received and determined. These leases require substantial federal involvement, both to review and dispose of the applications, and to oversee the leases if they are approved. This, again, represents a far greater degree of ongoing federal involvement than courts have found sufficient in cases like *Clearwater*.

Recent district court cases are in accord. For example, in *Gallatin Wildlife Association v. U.S. Forest Service*, 2016 WL 3282047 (D. Mont. June 14, 2016), the court held that an agency's periodic issuance of "Annual Operating Instructions" for grazing operations on federal land constituted ongoing major federal action and "demonstrate[d] the USFS's ongoing supervision" over grazing activities in a national forest. *Id.* at *1, *11. The plaintiff in that case sought supplemental NEPA analysis based on new information, *id.* at *10, and the court held that the agency's failure to evaluate the need for a supplemental EIS violated NEPA, *id.* at *13.

Moreover, the court in *Gallatin* rejected a precisely analogous argument from the federal defendants that, because the agency had already approved the Revised Forest Plan at issue there, "no federal actions exist[ed]." *Id.* at *10-11. Instead, the court determined that the Forest

Service's "ongoing supervision" over grazing in the national forest meant that the agency "still maintain[ed] a 'meaningful opportunity to weigh' the benefits of the grazing versus the possible detrimental effects grazing may cause on the environment," and that NEPA's supplementation duty thus continued to apply. *Id.* at *11, *13. Appellants' arguments here are precisely the same, but relate to a program that is even-more-obviously "continuing" and environmentally significant. BLM's continued issuance of new leases and lease modifications, as well as continued oversight of existing leases, thus triggers the same duty here as the court applied in *Gallatin*.

B. BLM has violated its duty to analyze the cumulative contribution of the federal coal-leasing program to climate change.

BLM has never taken a "hard look" at the coal-leasing program's contributions to climate change, or the detrimental effects unleashed by that phenomenon. *See supra* pp.11-17. This failure violates a fundamental tenet of NEPA requiring consideration of cumulative impacts. *See supra* pp.7-8; 40 C.F.R. §1508.7; *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016). BLM must demonstrate compliance with NEPA—and the cumulative effects requirement—each time it issues a site-specific

decision within a larger umbrella program. *New York v. NRC*, 824 F.3d 1012, 1018 (D.C. Cir. 2016) ("When the NRC does make a [site-specific] licensing decision in partial reliance on the [umbrella-level Generic EIS], it must *at that time* ensure that it has fully complied with NEPA."). By failing to update its PEIS—while simultaneously arguing that individual, lease-specific EISs cannot meaningfully address such a generalized phenomenon—BLM has manifestly failed to do so.

The cumulative effects requirement is intertwined with NEPA's requirement to consider indirect impacts—that is, environmental effects that are "'later in time or farther removed in distance'" from the underlying decision, yet nonetheless "'reasonably foreseeable.'" *Public Citizen*, 541 U.S. at 764. Agencies are required to "consider the incremental impact of a project for possible cumulative effects by incorporating the effects of other projects into the background data base of the project at issue." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002).

Here, a programmatic-level analysis is the only appropriate vehicle for considering the program's cumulative impacts on climate change. 40 C.F.R. §1508.28; *Kleppe*, 427 U.S. at 400 (noting that NEPA required

programmatic EIS for earlier version of program because it was a "coherent plan of national scope" that "surely has significant environmental consequences"); *id.* at 402 n.14 ("[S]ince the kind of [EIS] required depends upon the kind of federal action being taken, the [EIS] on a proposed mining plan or a lease application may bear little resemblance to the statement on the national coal-leasing program."). Nonetheless, BLM has not updated its PEIS since 1985, nor said one word about the program-level impacts of federal coal leasing on greenhouse emissions or climate change since its first PEIS in 1979.

Some recent site-specific EISs prepared for individual lease sales have described the particular lease's relationship to these issues, but the glaring inadequacy of these site-specific analyses only underscores why updating the *programmatic* EIS is necessary to adequately analyze the cumulative effects of the program in the way NEPA requires. For example, the 2009 EIS prepared for the East Lynn Lake coal lease in West Virginia notes that "[t]he assessment of so-called 'greenhouse gas' (GHG) emissions and climate change is in its formative phase," BLM, Final Land Use Analysis and Final EIS for the East Lynn Lake Coal Lease 264, EIS-ES-030-2008-0004 (2009), *cited in* Compl. ¶¶91-92, and laments how

"[t]he lack of scientific tools designed to predict climate change *on regional or local scales* limits the ability to quantify potential future impacts." *Id.* at 266. Critically, that EIS thus concludes that "the location, combustion efficiency, and amount of [greenhouse gas] emissions potentially generated is beyond the scope of this analysis," in part because, while alternatives "could lower direct [greenhouse gas] emissions from mine transportation and processing equipment minimally," that effect would not substantially change "the use of coal at national levels." *Id.*

As the foregoing demonstrates, the form of the agency's own analysis in its site-specific EISs makes them inadequate vehicles for assessing generalized climate-change effects from the overall program. That is because, on the agency's own account, there is an inevitable mismatch between the global scale of climate change and the local scale of individual leases. Examining its program one lease at a time, as in the East Lynn Lake EIS, BLM's view is that it cannot analyze the program's climate-change-related effects because changes at one mine do not affect national use of coal or local impacts from global warming. But all this proves is that the agency must update its *programmatic* environmental analysis to account for three decades of climate-change science that it has never

considered, and that bear on the large-scale "impacts" of the program as a whole. *See* 40 C.F.R. §1502.9(c)(1)(ii). NEPA's requirement to consider cumulative effects means that an agency "cannot treat the identified environmental concern in a vacuum." *Grand Canyon Trust*, 290 F.3d at 346.

Considered as a whole, the coal-leasing program is among the single greatest contributors to U.S. greenhouse gas emissions. Compl. ¶1. And yet, since the program's inception, the federal government has never seriously considered the *program's* impacts related to climate change—even when site-specific EISs quantify national emissions, they do not identify the share attributable to *federal* coal or attempt to quantify or monetize the climate-change impacts of the program as a whole. *See, e.g.*, BLM et al., Colowyo Coal Mine, Final Environmental Assessment 4-24, 4-27 (2016), https://www.wrcc.osmre.gov/programs/federalLands/NEPA_ColowyoEA.pdf. NEPA precludes the agency from chopping the climate-change-related effects of the program into little bits, and then resting on its conclusion that no single bit has a significant impact. *See Grand Can-*

yon Trust, 290 F.3d at 346 (agency violated NEPA by considering an increase in flights resulting from project at issue in isolation from other noise impacts at a national park).

Indeed, BLM's approach to site-specific EISs, coupled with its obstinacy regarding any update to the PEIS, represents a distinct effort to have it both ways. Interior has defended the silence of its site-specific EISs regarding the climate-change-related effects of greenhouse emissions by arguing that "'[g]iven the state of the science, it is not possible to associate specific actions with the specific global impacts such as potential climate effects.'" *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013). But the difficulty of linking marginal emissions from alterations at any given mine to climate changes only increases the importance of incorporating a *program-level* analysis of federal coal leasing's climate-change contributions. BLM cannot push its climate-change analysis into the site-specific EISs only to turn around and say that such small-scale, site-specific EISs will necessarily have little to say about how those narrow decisions impact large-scale climate change. Instead, it should manifestly analyze such effects through an updated PEIS.

Accordingly, courts have twice recently rejected Interior's approach to analyzing greenhouse gas emissions from coal mining in lease-specific EISs. In these EISs, Interior simply quantified the emissions at issue while contending that even a qualitative analysis of the impacts of these emissions is impossible given the scale of global warming. *See Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, __ F. Supp. 3d __, 2017 WL 3480262, at *12 (D. Mont. Aug. 14, 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014). In each case, the court held that this analysis does not satisfy NEPA's "hard look" requirement. *Mont. Envtl.*, 2017 WL 3480262, at *15; *High Country*, 52 F. Supp. 3d at 1193. The courts made clear that where an agency quantifies the *benefits* of coal mining in its NEPA review, it must also quantify the *costs*, including the costs of the emissions associated with the action. *Mont. Envtl.*, 2017 WL 3480262, at *15; *High Country*, 52 F. Supp. 3d at 1190-91. In each case, the court noted that the federal government had developed the "social cost of carbon" precisely to quantify the incremental cost of each marginal ton of greenhouse gas emis-

sions, and that failure to employ this tool, or at least consider its applicability, violates NEPA. *See Mont. Envtl.*, 2017 WL 3480262, at *12; *High Country*, 52 F. Supp. 3d at 1190-93.

Here, BLM has utterly failed to quantify the costs of greenhouse emissions on a programmatic level, despite quantifying the societal benefits of mining, both in lease-specific EISs and (more importantly) in the PEIS. *See* 1979 PEIS at 5-133 to 137 (quantifying coal-related employment gains); 5-142 to 150 (quantifying state tax and expenditure increases); 5-158 to 163 (quantifying railroad investments). The failure to assess the costs of the greenhouse emissions associated with the program thus runs afoul of NEPA. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198-1201 (9th Cir. 2008) (agency's failure to quantify greenhouse emissions in monetary terms violates NEPA).

C. The district court misapplied the relevant precedents.

To reach a contrary conclusion, the district court erroneously relied on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*"), along with a handful of out-of-circuit and unpublished cases. Op. 8-9. Unlike *Marsh*, however, none of these authorities addresses

when a PEIS prepared for an *ongoing* national program requires supplementation.

Start with *SUWA*. It contains only one relevant paragraph on this issue, which stands solely for the unremarkable proposition that an agency has no obligation to supplement an EIS respecting a federal action that has already concluded. *See* 542 U.S. at 73. *SUWA* thus contrasted *Marsh*—where the dam construction project was "not yet complete"—with a situation where there was "*no ongoing* 'major Federal action' that could require supplementation." *Id.* (quoting *Marsh*, 490 U.S. at 374) (emphasis added). Indeed, the most important aspect of *SUWA* for present purposes is its express reaffirmation of the test from *Marsh* and its acknowledgement that NEPA's supplementation duty *does* apply to "ongoing major Federal action." *Id.* at 72-73.

Unlike the major, ongoing program of the kind at issue here, *SUWA* involved an already complete "land use plan"; the plaintiffs argued that the plan's EIS needed to be updated based solely on increased use of off-road vehicles in the relevant area. 542 U.S. at 60-61. Critically, the *SUWA* Court relied on applicable regulatory text to decide that the "ma-

jor federal action" that triggered NEPA duties there was limited to "*approval* of a land use plan." *See id.* at 73 (quoting 43 C.F.R. §1601.0-6 (2003)) (alterations omitted). Indeed, having devoted most of the opinion to holding that the land use plan at issue did *not* impose enforceable supervision duties on BLM at all, *see id.* at 67-72, the Court merely held that—particularly in light of the regulation's text—the approval of the plan itself was the major federal action, and no ongoing action remained. *Id.* at 73.

On the most important measure—the text of the applicable agency regulations and guidance—this case is *SUWA*'s opposite. Unlike in *SUWA*, there is no regulation defining or similarly limiting which agency actions constitute "major federal actions" that trigger NEPA duties. Instead, the court must apply the test from *Marsh*, which plainly demonstrates that the ongoing coal-leasing program is a continuing major federal action. *See supra* pp.32-34. But the relevant agency pronouncements are not simply silent; they in fact show both the ongoing nature of the coal-leasing program *and* BLM's acknowledgement that, under NEPA, it is required to keep its analysis fresh in light of changing information or circumstances. As noted throughout this brief, *see supra* pp.15-

16; *infra* pp.64-65, BLM has repeatedly acknowledged its obligation to update its PEIS to account for "significant new information"—a promise that is wholly inconsistent with the suggestion that the federal action was entirely complete in 1979.

Moreover, BLM's own description of the purpose of its PEIS shows that the "major federal action" it addressed was not the mere adoption of coal-leasing *regulations*—as in *SUWA*—but rather the "unavoidable national and inter-regional *impacts* of coal *production*" under the program. 1979 PEIS at v (emphases added). It is thus beyond doubt that BLM contemplated a cohesive plan of national scope, and intended the PEIS to address its "unavoidable national … impacts"—*effects like climate change*—on an ongoing basis. The PEIS thus requires updating precisely because current climate science represents "significant new information" on the very "unavoidable national … impacts of coal production" to which the agency purported to devote that programmatic statement.

There is also a key factual difference between this case and *SUWA*. In *SUWA*, the Court expressly noted that BLM *would* retain an obligation to update its EIS for its land use plan every time it updated or amended it. *See* 542 U.S. at 73. And, critically, the Federal Land Policy

and Management Act of 1976, 43 U.S.C. §1701 *et seq*., itself requires periodic updates for such land use plans, 43 U.S.C. §1712. An order directing BLM to issue a supplemental EIS in the *SUWA* context would thus have been duplicative of its statutory obligation to prepare an EIS for each statutorily required plan update. BLM is under no such obligation to periodically update the federal coal-management program; the only bulwark against BLM's NEPA analysis becoming stale in this context is NEPA's own supplementation requirement. The district court's decision would thus expand *SUWA*'s holding far beyond that case's context and place far more weight upon its rationale than it can reasonably bear.

The other cases the district court relied upon do not remotely address the question of when a PEIS prepared for an ongoing national program must be supplemented. Op. 7-9. For example, the court cited *Hammond v. Norton*, 370 F. Supp. 2d 226, 255 (D.D.C. 2005), for the proposition that no supplemental EIS need be prepared if remaining federal actions are "purely ministerial." Op. 8. But that case *supports* rather than undercuts appellants' arguments. In *Hammond*, the plaintiffs argued that an EIS regarding approval for a pipeline right-of-way required supplementation based on new information. And after noting that the duty

to supplement does not apply if the remaining federal actions are "purely ministerial," 370 F. Supp. 2d at 255, the court went on to find that two remaining federal actions were *not* "purely ministerial" because BLM "still retain[ed] discretion to halt the [project] should [the contractor] not meet its environmental obligations." *Id.* at 256. Those two remaining actions—(1) approval of a Plan of Development "'detailing how the pipeline and associated facilities will be constructed in compliance with the [right-of-way] terms, conditions, and stipulations'"; and (2) a Notice to Proceed "allowing construction to commence"—are unquestionably closer to "'ministerial'" actions than the myriad remaining federal actions in the present case—which include *indefinite* pricing, approval, and supervision of new leases, as well as management of existing ones. *Id.* If the issuance of two administrative notices sufficed in *Hammond*, then the government's future approval and management of new leases and modifications—with no end in sight as to either action—surely suffices. Moreover, Secretary Jewell's decision to "pause" new leasing activity pending an environmental review vividly demonstrates that, as in *Hammond*, Interior still "retains discretion to halt the [program]" or otherwise modify

it based on competing policy and environmental priorities. *See id.* (treating this as dispositive regarding need for supplementation under NEPA).

The district court also erroneously relied upon *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115, 1123 (10th Cir. 2009), which held that an EIS prepared for a Wyoming elk feedground did not require updating. Again, *Greater Yellowstone*'s analysis only supports appellants. There, the court looked to "the actual degree of ongoing federal involvement in the project" in determining whether there was an "ongoing" program for purposes of NEPA supplementation, and held that the supplementation duty applied in cases involving "continuing meaningful federal agency involvement at various stages." *Id.* at 1124-25. Because the Forest Service had been "largely uninvolved" since issuing an operating permit many years earlier, and Wyoming (rather than the federal agency) "remain[ed] the only meaningful actor involved in the operation" of the feedground, *id.* at 1123, the Court found no major federal action under NEPA. But here, of course, BLM remains the sole "meaningful actor involved in operation" of the coal-leasing program at all of its "various stages": it continues to run the program and make all applicable leasing decisions; it retains the discretion to halt or alter the program at any

time; and it is involved at every step of the leasing and subsequent supervision process.

The district court also purported to rely on *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013), for the proposition that "'additional, independent actions'" do not trigger a supplementation requirement "where those actions d[o] not 'affect the validity or completeness' of the plan for which the environmental analysis was conducted." Op. 8 (quoting 706 F.3d at 1095). But that simply misunderstands appellants' argument. Appellants did not allege that any "additional, independent action[]" like an individual lease application triggered the duty to supplement, nor does NEPA require that showing. Instead, the duty is triggered here by "significant *new* … *information*" in the context of an ongoing program. 40 C.F.R. §1502.9(c)(1)(ii) (emphasis added). Moreover, if the supplementation requirement applies where it is necessary to ensure the "validity or completeness" of the already-completed environmental analysis (as *Center for Biological Diversity* says) then surely the failure to adequately consider the program's significant contribution to the gravest environmental threat currently confronting humanity affects the "validity and completeness" of the 1979 PEIS—which, again, the

agency itself described as aimed at the "unavoidable national … impacts of coal production," and promised to update to account for new information after *encouraging further study of climate change*. *Supra* pp.13-14.

Unsurprisingly, none of the other cases cited below (Op. 8-9) involved a coherent program of national scope over which the federal government retains sole control. Instead, all involved projects in which either (1) third parties retained primary control over any continuing activities or (2) the remaining federal governmental action was minimal. *See Yount v. Salazar*, 2013 WL 2370619, at *2 (D. Ariz. May 29, 2013) (no supplemental EIS necessary where "nothing remained to be constructed or completed after the final EIS was completed"); *Audubon Naturalist Soc'y v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 710-11 (D. Md. 2007) (no supplemental EIS needed where ninety percent of project already constructed); *Envtl. Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.*, 2005 WL 3021939, at *5-6 (N.D. Cal. Nov. 10, 2005) ("adaptive management" duties for endangered species not sufficiently "major" to trigger NEPA).

More fundamentally, none of these cases involved a failure to engage in informed decisionmaking on the scale of BLM's failure to consider

the environmental effects of dumping hundreds of millions of tons of greenhouse gases into the atmosphere, as is at issue here. NEPA's *core* policy objective is to force agencies to consider the actual environmental consequences of their major decisions, and to lay bare for the public the environmental costs associated with any promised benefits. In this case, Interior is refusing to update its PEIS to account for over 30 years of climate science, while managing an ongoing program that alone accounts for eleven percent of total U.S. greenhouse emissions. The cases cited by the district court involved narrow issues like the alleged failure to consider new information relevant to a single incidental take permit for an endangered species (*Envtl. Prot. Info. Ctr.*), or the failure to consider new information that did not "affect the validity or completeness" of a prior EIS (*Hammond*). None approaches the gravity of ignoring a generational environmental threat to which the relevant program is undoubtedly making a major contribution.

Indeed, this case raises the issues of transparency and government accountability that embody NEPA's animating concerns. Obviously, climate change is now a politically salient issue, and there are at least some key differences between the current and previous administrations on this

score. But it is difficult to identify the precise nature of those differences without the "action-forcing" accounting that NEPA requires. *Marsh*, 490 U.S. at 371. NEPA was designed to play a limited but critical role in the political process: to guarantee that the government will forthrightly consider the environmental consequences of its decisions, and give the public the chance "to react to the effects of a proposed action at a meaningful time." *Id.* But that public accountability mechanism only works if agencies are made to account for the best scientific estimate of the environmental costs of their decisions, and then forced to commit to a publicly stated view of whether the benefits of its ongoing actions are worth those costs. As the history of this very case shows, different Secretaries are free to reach different judgments about how to manage a major, ongoing program like this one. What they cannot do is obscure the environmental stakes and thereby prevent citizens from judging the Department's actions for themselves. This Court thus must hold Interior to its NEPA obligations, and reverse.

II. BLM Further Violated The APA By Breaching Its Own Commitments To Update The 1979 PEIS In Light Of New Information Regarding The Leasing Program's Effects.

Not only does NEPA commit the agency to update the 1979 PEIS, but the agency itself repeatedly recognized that commitment, and obligated *itself* to undertake supplemental analysis should new information of the kind at issue here emerge. BLM did so both in the 1979 PEIS itself, *see supra* pp.12-15, and in the Record of Decision accompanying it. *See* Interior, Secretarial Issue Document, Federal Coal Management Program 97-98 (1979) (repeating this commitment under heading, "Meeting the Requirements of [NEPA]"). And, in fact, BLM did update the 1979 PEIS in 1985, noting that a supplement was "needed because economic and environmental conditions have changed." 1985 SEIS at 3.

Having committed itself to updating the 1979 PEIS, BLM cannot now disregard its duty to follow through on that promise. The Supreme Court in *SUWA* recognized that when language in a planning document "creates a commitment binding on the agency," that language can be enforced through the APA. 542 U.S. at 71. *SUWA* drew a sharp distinction between specific commitments made by an agency in a planning docu-

ment (which the Court determined would commit the agency to a particular course) and vague statements regarding allocation of resources (which would not). *Id.* at 70-71. BLM's consistent and repeated statements committing to update the 1979 PEIS under specific, defined circumstances commit the agency to doing so.

Indeed, the language the agency used to express its commitment captures the present situation quite precisely: It said it would update the PEIS "*when its assumptions, analyses and conclusions* are no longer valid." *See supra* p.15. Given the nascent state of climate science in 1979, the agency assumed at that time that climate change due to greenhouse gas emissions was a speculative concern for the next few centuries that would require further study before its costs could be analyzed. But the further study the PEIS called for has been conducted over the ensuing 38 years, and it has demonstrated that the effects of climate change are now neither speculative nor remote. The conditions the agency itself set on updating the PEIS have thus been met, and the agency is legally obligated to follow through.

The conclusion that BLM must honor its own promises made in enacting and amending the 1979 regulations is backed up by CEQ's regulations, which "require[] the BLM to follow through with the commitments it makes in a record of decision." *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1123 (D. Mont. 2016) (citing 40 C.F.R. §1505.3, which provides that "[m]itigation … and *other conditions* established in the [EIS] or during its review and *committed as part of the decision shall be implemented*" by the appropriate agency (emphases added)). Indeed, in *Friends of Animals*, the court interpreted *SUWA* itself to require BLM to honor its commitment to recalculate target species populations within five years, even though the statute at issue did not require such an update. 200 F. Supp. 3d at 1125 (*SUWA* "made it clear that although broad statutory mandates are unenforceable under §706(1) of the APA, language in a plan creating a commitment binding on the agency is a different matter"). The court held that because the agency made this commitment in a formal record of decision, the court was compelled to enforce it, *see id.* at 1123 (citing other cases for same proposition), as this Court should hold here.

Several other cases—not to mention basic principles of agency accountability—are in accord. *See Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998) (if an agency commits in a "finding of no significant impact" under NEPA to take an action not otherwise required by law, agency must follow through on commitment); *Lee v. U.S. Air Force*, 220 F. Supp. 2d 1229, 1236 (D.N.M. 2002) (agency is "legally bound by the Record of Decision" and failure to comply with its conditions renders it "subject to all recourse contemplated by federal law"), *aff'd*, 354 F.3d 1229 (10th Cir. 2004). As the court noted in *Friends of Animals*, CEQ's guidance makes clear that "'the terms of a Record of Decision are enforceable by agencies and private parties.'" 200 F. Supp. 3d at 1123-24 (quoting 46 Fed. Reg. 18,026, 18,037 (Mar. 23, 1981)). This requirement "'is based on the principle that an agency must comply with its own decisions and regulations once they are adopted.'" *Id.* And without that basic principle, the entire edifice of administrative law—with its careful emphasis on the integrity of the agency's expressed reasons for its conclusions—would make little sense: An agency's commitments to further actions are part of the ra-

tionale for its initial decision, and honoring those commitments is accordingly necessary to prevent that rationale from becoming arbitrary and capricious.

Indeed, from the perspective of the core aims of the APA and NEPA, this is just not a close case. While neither compels an agency to choose a particular result, both seek to achieve more rational agency decisionmaking by requiring a forthright accounting of the agency's basis for acting—including a real weighing of purported benefits against environmental costs. Interior's refusal to update its PEIS and the administration's aversion to any NEPA accounting for the costs of greenhouse emissions are of a piece, and they represent an assault on the fundamental purposes of administrative law. If Interior's view is that it need not account for the climate-change costs of the coal-leasing program because greenhouse emissions do not cause global warming, it must *say that*, and both defend that scientific analysis under NEPA and suffer the political consequences of that formal assertion. Likewise, if it wants to acknowledge those costs but continue operating the coal-leasing program by discounting them relative to the economic benefits, it must say *that* and let the public be the judge of the balance it has struck. What it cannot do is hide the ball

indefinitely, leaving the public to guess at both the environmental costs of one of the Nation's predominant sources of carbon pollution and the agency's views on what many voting citizens believe to be the defining environmental-protection issue of our time.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

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September 15, 2017

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this document contains 12,940 words.

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September 15, 2017

/s/ Eric F. Citron
Eric F. Citron

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on September 15, 2017. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Eric F. Citron
Eric F. Citron

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AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

(aa) ''zero emission vehicle'' means a vehicle that produces zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions.

SEC. 20. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

BARACK OBAMA.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

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

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

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

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

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

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

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

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

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

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

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

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

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

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use

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of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

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

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

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

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

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

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

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appro-

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

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as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

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in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice

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

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

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

§ 1502.17 List of preparers.

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

§ 1502.18 Appendix.

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

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

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

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

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

§ 1502.19 Circulation of the environmental impact statement.

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

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

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

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

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

§ 1502.20 Tiering.

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

§ 1502.21 Incorporation by reference.

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

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§ 1508.6 Council.

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

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

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

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

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

§ 1508.9 Environmental assessment.

Environmental assessment:

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

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

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

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

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

§ 1508.10 Environmental document.

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

§ 1508.11 Environmental impact statement.

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

§ 1508.12 Federal agency.

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

§ 1508.13 Finding of no significant impact.

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

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repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

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

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

§ 1508.20 Mitigation.

Mitigation includes:

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

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

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

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

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

§ 1508.21 NEPA process.

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

§ 1508.22 Notice of intent.

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

(a) Describe the proposed action and possible alternatives.

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

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

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

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

§ 1508.25 Scope.

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

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

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

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

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

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

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

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

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

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EDITORIAL NOTE: This listing is provided for information purposes only. It is compiled and kept up-to-date by the Council on Environmental Quality, and is revised through July 1, 2016.

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