
No. C13-0124-1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2013

FRIENDS OF NEWTONIAN,
Petitioner,

— *against* —

UNITED STATES OF DEPARTMENT OF DEFENSE
and
MAINSTAY RESOURCES, INC.,
Respondents.

*On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit*

BRIEF FOR PETITIONER

TEAM 62
Attorneys for Petitioner

QUESTIONS PRESENTED

- I. Whether the execution of a mineral lease between the United States Department of Defense and a nonfederal entity is a final agency action under the Administrative Procedure Act that is ripe for judicial review where the lease has been issued and the nonfederal entity has completed construction of the drill sites contemplated by the lease.

- II. Whether the United States Department of Defense's lease of mineral rights to a nonfederal entity constitutes a major federal action requiring an Environment Impact Statement under the National Environmental Policy Act where the terms of the lease allow the Department of Defense to regulate both lease operations and product distribution and the activities performed under the lease could pose harmful effects to the environment and human health that have yet to be considered by either the Department of the Defense or the general public.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Friends of Newtonian—the plaintiff in the United States District Court for the Western District of New Tejas and the Appellant before the United States Court of Appeals for the Fourteenth Circuit—respectfully submits this brief-on-the-merits in support of its request that this Court reverse the judgment of the court of appeals.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New Tejas is unreported. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 3–20.

STATEMENT OF JURISDICTION

The judgment of the Fourteenth Circuit Court of Appeals was entered on October 15, 2013. R. at 3. The petition for a writ of certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of Section 704 of the Administrative Procedure Act, which provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702 (2006). *See* Appendix “A.”

This case also involves the interpretation of Section 4332(C) of the National Environmental Policy Act of 1969, which provides that federal agencies must prepare and Environmental Impact Statement for every “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” 42 U.S.C. § 4332(C) (2006). See Appendix “B.”

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Friends of Newtonian is an environmental organization whose stated purpose is to “build widespread citizen understanding and advocacy for policies and actions designed to manage and protect Newtonian’s and the Unties States’ environmental health.” R. at 11. It filed this lawsuit seeking to enjoin the activities arising out of a lease between the Department of Defense and Mainstay Resources, Inc. pending compliance with National Environmental Policy Act of 1969 (“NEPA”) requirements. R. at 12.

Closure of Fort Watt. In 2001, the Department of Defense considered closing and/or realigning a number of military installations throughout the United States pursuant to the Defense Base Realignment and Closure Act of 1990. R. at 3. One of these military installations was Fort Watt. R at 4. As part of the decision process of whether to recommend the closure and sale of Fort Watt, the Defense Base Closure and Realignment Commission (“Commission”) completed an Environmental Impact Statement (“EIS”) as required by the NEPA. R. at 5. The EIS considered

the positive and negative environmental effects, which might stem from decommissioning Fort Watt and selling the property to private entities. R. at 6. One section of the EIS addressed oil recovery and extraction as a possible future use of the land. R. at 6. However, this section primarily addressed the potential impacts of conventional oil and gas development and only briefly discussed unconventional development procedures, providing nothing more than a definition of the term hydraulic fracturing (“fracking”) and a statement that it was not then economically feasible. R. at 6. After completion of the EIS, the Commission issued its Record of Decision, recommending that the President approve the closure and sale of Fort Watt. R. at 8.

The Sale of Fort Watt. Upon receipt of President approval, the Department of Defense closed Fort Watt and sold the property to private entities, reserving all mineral rights to the property in the sale. R. at 7. One of the private purchasers was Mainstay Resources, Inc. R. at 7. Mainstay Resources is one of the largest independent oil and natural gas exploration and production companies in the United States.¹ R. at 7. It purchased a 750-acre strip of land consisting of a shallow valley approximately one mile long and part of the surrounding foothills. R. at 8.

The Mineral Lease. After the sale, the Department of Defense negotiated an oil and gas lease with Mainstay Resources. R. at 8. The lease set forth multiple

¹ Mainstay Resources had unsuccessfully been attempting to expand its presence into New Tejas for many years given the astronomical potential for profits surrounding the Magnus Shale and jumped at the opportunity for expansion. R. at 7.

rights and obligations between the parties. R. at 8–9. For example, it provided that Mainstay Resources could develop the minerals under the land it purchased for a period of 20 years and as long thereafter as production continued in paying quantities. R. at 8. It established that the Department of Defense was to retain a participatory royalty interest in the mineral rights and would receive a monthly royalty equal to one-fourth of the gross proceeds of the sale of all oil and/or natural gas produced from the 750 acres. R. at 8–9. It also entitled the Department of Defense to delay rental payments at the rate of \$25.00 per acre, annually beginning on the date of the lease and continuing thereafter until a well actually yielding royalties from oil and/or natural gas came into production on the property. R. at 9. It allowed the Department of Defense to conduct periodic site visits to review lease operations to make sure that it was in compliance with federal, state and local statutes and regulation. R. at 9. It gave the Department of Defense veto power over the individuals or entities to whom Mainstay Resources could sell the oil and/or natural gas, based on national security concerns. R. at 9 .

Construction Of Watt 1 And Watt 2. After the execution of the lease Mainstay Resources began preliminary construction on two drill sites, Watt 1 and Watt 2. R. at 10. Both were located on the property it had purchased from the Department of Defense, one at the southwest end of the property and the other along the northern edge of the valley near the foothills. R. at 10. Drilling operations were ultimately delayed for a number of years based on Mainstay Resources' new focus on modern fracking procedures. R. at 10. Between that time

and the filing of this lawsuit, Mainstay Resources kept the lease in effect by timely paying the required delay rental payments outlined in the lease. R. at 10.

Fracking Procedures. With the Department of Defense’s blessing, in 2010 Mainstay Resources reconfigured Watt 1 and Watt 2 for fracking purposes. R. at 10. It obtained updated drilling permits and was set to begin actively fracking Watt 1 and Watt 2 on February 1, 2011. R. at 10. Before drilling could commence, Friends of Newtonian filed this lawsuit. R. at 8–10.

II. NATURE OF THE PROCEEDINGS

The District Court. Friends of Newtonian filed this suit seeking declaratory and injunctive relief under the NEPA and the APA to enjoin the Department of Defense and Mainstay Resources from fracking at Watt 1 and Watt 2. R. at 11. Friends of Newtonian argued the fracking process could cause irreparable damage to the New Tejas River and other Newtonian water sources if the chemicals used in the fracking process were to infiltrate the river. R. at 11. It argued that because the Department of Defense’s execution of a mineral lease with Mainstay Resources and reservation of a managing interest in the lease activities constituted a “major federal action” significantly affecting the quality of the human environment, the Department of Defense was required to prepare an EIS pursuant to the NEPA. R. at 12. The district court denied Friends of Newtonian’s motion for preliminary injunction. R. at 12.

The Court of Appeals. Friends of Newtonian appealed the district court’s judgment. The Fourteenth Circuit Court of Appeals affirmed the district court’s denial of injunctive relief by holding for the Department of Defense. R. at 12–18.

SUMMARY OF THE ARGUMENT

The court of appeals improperly affirmed the district court’s denial of Friends of Newtonian’s motion for preliminary injunction because the Department of Defense’s execution of and managerial interest in the lease with Mainstay Resources Inc. is a “final agency action” under the APA that is ripe for review, and a “major federal action” under the NEPA requiring the preparation of an Environmental Impact Statement.

I.

Friends of Newtonian’s claim concerns a “final agency action” that is ripe for judicial review. Because the NEPA does not provide for a private cause of action, claimants must first satisfy the requirements for judicial review under the APA, which provides a route for judicial review of agency actions. These requirements mandate that the agency action at issue be a “final agency action” that is ripe for judicial review. Although the court of appeals correctly concluded that there was a “final agency action” under the APA, it did so by misapplying the legal standard. Instead of relying on the Department of Defense’s execution of the mineral lease with Mainstay Resources as the “final agency action” at issue, it relied on the Commission’s Record of Decision and the sale of property. This analysis is flawed. Prior to obtaining the lease, MRI could not begin drilling operations on the land it

purchased from the Department of Defense, it could not construct the drill sites and it could not frack. The performance of any one of these acts would have been a clear violation of the Department of Defense's rights as the owner of the mineral estate. As such, the "final agency action" that gives rise to Friends of Newtonian's claim is the execution of the lease.

Moreover, the execution of the lease marked the consummation of the Department of Defense's decision-making process and set forth the legal rights and obligations of the parties involved. Unlike the decision to close Fort Watt and sell the property, the decision to lease was not subject to further review by the President or any other federal agency, and consummated at the time the lease was executed. The issuance of the lease was in no way tentative or interlocutory. Instead, it represents the kind of definitive, irrevocable commitment that this Court and other courts have regularly been willing to label as final. Furthermore, the lease set forth the rights and obligations of the parties and had direct legal consequences. It granted Mainstay Resources the right to begin oil recovery and extraction. It entitled the Department of Defense to royalties under the lease. It gave the Department of Defense the power to control and review Mainstay Resources' operations and product distribution.

Finally, the execution of the mineral lease is a final agency action that is ripe for review. It causes effects of a strictly legal kind, and has the potential to inflict significant harm upon the interests that Friends of Newtonian asserts. Absent judicial intervention the fracking processes at Watt 1 and Watt 2 will begin.

Construction of the drill sites is complete. The only thing standing in front of the activity is this lawsuit. Once the process begins, the damage will be done.

This Court should hold that the execution of the mineral lease between the Department of Defense and Mainstay Resources is a “final agency action” that is ripe for judicial review.

II.

Friends of Newtonian’s claim also satisfies the requirements under the NEPA. NEPA provides that federal agencies must prepare an Environmental Impact Statement for every major federal action significantly affecting the quality of the human environment. In applying this standard, the court of appeals held that the Department of Defense’s execution of the lease with Mainstay Resources and managing interest in the lease was not a “major federal action” requiring the preparation of an Environmental Impact Statement. However, once again, the court of appeals misapplied this standard. A nonfederal entity does not have to receive federal funding for their actions to be considered a “major federal action” under the NEPA. Instead, the correct standard requires some form of “control” over the nonfederal entity’s action by a federal agency. The terms of the lease satisfy this standard. Without the lease, Mainstay Resources could not engage in any type of oil recovery, let alone fracking. It also gives the Department of Defense control of lease operations and product distribution. This is the type of “control” that this standard contemplates.

Mainstay Resources' fracking procedures under the lease also pose to significantly affect the quality of the human environment. Given the close proximity of the two drill sites to the New Tejas River, contamination of Newtonian resources is of real concern. Furthermore, the harmful effects of the chemicals used in fracking procedures warrant NEPA review. Fracking procedures are already suspected of contaminating natural water resources in various states around the U.S. It is not yet clear what impact this contamination could have on public health. However, initial studies have shown that many of the chemicals used in the fracking process can have substantial effects on human health. This is the type of unknown significant effect that warrants NEPA review.

Finally, requiring review of Mainstay Resources' fracking procedures is in line with the purpose of the NEPA. The harmful effects of the process have yet to be considered by the Department of Defense or the general public and the public interest in financial gain does not outweigh their interest in living a health life.

This Court should reverse the court of appeals and render judgment for Friends of Newtonian.

ARGUMENT AND AUTHORITIES

Friends of Newtonian challenges the lower court's denial of its preliminary injunction under two federal statutes—the National Environmental Protection Act (“NEPA”), 42 U.S.C. § 4321 (2006), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706 (2006). R. at 11. This appeal focuses on the court of appeals' erroneous application of the requirements for judicial review under the APA and the

“major federal action” requirement under the NEPA. Both issues concern purely legal questions regarding the scope of the federal statutory provisions.

A district court’s denial of a preliminary injunction is reviewed for an abuse of discretion.² *Brown v. Chote*, 411 U.S. 452, 457 (1973). However, a district court abuses its discretion by applying “the wrong legal standard” or misapplying “the correct legal standard.” *Waste Mgmt., Inc. of Tenn. v. Metro. Gov’t of Nashville & Davidson Cnty.*, 130 F.3d 731, 735 (6th Cir. 1997). Thus, a lower court’s “interpretation of the underlying legal principles is subject to de novo review.” *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005). Ripeness is also a question of law reviewed de novo. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995).

Friends of Newtonian’s claim satisfies the requirements under both federal statutes. Under the applicable standards of review, the lower court erred. Because the Department of Defense’s actions consisted a “final agency action” under the APA that is ripe for judicial review and a “major federal action” requiring an EIS pursuant to the NEPA, this Court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit.

² “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see also *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982).

I. THE DEPARTMENT OF DEFENSE’S EXECUTION OF A MINERAL LEASE WITH MAINSTAY RESOURCES WAS A FINAL AGENCY ACTION THAT IS RIPE FOR JUDICIAL REVIEW.

Friends of Newtonian filed this suit seeking injunctive relief under the NEPA. As a threshold matter, this Court must determine whether Friends of Newtonian’s claim is ripe for judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (establishing that the injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless they arise in the context of a controversy ripe for judicial resolution). “Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807–08 (2003) (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 880 (1990); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732–33 (1998); *Abbott Labs. v. Gardner*, 387 U.S. at 148–49). The doctrine is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993); *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. at 807–08. In deciding whether an agency’s decision is, or is not, ripe for judicial review, this Court has examined both the “fitness of the issues for judicial decision”

and the “hardship to the parties of withholding court consideration.” *Texas v. United States*, 523 U.S. 296, 300–01 (1998); *Abbott Labs. v. Gardner*, 387 U.S. at 148–49. Friends of Newtonian’s claim satisfies this standard.

A. Friends of Newtonian’s Claim Is Fit for Judicial Review Because the Department of Defense’s Execution of a Mineral Lease with Mainstay Resources Is a “Final Agency Action” Under the APA.

Friends of Newtonian’s claim satisfies the first ripeness requirement—that the challenged agency action is fit for judicial review. Because the NEPA does not authorize a private right of action, this Court’s jurisdiction is limited to judicial review under the APA.³ *See Lujan*, 497 U.S. at 882 (reviewing NEPA claim through the APA because the NEPA did not provide a private cause of action); 5 U.S.C. §§ 701–706 (providing route for judicial review of agency actions). The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Where review is “not [sought] pursuant to specific authorization in the substantive statute, but only

³ Other courts have recognized that federal courts have jurisdiction over NEPA challenges pursuant to the APA as well. *See, e.g., R.* at 13; *Envtl. Def. Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1171 (6th Cir. 1972); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993); *Sierra Club v. Slater*, 120 F.3d 623, 630–31 (6th Cir. 1997); *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 813 (8th Cir. 2006); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988).

under the general review provisions of the APA, the ‘agency action in question must be ‘final agency action.’”⁴ *Lujan*, 497 U.S. at 882 (quoting 5 U.S.C. § 704).

Friends of Newtonian’s claim satisfies this requirement. The lower court held that the Department of Defense’s actions constituted a “final agency action” under the APA. Although the lower court came to the correct conclusion, it did so by misapplying the “final agency action” standard. Under the correct analysis, the Department of Defense’s actions constitute a “final agency action.”

1. The Department of Defense’s execution of a mineral lease with Mainstay Resources is the “agency action” on which Friends of Newtonian’s claim is based, not the Record of Decision or the sale of the property.

Friends of Newtonian’s claim satisfies the first requirement necessary for judicial review pursuant to the APA—that there is an “agency action” which adversely affects the claimant. To bring suit under the APA, a claimant must identify some “agency action” that affects him in a specified fashion. *Lujan*, 497 U.S. at 882; *see also Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 87 (D.C. Cir. 1991) (establishing that “plaintiffs seeking judicial review under section 702 of the APA for an alleged violation of NEPA and claiming only an “informational injury” must show the *particular* agency action—in addition to the agency’s refusal to

⁴ Whether a federal agency’s conduct constitutes a “final agency action” within the meaning of the APA is a legal question. *Colo. Farm Bureau Fed’n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000). It is a jurisdictional requirement, *Lujan*, 497 U.S. at 882, and “is an essential precondition to ripeness.” E. Gates Garrity-Rokous, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 Yale L.J. 643, 648 n.31 (1991).

prepare an impact statement—that allegedly triggered the violation and thereby caused the injury”).

The agency action on which Friends of Newtonian’s claim is based is the executed mineral lease between the Department of Defense and Mainstay Resources. Friends of Newtonian’s claim seeks to prevent the contamination of several Newtonian reservoirs and fresh water aquifers that will occur if the toxic chemicals used in the fracking process infiltrate the New Tejas River. R. at 11. The lower court identified the Commission’s Record of Decision, which recommended the closure and sale of Fort Watt, as the “agency action” that adversely affected Friends of Newtonian. R. at 14. This analysis was flawed. Neither the Commission’s Record of Decision, nor the sale of the property gave Mainstay Resources the right to extract and recover minerals. The execution of the mineral lease did.

When the Department of Defense sold the property, it retained “the mineral rights to the entire property.” R. at 8. This created two distinct estates, a mineral estate and a surface estate. *See* 53A Am. Jur. 2d *Mines and Minerals* § 159 (2013) (establishing that when the mineral estate is severed from the surface estate, separate and distinct estates are created). Any oil extraction or recovery procedures conducted by Mainstay Resources prior to the time at which it the Department of Defense issued the lease would have been a clear violation of the Department of Defense’s rights as the mineral estate owner. *See id.* (establishing that among the rights attributed to the mineral estate owner is the right to develop oil and gas). Accordingly, it was not until the Department of Defense executed the lease that

Mainstay Resources was given the legal right to develop minerals on the property. The lease is the action that permitted Mainstay Resources to engage in oil extraction and recovery procedures at Watt 1 and Watt 2. This lease is the action that permitted Mainstay Resources to frack.

Moreover, a federal agency's execution of an oil and gas lease fits well within the APA's "agency action" requirement. The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" 5 U.S.C. § 551(13) (2006). This Court has interpreted this standard generously. *See Abbott Labs. v. Gardner*, 387 U.S. at 140–41 (recognizing the "legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation"). As long as the "agency action" at issue is an "identifiable action or event," rather than merely the general "day-to-day operations" of the agency, it will be considered an "agency action." *See Lujan*, 497 U.S. at 898. A federal agency's lease of mineral rights to a private entity meets this requirement. *See Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (holding that a lease and all-post leasing activities were "agency action").

Because Friends of Newtonian's claim seeks to prevent Mainstay Resources from fracking Watt 1 and Watt 2, the "agency action" on which its claim is based is the execution of the mineral lease between the Department of Defense and

Mainstay Resources, not the Commission’s Record of Decision or the sale of the property.

2. The Department of Defense’s execution of an oil and gas lease with Mainstay Resources was a “final agency action.”

Friends of Newtonian’s claim satisfies the second requirement necessary for judicial review under the APA—that the “agency action” be final. In *Bennett v. Spear*, 520 U.S. 154 (1997), this Court set forth a two-condition test for determining whether an agency action is final. First, the action must “mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *Id.* at 177–78. And second, the action must be one by which “rights or obligations have been determined, or from which legal consequences will flow.” *Id.*; see also *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (recognizing that the core question in this analysis is “whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties”). This Court has previously interpreted these factors in a flexible, pragmatic way. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239–40 (1980) (interpreting the APA’s finality requirement under a pragmatic and flexible view); *Abbott Labs. v. Gardner*, 387 U.S. at 149 (same). As long as the agency has issued “a definitive statement of its position, determining the rights and obligations of the parties” the action will be considered final.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 813 (8th Cir. 2006).

a. The execution of the lease marked the consummation of the Department of Defense’s decision-making process.

Friends of Newtonian’s claim for relief satisfies the first element of the “finality” requirement—that the federal agency’s action mark the consummation of its decision making process. This standard is satisfied when the agency has “rendered its last word on the matter” at issue. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 478 (2001) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980)). Tentative and interlocutory actions will not suffice. *Bennett*, 520 U.S. at 177–78. The agency must arrive at a definitive position on the issue in question, *Darby v. Cisneros*, 509 U.S. 137, 144 (1993); *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983), and in the context of the NEPA, the position must be one that represents the agency’s “last word on the project’s environmental impact” as a whole. *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982). Friends of Newtonian’s claim satisfies this requirement.

After the President approved the Commission’s Record of Decision, the Department of Defense sold the property to various private entities reserving the mineral rights in the entire property. R. at 8. The Department of Defense then made the decision to grant Mainstay Resources a mineral lease in the 750 acres of land Mainstay Resources purchased. R. at 8. The lease was subsequently executed on June 1, 2003. R. at 8. This marked the consummation of the Department of Defense’s decision-making process. Unlike the decision of whether to close Fort Watt and sell the property, the decision to lease was not subject to further review by the President or any other federal agency and was consummated at the time the

lease was issued. This is not the type of tentative, provisional, or contingent, decision that courts have refused to label as final. *See Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009) (establishing that challenge to first stage of multistage lease program was not ripe when agency would be conducting additional analyses in later stages that could scuttle the program); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49–50 (D.C. Cir. 1999) (recognizing that the Forest Service's decision to issue leases was not final until leases were issued because the agency could “undertake additional efforts to comply with its NEPA obligations” until that time); *Norvell v. Sangre de Cristo Dev. Co.*, 519 F.2d 370, 377–79 (10th Cir. 1975) (finding that petitioners challenge to activities under the lease were not ripe because all activities under the lease were in limbo pending compliance with NEPA and a possibility existed that the project would not meet the requirements of the NEPA); *Mobil Exploration & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1198 (10th Cir. 1999) (holding that a United States Minerals Management Service letter did not represent “final agency action” because it “served only to initiate further proceedings by which the MMS could [conclusively] determine whether Plaintiffs owed royalties”).

Instead, the Department of Defense's decision to lease the mineral rights represents the kind of definitive, irrevocable commitment that this Court and other courts have regularly been willing to label as final. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) (establishing that the issuance of a lease without a no-surface-occupancy stipulation

was an irretrievable commitment because the agency could not prevent environmental impacts caused by the lease after its issuance). *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (recognizing that the issuance of a compliance order that was not subject to further agency review marked the consummation of the agency’s decision making process).

Because the execution of the mineral lease was an irrevocable commitment and was not subject to review by the President or any other agency it marked the consummation of the Department of Defense’s decision-making process. Thus, this element weighs in favor of finality.

b. The execution of the lease is an “action” that determines the rights or obligations of the parties and one from which legal consequences flow.

Friends of Newtonian’s claim for relief satisfies the second element of the “finality” requirement—that the federal agency’s action be one by which rights and obligations have been determined, and from which legal consequences will flow. Courts have consistently recognized that this element is satisfied if the agency action in question imposes “an obligation, den[ies] a right, or fix[es] *some* legal relationship as a consummation of the administrative process.” *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (emphasis added); *see also Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 986–87 (9th Cir. 2006);

Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1387 (10th Cir. 1992).⁵ The execution of the lease satisfies this requirement.

On June 1, 2003, the lease between the Department of Defense and Mainstay Resources was executed. R. at 8. This lease set forth the parties' rights and obligations. It granted the Department of Defense a monthly royalty equal to one-fourth of the gross proceeds of the sale of all oil and/or natural gas produced pursuant to the lease. R. at 8–9. It entitled the Department of Defense to receive delay rental payments from Mainstay Resources at the rate of \$25.00 per acre, annually, beginning on the date of the lease and continuing thereafter until a well actually yielding royalties from oil and/or natural gas came into production on the property. R. at 9. It allowed the Department of Defense to control and review Mainstay Resources' operations. R. at 9. It gave the Department of Defense veto power over the entities to whom Mainstay Resources could sell oil and/or natural gas produced on the lease. R. at 9. It granted Mainstay Resources the legal right to construct drilling sites. R. at 8. It contracted to Mainstay Resources the right to

⁵ Although this Court has also held that this standard is satisfied when the agency action alters legal regime to which the involved federal agency is subject, this is not mandatory. *See, e.g., Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 482–83 (2004) (holding that EPA's order under the Clean Air Act prohibiting the Alaskan Department of Environment from issuing permits to a zinc mining company was a final agency action because the order effectively halted construction of the mine through the threat of civil and criminal penalties, despite lack of alteration of EPA's legal regime); *Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987) (holding that the Department of Education's letter informing state that interest would accrue was a final agency action despite lack of alteration of the Department's legal regime). Instead, this requirement can be satisfied through multiple alternative routes. *Or. Natural Desert Ass'n*, 465 F.3d at 987.

extract and recover oil and/or gas for a period of 20 years and as long thereafter as production continued in paying quantities. R. at 8.

These are the type of direct tangible effects that have led other courts to find that an agency's action sets forth the rights and obligations of the parties involved. *Compare Colo. Env'tl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1206 (D. Colo. 2011) (recognizing that the issuance of leases approving the exploration and reclamation activities on certain lease tracts weighs heavily in favor of a finding that the action is ripe for judicial review), *and Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 WL 7701433, at *3 (D.N.M. Aug. 3, 2011) (establishing that Forest Service's action of approving mineral leases on federal land constituted "final agency action authorizing specific activities" where lease had been executed and the lessee had acquired legal rights in the land), *with Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1065–66 (10th Cir. 2012) (establishing that agency action did not determine any rights and obligations of the parties where "no Nuclear Facility construction was occurring, the project design was less than 50% complete, and NNSA was still evaluating sizing, layout, and excavation options").

Moreover, a federal agency's execution of a mineral lease is far different from agency actions that this Court has previously held not to be final for lack of direct appreciable legal consequences. *See Franklin v. Massachusetts*, 505 U.S. at 798 (establishing that the Secretary of Commerce's presentation of report containing decennial census to the President was not final agency action because report carried

“no direct consequences” and served “more like a tentative recommendation than a final and binding determination”); *Dalton v. Specter*, 511 U.S. 462, 469–71 (1994) (establishing that submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment Commission was not a final agency action because the recommendations were in no way binding on the President). Unlike the agency actions in those cases, which in no way affected the rights of the parties involved, the Department of Defense’s execution of the lease had “direct and appreciable legal consequences.” *Bennett*, 520 U.S. at 178.

Because the Department of Defense’s decision to lease had a binding legal effect on the parties, this element weighs in favor of finality. This Court should hold that the Department of Defense’s lease with Mainstay Resources is a “final agency action.”

B. Friends of Newtonian Will Suffer Sufficient Harm Because of the Execution of the Mineral Lease Between Mainstay Resources and Department of Defense.

Friends of Newtonian’s claim satisfies the second ripeness requirement—that it will suffer sufficient hardship if judicial review is withheld. In *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. at 733–34, this Court considered two factors in evaluating the “hardship” element: 1) whether the agency action caused effects of a strictly legal kind; and 2) whether the agency action will inflict significant practical harm upon the interests that the claimant advances. Friends of Newtonian’s claim satisfies both requirements.

First, the Department of Defense’s lease causes adverse effects of a strictly legal kind. It gives Mainstay Resources the legal right to recover and extract federally owned minerals. As this Court recognized in *United States v. Los Angeles & Salt Lake Railroad Co.*, 273 U.S. 299, 309–10 (1927) (opinion of Brandeis, J.), if the action commands someone to do something or to refrain from doing something; grants, withholds, or modifies a type of formal legal license, power, or authority; subjects someone to civil or criminal liability; or creates “legal rights or obligations,” it has effects of a strictly legal kind. Unlike the circumstances in *Ohio Forestry Ass’n*, 523 U.S. at 733–34, where this Court rejected a claim seeking review of an agency’s plan to cut timber because the plan did not give anyone “a legal right to cut trees[,]” the lease’s effects are of a strictly legal kind, giving Mainstay Resources the right to recover oil.

Second, if judicial review is denied, the lease will inflict significant practical harm upon the interests that Friends of Newtonian advances. Since the execution of the lease, Mainstay Resources has constructed two well sites, Watt 1 and Watt 2. R. at 10. Each has been completely constructed and Mainstay Resources has obtained all the necessary permits to begin the fracking process. R. at 10. The chemicals used in the fracking process pose to contaminate and pollute the New Tejas River—which flows in close proximity of the well locations—and several natural water sources in Newtonian. R. at 8–10. This Court and others have established that allegations of injury to important environmental interests may constitute substantial harm deserving of judicial intervention. *See, e.g., United*

States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973) (“Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”); *Cady v. Morton*, 527 F.2d 786, 791 (8th Cir. 1975) (establishing that injuries of a noneconomic nature to widely-shared aesthetic and environmental interests is sufficient for judicial review); *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir. 1970) (recognizing that public interest in environmental resources is a legally protected interest, the violation of which is sufficient for judicial review).

These circumstances are far different from those in which this Court has rejected claims for relief because the threat of harm was distant and uncertain. In *Ohio Forestry Ass’n*, this Court denied a petitioner’s claim seeking to prevent the Forest Service from logging. 523 U.S. at 733–34. This Court reasoned that because the Forest Service needed to “focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court” prior to even beginning the logging process, the petitioner could bring its claim at a later time when the harm was more imminent. *Id.* at 734.

Once the fracking process begins, the harm will have been caused. Absent judicial intervention, the process will begin. Because the Department of Defense’s execution of the lease with Mainstay Resources caused strictly legal effects,

designating the rights and obligations of the parties and Mainstay Resources' fracking procedures are not contingent future events, Friends of Newtonian will suffer sufficient hardship if judicial review is withheld. This Court should find that Friends of Newtonian's claim concerns a "final agency action" that is ripe for review.

II. THE DEPARTMENT OF DEFENSE'S LEASE OF AND PARTICIPATING ROYALTY INTEREST IN THE MINERAL RIGHTS OF FORT WATT PROPERTY CONSTITUTES A "MAJOR FEDERAL ACTION" REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT PURSUANT TO THE NEPA.

Friends of Newtonian's claim also satisfies the requirements under the NEPA. The purpose of the NEPA is to place restraints on the "profound impact of man's activity on the interrelations of all components of the natural environment." 42 U.S.C. § 4321. NEPA imposes procedural requirements on federal agencies to evaluate the environmental impact of their proposals and actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). These procedures require a federal agency to prepare an EIS prior to undertaking any "major federal action" that will "significantly affect the quality of the human environment."⁶ 42 U.S.C. § 4332(2)(C) (2006).

⁶ The EIS serves to inform "the public and Congress of the environmental consequences of and alternatives to agency actions, thus fostering informed debate and strengthening agency accountability." *Atlanta Coal. on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1344 (5th Cir. 1979). This "informative purpose was the principal motivating force underlying the enactment of NEPA." *Id.* NEPA designates that upon the occurrence of a "major federal action significantly affecting the quality of the human environment" the acting agency should procure an EIS contemplating:

- (i) the environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

Because the Department of Defense’s execution of and participatory royalty interest in the lease represents a “major federal action” requiring the preparation of an EIS, the lower court erred. This Court should reverse the judgment of the court of appeals.

A. The Department of Defense’s Lease and Reservation of a Managing Interest in the Minerals with Mainstay Resources Is the Type of “Partnership” or “Joint Venture” Required by the NEPA for a Project Between a Federal and Non-Federal Agency to Be a Major Federal Action.

Friends of Newtonian’s claim satisfies the first requirement under the NEPA, that it concern a major federal action. In applying the “major federal action” standard to actions of non-federal agencies, the circuit courts have considered whether the action at issue can be characterized as a type of “partnership” or “joint venture” between the non-federal and federal agencies involved. *See, e.g., Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 103 (1st Cir. 2012) (establishing that one route a plaintiff could take to satisfy the “major federal action” requirement under the NEPA is “their claim that a partnership existed between the federal and non-federal entity”); *Biderman v. Morton*, 497 F.2d 1141, 1147 (2d Cir. 1974) (establishing that “non-federal parties may be enjoined, pending completion of an EIS, where those non-federal entities

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- (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.

42 U.S.C. § 4332(2)(C).

have entered into a partnership or joint venture with the Federal Government”); R. at 16.

By concluding that the lease was not a “major federal action,” the court of appeals joined a growing circuit split regarding the scope of this standard in the context of suits seeking to enjoin non-federal agencies under the NEPA. *See, e.g., Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001) (considering whether the agency has sufficient discretion over action to affect the outcome, or whether its role is merely ministerial); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 302 (1st Cir. 1999) (looking to “whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome”); *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1051 (10th Cir. 1998) (establishing that there is a “major federal action” when “the federal government has actual power to control the project”); *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994) (recognizing that “[t]he touchstone of major federal activity constitutes a federal agency’s authority to influence nonfederal activity”); *Sugarloaf Citizens Ass’n v. Fed. Energy Regulatory Comm’n*, 959 F.2d 508, 513–14 (4th Cir. 1992) (holding that “a non-federal project is considered a ‘federal action’ if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome”); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397–98 (9th Cir. 1992) (holding that no major federal action existed in part because Montana did not receive federal

funds nor had Montana received goods or services from a federal agency establishing a partnership with such an agency); *Ringsred v. City of Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987) (finding that “federal action [must be] a legal condition precedent to the [private event]”); *NAACP v. Med. Ctr., Inc.*, 584 F.2d 619, 628 n.15 (3d Cir. 1978) (recognizing that federal agency’s action must be a legal precondition that authorizes the other party to proceed with action); *Proetta v. Dent*, 484 F.2d 1146, 1148 (2d Cir. 1973) (establishing that there was no major federal action where private action could proceed “independently” of federal agency assistance or control).

The court of appeals based its holding on the standard set forth by the First and Ninth Circuit Courts of Appeals. This standard requires that the non-federal and federal agency be interdependent on one another to complete the project; that is, that the non-federal actor receive federal funding and assistance from the federal agency and that the federal agency exercise sufficient control over the endeavor. R. at 17. This analysis is flawed. This Court should clarify the circuit split and adopt the approach used by the Second and Fourth Circuit Courts of Appeals, that a non-federal project is considered a “major federal action” if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome as that interpretation is most consistent with Council on Environmental Quality regulations and the general purpose of the NEPA.

1. Federal funding is not required for a nonfederal action to be considered a major federal action.

NEPA does not define the term “major federal action.” However, the Council on Environmental Quality (CEQ)⁷ has issued regulations defining the term as encompassing not only actions by the federal government, but also actions by nonfederal actors “with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18 (1978). This Court has stated that the “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). The court of appeals’ interpretation of this language is at odds with CEQ’s requirements.

The court of appeals based its conclusion primarily on the fact that the Department of Defense did not provide federal funding to Mainstay Resources for either the purchase of Fort Watt land or the construction of Watt 1 or Watt 2. R. at 17. The court also reasoned that “[n]one of the construction or fracking has been or will be performed by any federal employees.” R. at 17. However, the lack of federal funding and assistance by the Department of Defense in this case is not a determinative factor. See 40 C.F.R. § 1508.18(a) (establishing that the term “actions” include “projects and programs entirely *or* partly financed, assisted, conducted, regulated, *or approved by federal agencies*”) (emphasis added). As the Fifth Circuit Court of Appeals recognized in *Atlanta Coalition on Transportation Crisis, Inc. v. Atlanta Regional Commission*, although “the federal character of a

⁷ The CEQ is a federal executive agency created by NEPA. 42 U.S.C. § 4342 (2006). CEQ regulations implementing NEPA are binding on all federal agencies. *Andrus v. Sierra Club*, 442 U.S. 347, 357–58 (1979).

state of local project can be established merely, by the presence of substantial federal assistance[,] . . . the presence of federal financial assistance is generally just one factor in the analysis of whether there is sufficient federal control over, responsibility for, or involvement with an action to require preparation of an EIS.” 599 F.2d 1333, 1347 (5th Cir. 1979). It is not dispositive. *Id.*

In fact, even the cases from the First and Ninth Circuit Courts of Appeals, on which the court of appeals relied, recognize that a non-federal agency’s action could be enjoined where the non-federal actor was not receiving federal funding. *See Mayaguezanos por la Salud y el Ambiente*, 198 F.3d at 302 (recognizing that in cases where there is no claim that the non-federal project is being federally funded, it applies the same standard as the Fourth Circuit, looking to “whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome”); *Fund for Animals, Inc.*, 962 F.2d at 1397 (recognizing that nonfederal actors may be enjoined under the NEPA “if their proposed action cannot proceed without the prior approval of a federal agency”).

Other circuit courts recognize this distinction as well. *See Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985) (holding that federal court could enjoin nonfederal actor where the nonfederal action cannot lawfully begin or continue without the prior approval of a federal agency); *Biderman*, 497 F.2d at 1147 (holding that where nonfederal action cannot lawfully begin or continue without the prior approval of a federal agency, nonfederal actor may be enjoined

under NEPA); *Sugarloaf Citizens Ass'n*, 959 F.2d at 513–14 (holding that “a non-federal project is considered a ‘federal action’ if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome”).

The fact that the Department of Defense did not provide federal funding or assistance to Mainstay Resources is not dispositive. As a leading commentator on the issue has observed: “[T]he distinguishing feature of ‘federal’ involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding ‘federal’ action emphasize authority to exercise discretion over the outcome.” *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) (quoting William H. Rodgers, Jr., *Environmental Law* 763 (1977), *overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992)). Instead, this analysis should focus on “control.”

2. The Department of Defense’s execution of and managing interest in the lease with Mainstay Resources represents the level of “control” necessary to satisfy the major federal action standard.

The Department of Defense’s execution of the lease and reservation of a managing interest in the minerals satisfies the “control” standard. In cases where there is no claim that the non-federal project is being federally funded, the circuit courts have focused on the federal agency’s “control” over the private actor. *See, e.g., Mayaguezanos por la Salud y el Ambiente*, 198 F.3d at 302; *Sugarloaf Citizens Ass’n*, 959 F.2d at 513–14; *Ross*, 162 F.3d at 1051; *Ringsred*, 828 F.2d at 1308;

NAACP v. Med. Ctr., Inc., 584 F.2d at 628 n.15. A non-federal project is considered a ‘federal action’ if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome. *Sugarloaf Citizens Ass’n*, 959 F.2d at 513–14; *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986); *Citizens Against Rails-to-Trails*, 267 F.3d at 1151; see *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244 (D.C. Cir. 1980). The terms of the lease satisfy this standard.

Without the lease, Mainstay Resources could not engage in any type of oil recovery, let alone fracking. The execution of the lease itself was the legal prerequisite for the consummation of the extraction process. Prior to this point, Mainstay Resources could not construct wells, it could not recovery oil and gas and it could not frack. As the Second Circuit Court of Appeals recognized in *Biderman v. Morton*:

In such instances, if NEPA is construed to mandate that the requisite agency decision be enlightened by and grounded on an EIS, it is beyond cavil that the court may then enjoin the non-federal actors pending completion of that impact statement. Indeed, were such non-federal entities to act without the necessary federal approval, they obviously would be acting unlawfully and subject to injunction.

497 F.2d at 1147.

Other circuit courts have recognized that the issuance of a lease satisfies this standard as well. See *Sierra Club v. Peterson*, 717 F.2d 1409, 1412–15 (D.C. Cir. 1983); see also *Cady*, 527 F.2d at 793–95 (holding that agency’s decision to issue coal leases required EIS); *South Dakota v. Andrus*, 614 F.2d 1190, 1194–95 (8th Cir. 1980) (holding that issuance of mineral patent not a major federal action, because

unlike a lease, mineral patent not a precondition to initiation of mining operations); *Greene Cnty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412 (2d Cir. 1972) (holding transmission lines could not be strung without Federal Power Commission license); *W. Va. Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (holding that timber-cutting and mining activity in Monongahela National Forest could not proceed without NPS permission).

Moreover, the terms of the lease granted the Department of Defense control over lease operations and produced mineral distribution. Section 11 of the lease is titled “Inspection” and states: “At least once each quarter, Lessor may inspect all operations and facilities at the Leased Premises with the Lessee to determine compliance with the provisions of the lease in connection with Lessee’s operation at, and production from, the Leased Premises.” R. at 9. Based on this section, the Department of Defense was required to inspect Mainstay Resources’ oil and gas extraction and recovery operations at least four times a year to determine compliance of the lease.

Section 14 of the lease is titled Compliance with Law and states:

Lessee shall comply with all applicable *federal*, state, and local *laws and regulations*, including without limitations, those governing land use, *conservation*, *pollution control*, endangered or threatened species preservation, and irrigation. Moreover, Lessee covenants to comply with all applicable *federal* and state *laws and regulations* regarding safety, protection of the Leased Premises, protection of property, protection of wildlife (including, without limitation, endangered species), and *protection of human life and health*.

R. at 9 (emphasis added). NEPA is a federal statute. Its stated purposes are to “declare national policy which will encourage productive and enjoyable *harmony*

between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man” 42 U.S.C. § 4321 (emphasis added). By approving Mainstay Resources’ operations in 2010, the Department of Defense established that Mainstay Resources’ fracking procedures satisfied NEPA requirements. This is the type of agency control that other courts have held sufficient. *See, e.g., Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (holding that NEPA requirements were triggered because federal approval was required before a county highway could be constructed through a park; agencies were required to consider environmental factors in their decision and had discretion whether or not to approve the construction of the road or to compel an alternative route); *Sierra Club v. Hodel*, 848 F.2d 1068 (holding that NEPA requirements were triggered because the agency had a statutory obligation to prevent unnecessary degradation of wilderness areas from the construction of a highway and the authority to require use of an alternative route).

The lease also provides the Department of Defense has complete veto powers over any and all sales of oil and gas produced from the leased premises to any unaffiliated third party if it deems the sale a national security risk. R. at 9. The lease provides no repercussions for Mainstay Resources should it disagree with the Department of Defense’s decision. It only provides that the Department of Defense can deny distribution. These are not the type of ministerial acts courts have been unwilling to label as satisfying this standard. *See Atlanta Coal. on Transp. Crisis*,

Inc., 599 F.2d 1333 (establishing that because the Secretary of Transportation had no discretion in ratifying planning procedures and allocating funding, NEPA did not apply); *NAACP v. Med. Ctr., Inc.*, 584 F.2d 619 (holding that because the Department of HEW had no discretion to reject capital expenditures plan under the Social Security Act, its approval of the plan was a ministerial act and NEPA did not apply).

The Department of Defense’s lease with Mainstay Resources and reservation of a managing interest in the minerals is a “major federal action” under the NEPA. The terms of the lease permit the Department of Defense to control both operations and distribution. Because this is the type of control and discretion that was intended by the NEPA, the lower court erred. This Court should reverse the lower courts judgment and hold that the lease was a major federal action.

B. Mainstay Resources’ Fracking Procedures at Watt 1 and Watt 2 Will Significantly Affect the Quality of the Human Environment.

Friends of Newtonian’s claim satisfies the second requirement necessary for the preparation of an EIS—that the “major federal action” is also one that “significantly affects the quality of the human environment.” The significance of the action at issue must be considered in the light of its effect of the “human environment.” 40 C.F.R. § 1508.14 (1978). Per CEQ regulations, this term should be interpreted “comprehensively” to include the natural and physical environment

and the relationship of people with that environment.⁸ *Id.* CEQ regulations also establish that “significance” is a function of the “context” and “intensity” of the major federal action on the “human environment.” 40 C.F.R. § 1508.27 (1978). In applying this standard, other courts have recognized that “a plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared.” *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1351 (9th Cir. 1992).

First, the “context” of the Department of Defense’s lease with Mainstay Resources is such that it could significantly affect the human environment. In determining the “context” of the action, CEQ regulations establish that courts should consider the significance of an action in several contexts, such as: society as a whole, the affected region, the affected interests, and the locality. 40 C.F.R. § 1508.27(a) (1978). The location of Watt 1 and Watt 2 cause considerable concern given the chemicals used in the fracking process. The two wells are located on the 750 acre piece of property which Mainstay Resources purchased from the Department of Defense. R. at 8–10. The land Mainstay Resources bought consists of a shallow valley approximately one mile long and part of the surrounding foothills. R. at 8. One drill site is located at the southwest foot of the valley and the other, along the northern edge of the valley near the foothills. R. at 10. The New Tejas River flows along the western edge of the valley, travels west for another 30 miles

⁸ “This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement.” *Id.*

and then crosses over the border where New Tejas and Newtonian meet.⁹ R. at 8. The proximity between Watt 1 and Watt 2 and the New Tejas River is alarming. The river flows directly into Newtonian aquifers. Contamination of the river means contamination of the aquifers.

Second, the intensity of potential harm that fracking Watt 1 and Watt 2 may have on the “human environment” warrants NEPA review. CEQ regulations establish that “intensity” is a multi-factor analysis considering factors such as: “[t]he degree to which the proposed action affects public health or safety” and “the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”¹⁰ 40 C.F.R. § 1508.27(b)(2), (5) (1978). Based on these factors, preparation of an EIS is warranted.

The effects of fracking on the environmental and human health are still being evaluated and not yet completely understood. While fracking has been around in some form for several decades, it did not become a viable means of shale oil and gas production until the late 2000s. R. at 6. Modern fracking techniques involve drilling vertically into the rock formation for several thousand feet and then drilling horizontal wells branching out from the vertical well.¹¹ R. at 6. To retrieve the oil

⁹ The two states border each other for 159 miles along New Tejas’ northwestern edge and Newtonian’s southeastern edge. R. at 8.

¹⁰ See 40 C.F.R. § 1508.27(b) for complete and extensive factors enumerated in CEQ regulations.

¹¹ Watt 1 sunk to 8200 feet and branched out horizontally approximately 3,750 feet. R. at 10. The well at Watt 2 extended 12,175 feet deep and approximately 5,400 feet horizontally. R. at 10. Mainstay Resources received updated drilling permits

or natural gas, huge quantities of water mixed with sand and chemicals are then injected at high pressure and volume into the rock, which creates fissures through which the trapped oil and gas may move freely toward the well. *See* Joe Hoffman, *Potential Health and Environmental Effects of Hydrofracking in the Williston Basin, Montana*, http://serc.carleton.edu/NAGTWorkshops/health/case_studies/hydrofracking_w.html (last modified Sept. 16, 2013) (establishing that the fracking process produces millions of gallons of toxic fluid containing not only the added chemicals, but other naturally occurring radioactive material, liquid hydrocarbons, brine water and heavy metals.)

These fissures provide pathways for gases, chemicals and other hazardous materials to infiltrate natural water sources. *See id.* (recognizing that the fissures created by the fracking process can also create underground pathways for gases, chemicals and radioactive material). In fact, in its relatively short existence, fracking is already suspected of polluting drinking water in multiple states. *See Risky Gas Drilling Threatens Health, Water Supplies*, Natural Res. Def. Council, <http://www.nrdc.org/energy/gasdrilling/> (last visited Nov. 25, 2013) (establishing that fracking is currently suspected of polluting drinking water in “Arkansas, Colorado, Pennsylvania, Texas, Virginia, West Virginia and Wyoming.”).

Moreover, it is not yet clear what impact the contamination of these water sources can have on human health. However, initial studies show that the chemicals used in the process can have alarming effects. *See Hoffman, supra*

and was set to begin actively fracking Watt 1 and Watt 2 on February 1, 2011. R. at 10.

(establishing that study found that over 632 different chemicals are used in the fracking process by oil companies in the U.S. Of these chemicals, 75% “could affect the skin, eyes, and other sensory organs, and the respiratory and gastrointestinal systems. Approximately 40–50% could affect the brain/nervous system, immune and cardiovascular systems, and the kidneys; 37% could affect the endocrine system; and 25% could cause cancer and mutations.”). An extensive report prepared by a congressional committee provides further support for this concern. In 2011, an extensive study by a congressional committee found that between the years of 2005 and 2009 oil and gas service companies used fracking products containing “29 chemicals that were (1) known or possible human carcinogens, (2) regulated under the Safe Drinking Water Act for their risks to human health, or (3) listed as hazardous air pollutants under the Clean Air Act.” *Chemicals Used in Hydraulic Fracturing*, U.S. House of Representatives Comm. on Energy & Commerce Minority Staff (Apr. 2011), <http://conservationco.org/admin/wp-content/uploads/2013/02/Final-Rebuttal-Exhibits.pdf-Adobe-Acrobat-Pro.pdf>. These chemicals included compounds like benzene, toluene, xylene, and ethylbenzene. *Id.* All are regulated contaminants under the Safe Drinking Water Act. *Id.* Additionally, “diesel fuel, a frequent contaminant of drinking water, is among the constituents of fracking fluids; a recent summary indicated that over 32 million gallons of fluids containing diesel fuel were injected into wells during fracking operations over this same period in 19 states.” *Id.*

The health impacts associated with exposure to the chemicals used in the fracking process are only now being examined by health experts, since such large-scale drilling is a recent phenomenon. Hoffman, *supra*. “Exposure to toxic chemicals even at low levels can cause tremendous harm to humans; the endocrine system is sensitive to chemical exposures measuring in parts-per-billions, or less.” *Id.* Many of the health risks from the toxins used during the fracking process do not express themselves immediately, and require studies looking into long-term health effects. *Id.*

These are the specific type of significant effects that this Court has required for NEPA review. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). There, this Court denied a petitioners request for injunctive relief pursuant to the NEPA because the actions taking place had been occurring for over forty years. *Id.* This Court reasoned that “[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures.” *Id.* As such, cases in which the defendant is “conducting a new type of activity with completely unknown effects on the environment” are particularly fit for NEPA review. *Id.*

C. Requiring NEPA Review of Mainstay Resources’ Fracking Procedures Is in Line with the Purpose of the NEPA.

Allowing review of Mainstay Resources’ fracking procedure is in line with the purposes of the NEPA. The NEPA recognizes that it is “national policy [to] encourage productive and enjoyable harmony between man and his environment.” 42 U.S.C. § 4321 (2006). It was intended to reduce or eliminate environmental

damage and to promote “the understanding of the ecological systems and natural resources important to” the United States. *Id.* At its core, NEPA promotes a sweeping commitment to “prevent or eliminate damage to the environment” by focusing Government and public attention on the environmental effects of proposed agency action. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989); *see also Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97–98 (1983); *U.S. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004). By so focusing agency attention, NEPA ensures that the agency will not act on “incomplete information, only to regret its decision after it is too late to correct.” *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir. 1997)

1. The harmful environmental effects of fracking at Watt 1 and Watt 2 have yet to be considered by the Department of Defense or the public.

First, the harmful effects of fracking at Watt 1 and Watt 2 have not yet been considered. Even if the prior EIS prepared by the Commission in deciding whether to recommend the sale of Fort Watt can be imputed to the Department of Defense—it failed to consider the impact fracking procedures may have on the environment.¹²

The EIS prepared by the Commission analyzed the positive and negative

¹² In some cases, the issue is whether a federal agency may, by delegating its NEPA evaluation responsibilities, avoid the statute’s procedural requirements. Generally, the answer is no. *See, e.g., Idaho v. ICC*, 35 F.3d 585 (D.C. Cir. 1994); *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 1:09-CV-00407-OWW-DLB, 2009 WL 1575169, at *19–20 (E.D. Cal. May 29, 2009). An agency may, however, adopt another agency’s EIS or EA in some circumstances. 40 C.F.R. § 1506.3 (1978); *see also Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291, 1318–19 (W.D. Wash. 1994) (recognizing that agencies that have significantly participated in a jointly prepared EIS may rely on it without independent verification), *aff’d on other grounds sub nom. Seattle Audubon Soc’y v. Mosely*, 80 F.3d 1401 (9th Cir. 1996).

environmental effects, which might stem from decommissioning the installation and selling Fort Watt property to private entities. R. at 5. It detailed possible future uses for the land—such as residential communities, multi-family housing, business parks or other commercial uses, and how each of the potential alternate uses could impact the area surrounding Fort Watt. R. at 5. One potential option mentioned in the EIS was oil recovery and extraction, which the EIS stated could prove to be extremely lucrative given Fort Watt’s location in relation to the Magnus Shale. R. at 6. However, the EIS only addressed the potential impacts of conventional oil and gas development on the Fort Watt area. R. at 6. It did not discuss the impacts of fracking. In fact, the only mention of fracking in the EIS was a definition of the term and that it was not then economically feasible. R. at 6.

Additionally, as previously discussed, the harmful effects associated with fracking are still largely unknown and have only been recognized in recent years. The public has not had ample opportunity to consider these negative effects. In fact, when the Commission performed the initial EIS, the only criticism stemmed from an op-ed letter from a former Captain stationed at Fort Watt prior to his retirement who opposed Fort Watt’s closure. R. at 5.

These facts in no way illustrate the type of informed decision making process that the NEPA was created to promote. *See Robertson*, 490 U.S. at 349. (recognizing that the NEPA ensures that a federal agency makes informed, carefully calculated decisions when acting in such a way as to affect the environment and also enables dissemination of relevant information to external

audiences potentially affected by the agency’s decision). The enactment of the NEPA marks a sweeping commitment to “prevent or eliminate damage to the environment” by focusing Government and public attention on the environmental effects of proposed agency action. *Marsh v. Or. Natural Res. Council*, 490 U.S. at 371; *see also Balt. Gas & Elec. Co.*, 462 U.S. at 97–98; *U.S. Dep’t of Transp.*, 541 U.S. at 756. It ensures that an agency will not act on “incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Or. Natural Res. Council*, 490 U.S. at 371.

2. The potential for economic stimulus does not outweigh the potential harm.

The lower court held that Friends of Newtonian’s claim should be denied because NEPA compliance did not weigh in the public’s interest due to the economic stimulus that the New Tejas area would receive from the endeavor. R. at 17. The lower court based its conclusion on this Court’s holding in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. at 23–26. But that case was fundamentally distinguishable from this case. There, the plaintiffs challenged the Navy’s use of sonar equipment during its training exercises because of the harmful effects that it had on the health of marine animals and the plaintiffs ability to study and observe said animals. *Id.* This Court denied the claim, recognizing that the severity of the harm alleged (i.e. “the harm to an unknown number of the marine mammals that they study and observe”) compared to the costs of “forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet” weighed in favor of national security. *Id.* at 23–24. In this case, Friends of

Newtonian has not alleged a hypothetical injury to marine mammals and recreational activities. Instead, its claim represents a significant concrete harm that has the potential to affect the health and well being of many New Tejas and Newtonian citizens. Conversely, the only public interest alleged by the Department of Defense and Mainstay Resources is financial gain—not national security.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit and render judgment in favor of Friends of Newtonian.

Respectfully submitted,

ATTORNEYS FOR PETITIONER

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APPENDIX “A”

5 U.S.C. § 704 (2006)

§ 704. Actions reviewable

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

APPENDIX “B”

42 U.S.C. § 4332 (2006)

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

Currentness

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

(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