

TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Procedures for Implementing the National Environmental Policy Act

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INTRODUCTION

TechFreedom files these comments to NASA's recent Interim Final Rule and Request for Comment related to implementation of the National Environmental Policy Act (NEPA),¹ following the Council on Environmental Quality (CEQ's) rescission of its implementing regulations on February 25, 2025.² These comments are limited to two issues: 1) the need for full public participation in this process; and 2) the need for NASA to recognize that NEPA does not apply to activities in outer space that do not directly impact the territory of the United States.

I. About TechFreedom

TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

TechFreedom and undersigned counsel have a long history advocating for a space regulatory system that encourages innovation and entrepreneurship in outer space. We advocate for policies and regulations that align closer to "permissionless innovation" rather than the "precautionary principle"³ when it comes to regulating innovative uses of outer space.⁴ We

¹ NASA, Interim Final Rule and Request for Comment under 14 CFR Part 1216, published July 1, 2026, 91 Fed. Reg. 39879 (July 1, 2026) ("NASA NEPA Interim Rule Order").

² Interim Final Rule & Request for Comments, 90 Fed. Reg. 10610 (Feb. 25, 2025); Final Rule, 91 Fed. Reg. 618 (Jan. 8, 2026).

³ *Continuing US Leadership in Commercial Space at Home & Abroad: Hearing Before the H. Comm. on Space, Sci., & Tech.*, 118th Cong. 3–4 (2023) (statement of James E. Dunstan), <https://techfreedom.org/wp-content/uploads/2023/07/Space-Governance-Testimony-July-13-2023.pdf> ("Understand that I am not here advocating for Congress to overregulate space activities. Overregulation introduces levels of friction into the regulatory system that could accelerate flight overseas and play directly into the interests of our adversaries. Nor am I advocating for a totally 'hands-off' approach to space activities. The dangers to the 'commons' of outer space require us to be good stewards of the cis-lunar system. In the same way that Earth sits in the 'Goldilocks' zone of our solar system, not too close to the sun, but not too far away, Congress's task is to find a balance on the continuum between 'permissionless innovation' (where nearly anything goes), and the 'precautionary principle' (where the government must micromanage and approve every activity by US citizens in space.)").

⁴ See, e.g., James Dunstan, *Regulating Outer Space: Of Gaps, Overlaps, and Stovepipes*, Ctr. for Growth & Opportunity at Utah State Univ. (July 10, 2023), <https://www.thecgo.org/research/regulating-outer-space-of-gaps-overlaps-and-stovepipes/>.

have filed comments at a variety of agencies, including the FCC,⁵ FAA,⁶ the Department of State,⁷ Department of Commerce,⁸ and NASA.⁹ We have especially commented in

⁵ See, e.g., TechFreedom Comments on SpaceX Orbital Data Center System, File No. SAT-LOA-20260108-00016 (Mar. 23, 2026), <https://techfreedom.org/wp-content/uploads/2026/03/TechFreedom-Comments-SpaceX-Data-Centers.pdf>; TechFreedom Comments on Space Modernization for the 21st Century, SB Docket No. 25-306 (Oct. 20, 2025), <https://techfreedom.org/wp-content/uploads/2026/01/TechFreedom-Comments-Space-Modernization-1-20-26.pdf>; TechFreedom Comments on Mitigation of Orbital Debris in the New Space Age & Space Innovation, IB Docket Nos. 18-313 & 22-271 (June 27, 2024), <https://techfreedom.org/wp-content/uploads/2024/06/TechFreedom-Orbital-Debris-Refresh-Comments-6-27-24.pdf>; TechFreedom, Comments on Space Innovation & Facilitating Capabilities for In-Space Servicing, Assembly, and Manufacturing, IB Docket Nos. 22-271 & 272 (Apr. 29, 2024), <https://techfreedom.org/wp-content/uploads/2024/04/TechFreedom-FCC-ISAM-Comments.pdf>.

⁶ TechFreedom Comments on Mitigation Methods for Launch Vehicle Upper Stages on the Creation of Orbital Debris, Docket No. FAA-2023-1858 (Dec. 22, 2023), <https://techfreedom.org/wp-content/uploads/2023/12/TechFreedom-comments-Mitigation-Methods-for-Launch-Vehicle-Upper-Stages-on-the-Creation-of-Orbital-Debris-12-22-23.pdf>.

⁷ TechFreedom Comments on Stakeholder Feedback on the EU Space Act (Aug. 15, 2025), <https://techfreedom.org/wp-content/uploads/2025/08/TechFreedom-Comments-EU-Space-Act.pdf>.

⁸ TechFreedom Comments on Mission Authorization Draft Concept (Mar. 13, 2026), <https://techfreedom.org/wp-content/uploads/2026/03/DOC-OSC-Mission-Authorization-TechFreedom-Comments.pdf>.

⁹ See, e.g., TechFreedom Comments on NASA's Low Earth Orbit Microgravity Strategy Draft Goals and Objectives (Sept. 27, 2024), <https://techfreedom.org/wp-content/uploads/2024/10/TechFreedom-NASA-LEO-Microgravity-Comments-9-27-24.pdf>, TechFreedom Comments on Non-Interference of Lunar Activities & Lunar Non-Interference Questionnaire (June 27, 2024), <https://techfreedom.org/wp-content/uploads/2024/06/TechFreedom-Non-Interference-Zones-NASA-6-7-24-v2.pdf>; TechFreedom Comments on Technology Mission Directorate (May 13, 2024), <https://techfreedom.org/wp-content/uploads/2024/05/TechFreedom-Technology-Shortfalls-for-NASA-Space-Technology-Mission-Directorate-May-13-2024.pdf>.

proceedings¹⁰ and court cases¹¹ related to NEPA as it relates to outer space activities. We are uniquely suited to provide commentary in this important proceeding on this issue. To be clear, we do not advocate for a “wild west” of space without any regulation. Instead, we advocate for rational regulations that do not hamstring the developing commercial space industry, and more importantly, do not allow first movers to build regulatory moats in space, nor foreign adversaries to achieve dominance on the High Frontier.¹²

II. NASA Should Open This Proceeding for Full Comment

A. Implementing NEPA Is Not a Rule of “Organization, Procedure, or Practice”

NASA opens the NEPA Interim Rule Order with the assertion that the proposed changes do not trigger a requirement for notice and comment under the Administrative Procedure Act (APA).¹³

Although NASA is voluntarily providing notice and an opportunity to comment on the interim final rule, the agency has determined that notice and comment

¹⁰ TechFreedom, Comments on Modernizing the Commission’s National Environmental Policy Act Rules at 18 (Sept. 18, 2025), <https://techfreedom.org/wp-content/uploads/2025/09/TechFreedom-Comments-NEPA-9-18-25.pdf> (discussing the weaponization of NEPA to slow down outer space development).

¹¹ Brief for TechFreedom as Amicus Curiae Supporting Fed. Commc’ns Comm’n, *The International Dark-Sky Association, Inc. v. Fed. Commc’ns Comm’n*, No. 22-1337 (D.C. Cir. Ct. App. 2023), <https://techfreedom.org/wp-content/uploads/2023/06/TF-22-1337-International-Dark-Sky-Association-Inc.-v.-FCC.pdf>; Brief for TechFreedom as Amicus Curiae Supporting Respondent, *Viasat, Inc. v. Fed. Commc’ns Comm’n*, 47 F.4th 769 (D.C. Cir. 2022) (No. 21-1123), <https://techfreedom.org/wp-content/uploads/2021/09/File-Stamped-TechFreedom-Amicus-Brief-Viasat-v-FCC.pdf>.

¹² See, e.g., James E. Dunstan, *We need a National Space Council to chart our future in outer space*, SPACENEWS (Jan. 23, 2025), <https://spacenews.com/we-need-a-national-space-council-to-chart-our-future-in-outer-space/>; James E. Dunstan, *Regulating outer space after Loper Bright*, SPACENEWS (July 5, 2024), <https://spacenews.com/regulating-outer-space-after-loper-bright/>; *Artemis Accords: One Small Step for NASA, Not So Giant a Leap for Space Law*, TECHFREEDOM (May 15, 2020), <https://techfreedom.org/artemis-accords-one-small-step-for-nasa-not-so-giant-a-leap-for-space-law/>; *Revived National Space Council Could Mean Space Policy Rethink*, TECHFREEDOM (July 7, 2017), <https://techfreedom.org/revived-national-space-council-mean-space-policy-rethink/>; James E. Dunstan, “Space Trash:” *Lessons Learned (and Ignored) from Space Law and Government*, 39 J. OF SPACE L. 23 (2013).

¹³ 5 U.S.C. § 553(b)(A).

procedures are not required because this interim final rule falls within the APA exception for “rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). In addition, NASA’s regulations implementing NEPA’s procedural requirements may be characterized as rules of agency organization, procedure, or practice. NASA’s regulations prescribe how NASA action proponents and non-Federal project sponsors should conduct NEPA reviews: detailing the administrative process applicable to preparation of environmental documents. The NASA regulations do not prescribe substantive environmental policies or command particular outcomes. Promulgation of rules of agency organization, procedure, or practice does not require notice and comment. See 5 U.S.C. 553(b)(A).

As we demonstrate below, NASA’s implementation of NEPA is not a rule of organization, procedural, or practice, i.e., an internal rule, but rather, has substantive external impact on private parties, especially commercial space ventures doing business with NASA.

Courts and legal scholars have long recognized the limitations on deference accorded to agencies under Section 553(b)(A). In *Pickus v. United States Bd. of Parole* (D.C. Cir. 1974)¹⁴ the Parole Board had issued guidelines for parole decisions without going through the notice-and-comment procedure outlined in § 553(b) of the APA, claiming that its guidelines were procedural in nature and thus exempting them from the notice-and-comment process.¹⁵ The appeals court noted that, while § 553(b) includes a grant of deference to an agency in cases where rules are purely procedural in nature, this deference ends when the rule promulgated by the agency substantively affects those regulated by it.¹⁶ Thus, the court concluded that such deference “should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority.”¹⁷

Following from *Pickus*, the court developed the “critical feature” test: Deference is due only when a rule “covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their

¹⁴ *Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

¹⁵ *Id.* at 1108-11.

¹⁶ *Id.* at 1112-14.

¹⁷ *Id.* at 1113. For example, the rule promulgated by the Parole Board in *Pickus* was held to have improperly circumvented the notice-and-comment process since the new guidelines affected how parole decisions came out, something that has an inherent, substantive effect on a third party.

viewpoints to the agency.”¹⁸ While the rule promulgated by the agency can retain the protection of the exemption if it only affects the way third parties interact with the agency (the format of a filing, or internal deliberations), the exemption from notice-and-comment ends when the rule impacts the substantive “rights or interests” of parties.¹⁹

Both the language used in the NEPA Interim Rule Order and in the rules themselves demonstrate that these rules impact the substantive rights of third parties, and any changes thereto are thus subject to notice-and-comment rulemaking—for example:.

NASA’s regulations ***prescribe how*** NASA action proponents ***and non-Federal project sponsors should conduct NEPA reviews***: detailing the administrative process applicable to preparation of environmental documents. The NASA regulations do not prescribe substantive environmental policies or command particular outcomes.²⁰

The Order adds: “The regulations also clarify non-Federal project sponsor procedures for preparation of environmental documents for actions that are proposed to occur on NASA jurisdictional property or for which NASA has final decision-making authority.”²¹ This impact is reflected in Section 1216.202(c):

Actions developed by non-Federal project sponsor. If NASA is considering a proposed action from a non-Federal entity and becomes aware that the non-Federal project sponsor is about to take an action within NASA’s jurisdiction that would meet either of the criteria in paragraph (b) of this section, NASA will promptly notify the non-Federal project sponsor that NASA will take

¹⁸ *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980).

¹⁹ *Id.* Incidental burdens to third parties are insufficient to eliminate the Section 553(b)(A) exemption. In *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 281-82 (D.C. Cir. 2000), for example, the DC Circuit found that “an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties.” The court there stated that the USDA’s elimination of face-to-face inspection requirements, while imposing increased burdens, was nonetheless procedural and did not impact the “rights or interests” of outside parties. In contrast, in *Mendoza v. Perez*, 754 F.3d 1002, 1023-25 (D.C. Cir. 2014), guidance letters issued by the DOL failed the *Batterton* critical feature test because they altered the minimum wage and housing standards employers were required to meet for the purposes of H1-B visas, thus affecting the ‘rights and interests of third parties.’.

²⁰ NASA NEPA Interim Rule Order, 39881 (emphasis added).

²¹ *Id.*

appropriate action to ensure that the objectives and procedures of NEPA are achieved.²²

There is an entire subpart of the NEPA regulations that “non-federal project sponsors” are required to follow.²³ Since completing a favorable NEPA review is a mandatory requirement for partnering with NASA on any project, like the changes to minimum wage and housing standards in *Mendoza*, NEPA rules have a substantial impact on outside parties.

Thus, the Regulatory Flexibility Analysis which accompanies the order is wrong, as its wording confirms:

This interim final rule modifies existing policies and procedural requirements for NASA compliance with NEPA. The interim final rule does not regulate small entities. Rather, the rule applies to NASA proposed action proponents, **and non-Federal project sponsors** which may seek to undertake an activity over which NASA has approval authority and sets forth the procedural process for compliance with NEPA.²⁴

Similarly, NASA is also incorrect when it states: “NASA’s regulations implementing NEPA do not dictate what outcomes such consideration must produce, nor do they impose binding legal obligations on private citizens.”²⁵ These rules **are** binding on private citizens. Given how many small entities engage with NASA through its various programs (and thus must comply with these rules to receive NASA funding), including the SBIR and STTR programs, to say that “the interim final rule does not regulate small entities” simply is false. These rules do not just impact the “organization, procedure, or practice” of NASA, they impact a vast number of entities who do business with NASA. Full notice and comment should have been afforded the public in this proceeding.

B. NASA’s Claim of a “Need for Speed” Is Belied by the Sixteen-Month Lag Between the CEG Order and NASA’s New Interim Rule

NASA’s second defense for eschewing notice and comment is the purported critical need to issue the interim ruling as quickly as possible, thus making notice and comment

²² *Id.* at 39885.

²³ 14 C.F.R. Subpart 1216.8, Procedures for Non-Federal Project Sponsor-Prepared NEPA Documents.

²⁴ NASA NEPA Interim Rule Order at 39882 (emphasis added).

²⁵ *Id.* at 39881.

“impractical.”²⁶ “Because of this need for speed and certainty, notice and comment are, to the extent required at all, impracticable and contrary to the public interest.”²⁷ This defense rings hollow when one considers that it took NASA sixteen months from the date the CEQ rescinded its NEPA regulations in February 2025 to issue the instance Interim Rule Order. NASA could have easily opened a rulemaking proceeding in early to mid-2025 which would have afforded the public ample opportunity to comment on the changes and still allow NASA to release the interim order when it did.

This defense is further undercut by the fact that other agencies are conducting full APA notice-and-comment rulemaking proceedings. The FCC, for example, opened a full rulemaking proceeding in August 2025,²⁸ and TechFreedom filed comments therein.²⁹ The FAA, which authorizes the launch and reentry of commercial space vehicles, just this week opened a proceeding related to its NEPA rules.³⁰ Finally, the EPA, the agency most linked to NEPA, similarly has opened a proceeding by proposing revised rules, and seeking public comment on the same.³¹ While other agencies have proceeded to issue new rules without seeking public comment,³² NASA should follow the lead of the FCC, the FAA, and the EPA and conduct a full notice-and-comment rulemaking proceeding.

²⁶ 5 U.S.C. § 553(b)(B).

²⁷ NASA NEPA Interim Rule Order at 39881.

²⁸ See Modernizing the Commission’s National Environmental Policy Act Rules, WT Docket No. 25-217, 90 Fed. Reg. 40295 (proposed Aug. 19, 2025) (to be codified at 47 C.F.R. pt. 1).

²⁹ TECHFREEDOM, *supra* note 11.

³⁰ Fed. Aviation Admin., *Notice of Proposed Rulemaking: Waiver Specified Statutory Requirements for Commercial Space Launch and Reentry Actions*, <https://www.faa.gov/newsroom/2120-AM51-FAA-Commercial-Space-Waiver-NPRM-Final.pdf>.

³¹ Update of Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions, 91 Fed. Reg. 38359 (proposed June 25, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-06-25/pdf/2026-12862.pdf> (EPA).

³² See, e.g., Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025) (CEQ); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (July 3, 2025) (Dep’t of the Interior); Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676 (July 3, 2025) (Dep’t of Energy); National Environmental Policy Act, 90 Fed. Reg. 29632 (July 3, 2025) (USDA); Revision of National Environmental Policy Act Regulations, 90 Fed. Reg. 29426 (July 3, 2025) (FHWA, FRA & FTA); Recission of Procedures for Implementing the National Environmental Policy Act (NEPA), 90 Fed. Reg. 29453 (July 3, 2025) (Dep’t of the Navy); Procedures for Implementing NEPA; Removal, 90

C. ACUS Cautions That, When in Doubt, Agencies Should Conduct Notice-and-Comment Rulemaking

Even if NASA could sustain its argument that its NEPA rules just impact the “organization, procedure, or practice” of NASA, the Administrative Conference of the United States (ACUS) for decades has urged agencies to conduct full notice-and-comment rulemakings when the question is in doubt.

For rules falling within the “procedure or practice” exception in 5 U.S.C. 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.³³

Issuing an interim rule and then asking for comment after the fact is no substitute for robust public input on an issue as critical as NEPA.

III. NASA Should Affirm That NEPA Does Not Apply to Space Activities That Have No Direct Impact on the Environment in the Territorial United States

Turning to the substantive changes to its NEPA rules, NASA notes that the vast majority of its projects and missions are subject to categorical exclusions, allowing it to proceed without conducting environmental assessments or full environmental impact statements.³⁴ But this conclusion starts at step two of the analysis which NASA (and woefully, several other agencies) often skip: Does NEPA even apply to the activity? That is where NASA’s analysis should begin. TechFreedom asserts that for some of the missions and projects set forth in the Interim Rule Order, NEPA does not even apply.

The changes promote regulatory certainty and administrative efficiency, which will result in environmental documents that inform NASA enterprise

Fed. Reg. 29461 (July 3, 2025) (Army Civil Works); Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. 29465 (July 3, 2025) (Army Regulatory Program).

³³ RECOMMENDATION 92–1, THE PROCEDURAL AND PRACTICE RULE EXEMPTION FROM THE APA NOTICE-AND COMMENT RULEMAKING REQUIREMENTS (June 18, 1992), <https://www.acus.gov/sites/default/files/documents/92-1.pdf>.

³⁴ NASA NEPA Interim Rule Order at 39883 (“Given the most recent data NASA has available, most NASA actions fall within the scope of a categorical exclusion (98 percent categorically excluded, 1.4 percent had an environmental assessment/finding of no significant impact, and 0.16 percent had an environmental impact statement/ record of decision).”).

decision making on proposed actions related to space exploration and earth observation missions, aeronautics research, launch facilities and activities occurring thereon, sounding rocket and balloon campaigns, field campaigns, agency master planning, infrastructure, construction and maintenance activities, etc.³⁵

As discussed below, several of these categories of activities are exempt from NEPA review, because NEPA does not apply to purely outer space activities. There is thus no need to make a determination as to whether any of the long list of categorical exclusions apply, when the underlying statute itself is inapplicable to many aspects of “space exploration,” “earth observation missions,” and other NASA activities that do not impact the biosphere.

A. NEPA Has Never Applied to Activities in Outer Space

We have argued for half a decade that NEPA has never applied to outer space. We’ve raised this issue both at the FCC,³⁶ with other U.S. regulatory agencies,³⁷ and in several briefs to the court of appeals.³⁸

³⁵ *Id.* at 39881.

³⁶ TechFreedom, Comments on Mitigation of Orbital Debris in the New Space Age & Space Innovation, IB Docket Nos. 18-313 & 22-271 (June 27, 2024), <https://techfreedom.org/wp-content/uploads/2024/06/TechFreedom-Orbital-Debris-Refresh-Comments-6-27-24.pdf>; TechFreedom, Comments on Expediting Initial Processing of Satellite and Earth Station Applications & Space Innovations, IB Docket Nos. 22-411 & 271 (Mar. 3, 2023), <https://techfreedom.org/wp-content/uploads/2023/03/TechFreedom-Comments-Satellite-Streamlining-3-3-23.pdf>.

³⁷ TechFreedom, Comments on Mitigation Methods for Launch Vehicle Upper Stages on the Creation of Orbital Debris, Docket No. FAA-2023-1858 (Dec. 22, 2023), <https://techfreedom.org/wp-content/uploads/2023/12/TechFreedom-comments-Mitigation-Methods-for-Launch-Vehicle-Upper-Stages-on-the-Creation-of-Orbital-Debris-12-22-23.pdf>; TechFreedom, Comments on OSTP National Orbital Debris Research and Development Plan (Dec. 31, 2021), <https://techfreedom.org/wp-content/uploads/2022/01/TechFreedom-Comments-OSTP-Orbital-Debris-Strat-Plan.pdf>.

³⁸ Brief for TechFreedom as Amicus Curiae Supporting Fed. Commc’ns Comm’n, *The International Dark-Sky Association, Inc. v. Fed. Commc’ns Comm’n*, No. 22-1337 (D.C. Cir. Ct. App. 2023), <https://techfreedom.org/wp-content/uploads/2023/06/TF-22-1337-International-Dark-Sky-Association-Inc.-v.-FCC.pdf>; Brief for TechFreedom as Amicus Curiae Supporting Respondent, *Viasat, Inc. v. Fed. Commc’ns Comm’n*, 47 F.4th 769 (D.C. Cir. 2022) (No. 21-1123), <https://techfreedom.org/wp-content/uploads/2021/09/File-Stamped-TechFreedom-Amicus-Brief-Viasat-v-FCC.pdf>.

Twice now, FCC grants of satellite licenses have been challenged based on a claim that the Commission failed to conduct proper environmental reviews. First, in 2021 the Commission authorized SpaceX to lower the orbit of a number of its Starlink satellites.³⁹ Some appellants argued that the Commission erred in failing to conduct a full environmental assessment. In the SpaceX Second Modification Order, the FCC said:

As a threshold matter, we note that it is not clear that all of the issues raised by these parties are within the scope of NEPA or related to our action in approving SpaceX’s Third Modification application. We further observe that several of the issues presented to the Commission raise novel questions about the scope of NEPA, including whether NEPA covers sunlight as a source of “light pollution” when reflecting on a surface that is in space. We note that NEPA is a procedural statute intended to ensure that Federal agencies consider the environmental impacts of their actions in the decision-making process. We find that we do not need to evaluate and determine whether NEPA applies to the novel issues raised by Viasat and The Balance Group in order to act on SpaceX’s application. Instead, for purposes of our analysis, and out of an abundance of caution, we will assume that NEPA may apply and consider the concerns raised in the record before us under the standard set forth in section 1.1307(c) of our rules.⁴⁰

The DC Circuit affirmed the Commission’s decision and rejected the NEPA violation claims, but only on standing grounds, finding that the injury Viasat alleged was purely economic and thus not covered by NEPA,⁴¹ and that The Balance Group had failed to establish Article III standing to challenge the decision.⁴² The judge panel seized on the fundamental question of the applicability of NEPA to outer space raised in our brief, spending a significant amount of

³⁹ In re Space Exploration Holdings, LLC, 36 FCC Rcd. 7995 (2021) (SpaceX Second Modification Order), *aff’d sub. nom.* Viasat v. Fed. Commc’ns Comm’n, 47 F.4th 769 (D.C. Cir. 2022).

⁴⁰ *Id.* ¶ 77.

⁴¹ *Viasat*, 47 F.4th at 780 (“We do not question that space congestion attributable to SpaceX may impose economic costs on Viasat itself. But we do not think that Viasat (or its shareholders, officers, employees, customers, suppliers, or other stakeholders) can fairly be described as having personally suffered a nuisance, aesthetic, or other environmental injury from congestion in outer space.”).

⁴² *Id.* at 782 (“Again, we are left with no basis to determine whether the requisite elements of standing have been met—an issue on which the Group bore the burden of proof.”).

time having counsel for the FCC and petitions address the issue,⁴³ but sadly, because the case could be resolved on procedural grounds, the issue remains unresolved.

In 2022, the FCC approved a further modification of the Starlink system for its second generation satellites, over objections that the Commission should have done a full environmental review.⁴⁴ And again, the FCC ducked the NEPA issue:

In addressing the concerns raised, we follow the approach in the SpaceX Third Modification Order, wherein we analyzed whether the preparation of an EA would be required pursuant to our rules, without deciding the novel issue of NEPA's scope vis-à-vis space activities. We conclude that an EIS is not required in connection with this particular licensing action, and that SpaceX is not required to prepare an EA prior to our taking action in this partial grant.⁴⁵

This time, a group called The International Dark-Sky Association appealed to the DC Circuit.⁴⁶ Oral argument was held on December 11, 2023,⁴⁷ and several of the judges again questioned counsel as to the fundamental question of the applicability of NEPA to outer space. The court ruled in favor of the FCC, but once more failed to reach the substantive issue, ruling only that the appellants had failed to present sufficient evidence for the FCC to conclude that SpaceX's application presented a "significant environmental impact" under NEPA.⁴⁸

In both cases, TechFreedom filed amicus briefs urging the DC Circuit to rule that NEPA does not apply to outer space.⁴⁹ Below, we provide our reasoning, as it applies equally as well to this proceeding.

⁴³ Oral Argument, *Viasat v. Fed. Commc'ns Comm'n*, No. 21-1123, 47 F.4th 769, 774 (D.C. Cir. 2022), <https://www.courtlistener.com/audio/78782/viasat-inc-v-fcc/>.

⁴⁴ Fed. Commc'ns Comm'n, 37 FCC Rcd. 14822, *Space Exploration Holdings, LLC, Request for Orbital Deployment and Operating Authority for the SpaceX Gen2 NGSO Satellite System* (2022).

⁴⁵ *Id.* ¶ 103.

⁴⁶ *Int'l Dark-Sky Ass'n, Inc. v. Fed. Commc'ns Comm'n*, 106 F.4th 1206 (D.C. Cir. 2024).

⁴⁷ Oral Argument, *Int'l Dark-Sky Ass'n, Inc. v. Fed. Commc'ns Comm'n*, No. 22-1337 106 F.4th 1206 (D.C. Cir. Ct. App. 2024), <https://www.courtlistener.com/audio/89415/international-dark-sky-association-inc-v-fcc/>.

⁴⁸ 106 F.4th 1206, 1218 (D.C. Cir. 2024).

⁴⁹ *See, e.g.*, TechFreedom Comments, *supra* note 38.

1. Statutes Are Presumed Not to Apply Extraterritorially

“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁵⁰ A court is to “presume,” in other words, “that statutes do not apply extraterritorially.”⁵¹ What this means, in concrete terms, is that “absent *clearly expressed* congressional intent to the contrary, federal laws will be construed to have only domestic application.”⁵² Any “lingering doubt” should be “resolved” against extraterritoriality.⁵³

To understand just how “clearly expressed” the “congressional intent” in favor of extraterritoriality must be, consider *Argentine Republic v. Amerada Hess Shipping*.⁵⁴ The statute at issue there said it applied in “territory and waters, continental and insular, subject to the jurisdiction of the United States.”⁵⁵ *Amerada Hess* holds that this language does not encompass the high seas, even though the high seas are “waters” potentially “subject to the jurisdiction of the United States.”⁵⁶ “When it desires to do so,” *Amerada Hess* concludes, “Congress knows how to place the high seas within the jurisdictional reach of a statute.”⁵⁷

That’s the bar for a “clearly expressed” congressional intent about extraterritoriality. And just as Congress knows how to address the “high seas” when it wants to, Congress knows how to address “space” when it wants to. After all, U.S. law extends American criminal-law jurisdiction to American-registered vehicles “used or designed for flight or navigation in space.”⁵⁸ Congress has extended U.S. patent law to outer space.⁵⁹ To apply in outer space, NEPA would need to look like these laws. It would need to refer to space explicitly. *Amerada Hess* demands as much.

⁵⁰ Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

⁵¹ Hernandez v. Mesa, 140 S. Ct. 735, 747 (2020).

⁵² RJR Nabisco, Inc. v. Euro. Cmty., 136 S. Ct. 2090, 2100 (2016) (emphasis added).

⁵³ Smith v. United States, 507 U.S. 197, 203-04 (1993).

⁵⁴ 488 U.S. 428 (1989).

⁵⁵ *Id.* at 440.

⁵⁶ *Id.*

⁵⁷ *Id.* The decision then cites laws that explicitly use the words “high seas.” *Id.* at 440 n.7.

⁵⁸ 18 U.S.C. § 7(6).

⁵⁹ 35 U.S.C. § 105(a) (“Any invention made, used or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of this title.”).

2. NEPA Does Not Overcome the Presumption Against Extraterritoriality

Of course, NEPA says nothing like that. On the contrary, its text, even before it was amended in 2023, suggests at every turn that the statute is a distinctly terrestrial and domestic territorial one. Extratextual factors, meanwhile, show that NEPA does not even apply abroad, let alone in outer space. The case law confirms it.

a. NEPA’s Text Does Not Support Applying It to Outer Space

Congress never “clearly expressed” an intent that NEPA apply abroad, which now has been clarified by the 2023 NEPA Amendments.⁶⁰ Prior to those amendments, “the intention of the NEPA Congress” was “obscure.”⁶¹ “Although the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems, it does not explicitly provide that its requirements are to apply extraterritorially.”⁶² The bottom line is that “nothing in NEPA’s language suggests Congress intended NEPA to apply outside United States territory.”⁶³ And if NEPA says “nothing” about applying “outside United States territory,” all the more does it say nothing about applying in outer space.

b. Congress Understood the Unique Nature of Outer Space in 1969

The absence of any explicit statutory reference to outer space is especially telling given when NEPA was passed. President Nixon signed NEPA into law on January 1, 1970, almost a decade after the United States first launched a person into orbit, and just a few months after the Apollo 11 Moon landing. At no time in American history has Congress been more aware of outer space. Congress debated NEPA just two years after the Senate ratified the Outer Space Treaty.⁶⁴ So important was that treaty that President Johnson coaxed a sitting Supreme

⁶⁰ 42 U.S.C. § 4336e(10)(B)(vi).

⁶¹ Nat’l Res. Def. Council v. Nuclear Reg. Comm’n, 647 F.2d 1345, 1367 (D.C. Cir. 1981) (Wilkey, J., solo opinion for the court).

⁶² Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990); *see also* 42 U.S.C. § 4332(2)(F).

⁶³ Consejo de Desarrollo Economico de Mexicali, AC v. United States, 438 F. Supp. 2d 1207, 1234 (D. Nev. 2006).

⁶⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies Art. IX, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST].

Court justice, Arthur Goldberg, into retiring from the bench to negotiate it.⁶⁵ Clearly Congress was aware of advances in space, and it could easily have expressed a desire for NEPA to apply there.

What Congress could have done with NEPA is particularly instructive. It could have used that legislative opportunity, just two years after U.S. ratification of the OST, to domestically execute the general non-contamination provision of Article IX of the OST.⁶⁶ It would have been quite simple for Congress to cite to the OST in NEPA and declare that it should apply to U.S. exploration and use of space. Yet it didn't.

If anything, NEPA is emphatic that it does *not* apply in space. It tells the federal government to take a "systemic" approach to making decisions that "may have an impact on *man's environment*."⁶⁷ It requires that reports be prepared on the impact of "major Federal actions significantly affecting the quality of the *human environment*."⁶⁸ And it says that one of its purposes is to protect "the environment and biosphere."⁶⁹ And while it may be true that the Earth and its orbital space share a connection, physics dictates that all of the solar system is connected via the gravitational forces that interplay between the sun and the planets, effectively putting all of outer space within the control of the U.S. government. Space, though, is not part of the biosphere—i.e., the places on Earth that can sustain life.⁷⁰ NEPA must be given a constrained territorial scope—not one expanded by inventive inferences.

Note, too, that NEPA talks of coordination specifically among "Federal, State, and local agencies."⁷¹ The failure to mention coordination with foreign governments or international

⁶⁵ See WALTER A. MCDUGALL, ...THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE 415-18 (1985).

⁶⁶ OST art. IX ("States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose.").

⁶⁷ 42 U.S.C. § 4332(2)(A) (emphasis added).

⁶⁸ *Id.* § 4332(2)(C) (emphasis added).

⁶⁹ *Id.* § 4331.

⁷⁰ See *Biosphere*, NATIONAL GEOGRAPHIC: EDUCATION (Oct. 19, 2023), <https://education.nationalgeographic.org/resource/biosphere/>.

⁷¹ 42 U.S.C. § 4332(2)(C)(v).

agencies is a clear sign that NEPA does not apply abroad, let alone in space.⁷² If “waters” could not encompass the high seas in *Amerada Hess*, “human environment” surely cannot encompass satellite orbits or human orbital outposts, let alone activities on the Moon and beyond.

c. Other Factors Support the Argument NEPA Does Not Apply to Space

Even if Congress generally wants a statute to apply abroad, there are at least two ways that desire can be thwarted, or paused, in individual instances. One arises when Congress lacks control over the place where a party seeks to apply federal law. The other arises when American foreign policy is at play. If either of these factors is present, a court is not to apply our law abroad. Both are present here.

d. Lack of Congressional Control of the “Territory” of Outer Space

“United States law governs domestically but does not rule the world.”⁷³ “In a case of doubt,” therefore, a statute should be construed “as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”⁷⁴ American law, in other words, should be presumed to apply only where America is sovereign. The United States does not possess sovereignty over outer space. Other nations are free to enter and operate there, including in ways our nation doesn’t approve of. Indeed, productive space projects that we try to block are likely to occur, sooner or later, with some other country’s blessing.⁷⁵

In matters of environmental law, America lacks control over space as a matter of fact; it has actively disclaimed such control as a matter of international law. Several treaties fill the space (as it were). The main such authority is the Outer Space Treaty, which 117 countries have joined.⁷⁶ “Outer space,” the treaty says, “is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”⁷⁷ By

⁷² See Consejo de Desarrollo Economico de Mexicali, AC v. United States, 438 F. Supp. 2d 1207, 1234 (D. Nev. 2006).

⁷³ Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).

⁷⁴ N.Y. Cent. R.R. Co. v. Chisholm, 268 U.S. 29, 31-32 (1925).

⁷⁵ James E. Dunstan, *Who wants to step up to a \$10 billion risk?*, SPACENEWS (June 25, 2021), <https://spacenews.com/op-ed-who-wants-to-step-up-to-a-10-billion-risk/>.

⁷⁶ OST.

⁷⁷ OST art. II.

commanding that outer space remain sovereignless, the treaty confirms that Congress lacks legislative control there.

It is true that, under the Outer Space Treaty, nations “retain jurisdiction and control” over the objects and persons they send into space.⁷⁸ This is not the same, however, as having control over a territory for the purpose of analyzing whether a statute applies to outer space. Congress doubtless can regulate American ships; that does not mean it controls the high seas.⁷⁹ The Antarctic Treaty says that visitors to that continent remain “subject to the jurisdiction” of their respective nations;⁸⁰ that does not mean Congress controls Antarctica.⁸¹ The ultimate question is whether Congress is *sovereign* in space. Because it isn’t—as other articles of the Outer Space Treaty confirm—NEPA, to apply in space, would have to say in the clearest possible terms that it does so. As we’ve seen, NEPA does no such thing.⁸²

e. Foreign Policy Considerations

Among its other important functions, the presumption against extraterritoriality helps “ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”⁸³ The “foreign policy consequences” that Congress was willing to generate in passing NEPA are anything but “clear.”⁸⁴ It could be said, in fact, that to apply NEPA abroad is almost always to

⁷⁸ OST art. VIII.

⁷⁹ See *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57, 72 (D.D.C. 2005).

⁸⁰ Antarctic Treaty art. VIII, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

⁸¹ *Smith v. United States*, 507 U.S. 197 (1993).

⁸² That is not to say that space is without rules. A nation that joins the Outer Space Treaty is liable to other treaty-joining nations for launching, or hosting a launch, into space of an object that causes damage to any of those other nations. OST art. VII. Indeed, this principle of responsibility for one’s own launches has a treaty unto itself—the Liability Convention. Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1971, 24 U.S.T. 2389, 961 U.N.T.S. 13810. Under the Liability Convention, a treaty nation is absolutely liable to another treaty nation for the damage caused, by one of its space objects, to people or property on Earth or in the air. *Id.* arts. I, II. Liability among treaty-joining nations for collisions in space, meanwhile, is to be resolved according to fault. *Id.* art. III. Finally, to help ensure that these rules can be enforced, a third agreement, the Registration Convention, requires signatory nations to record the objects they launch into space with an international tracking registry. Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15.

⁸³ *Hernandez v. Mesa*, 589 U.S. 93, 110 (2020).

⁸⁴ *Id.*

walk into a foreign-policy minefield. Consider Judge Wilkey’s opinion in *NRDC v. Nuclear Regulatory Commission*.⁸⁵ At issue was whether NEPA applied to the export of nuclear materials from the United States to the Philippines. Although Congress is doubtless concerned about the environment, observed Judge Wilkey, it also has other, counterbalancing interests, among them a “desire to enable American businesses and consequently the American economy to reap the benefits of sales of nuclear reactors and nuclear components.”⁸⁶ And the flipside of Congress’s desire to enable the sale of nuclear material abroad, of course, is foreign countries’ desire to buy that material. Are our nation’s courts to tell those countries how to balance the needs of the environment with their need for energy? No, this Court said. “Other cultures, other countries at diverse stages of development,” Judge Wilkey wrote, “will react in their own way” to the “global problem” of environmental protection.⁸⁷ The plaintiffs before him were not entitled to “presume that they can represent the Philippine environment” by imposing NEPA abroad.⁸⁸

The foreign-policy implications of applying NEPA to NASA’s exploration efforts cannot be overstated. Current national space policy directs the federal government to “promote the export of United States commercial space goods and services . . . for use in international markets.”⁸⁹ This policy was strengthened last year in Exec. Order No. 14,335, where the President declared:

It is the policy of the United States to enhance American greatness in space by enabling a competitive launch marketplace and substantially increasing commercial space launch cadence and novel space activities by 2030. To accomplish this, the Federal Government will streamline commercial license and permit approvals for United States-based operators.⁹⁰

U.S.-licensed companies can lead the way in both space launch and “novel space activities” vis-à-vis foreign competitors and adversaries such as China. To hamstring American

⁸⁵ 647 F.2d 1345 (D.C. Cir. 1981).

⁸⁶ 647 F.2d at 1373 (discussing the Nuclear Non-Proliferation Act of 1978, 22 U.S.C. § 3201, *et seq.*).

⁸⁷ *Id.* at 1367.

⁸⁸ *Id.*

⁸⁹ NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 1, 22 (Dec. 9, 2020), <https://spp.fas.org/eprint/nsp-2020.pdf>.

⁹⁰ Enabling Competition In The Commercial Space Industry, Exec. Order No. 14,335, 90 Fed. Reg. 40219 (Aug. 13, 2025), <https://www.whitehouse.gov/presidential-actions/2025/08/enabling-competition-in-the-commercial-space-industry/>.

companies by applying NEPA to outer space undermines these critical foreign policy interests.⁹¹

Congress presumably wants the foreign-policy benefits of American-provided launch services, satellite broadband, and other public-private partnerships in space exploration conducted through NASA. It presumably doesn't want to cede those benefits to another nation, such as China.⁹² And it presumably doesn't want private parties meddling in these foreign-policy issues by claiming to "represent" other countries' "environment."⁹³ Nothing in NEPA unsettles any of these presumptions. And the presumptions hold even though satellite launches can conceivably create ancillary costs (*e.g.*, a small chance of falling debris) back on Earth. There is no sign in NEPA that Congress would want the mitigation of those costs to be prioritized over the acquisition of the benefits, in soft power and international good will, that could come from such space-based commercial activities such as an American company's providing Internet to remote and poverty-stricken regions around the world.

f. Extensive Case Law Supports the Argument That NEPA Does Not Apply to Outer Space

The case law, on the whole, confirms that NEPA should not apply extraterritorially, let alone in outer space.⁹⁴ Three points about these cases are worth emphasizing. First, domestic

⁹¹ See Andrew Jones, *China establishes company to build satellite broadband megaconstellation*, SPACE NEWS (May 26, 2021), <https://spacenews.com/china-establishes-company-to-build-satellite-broadband-megaconstellation/>.

⁹² See Namrata Goswami, *How China Is Transforming Space Power*, THE DIPLOMAT (Sept. 12, 2025), <https://thediplomat.com/2025/09/how-china-is-transforming-space-power/>.

⁹³ Nat. Resources Def. Council, Inc. v. Nuclear Reg. Comm'n, 647 F.2d 1345, 1367 (D.C. Cir. 1981).

⁹⁴ See, *e.g.*, *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 300 (1st Cir. 1999) (court "skeptical" of extraterritorial application of NEPA to uranium sale to Japan, although case decided on other grounds); *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207, 1235 (D. Nev. 2006) (NEPA does not apply to extraterritorial impacts of government's work on a canal-lining project at the U.S.-Mexico border); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004) (similar); *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57 (D.D.C. 2005) (NEPA did not apply to the transport of decommissioned military vessels from Virginia to a shipbreaker in the United Kingdom); *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 468 (D.D.C. 1993) (NEPA does not apply to certain military bases in Japan because of "long standing treaty arrangements" concerning those bases, plus "U.S. foreign policy interests" would "outweigh the benefits from preparing" one); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 760 (D. Haw. 1990) (NEPA did not apply to the removal, by the military, of a weapons stockpile in Germany; it was necessary to "balance[e] the environmental goals of NEPA against the particular foreign

conduct or decision making does not necessarily trigger extraterritorial application of NEPA. In *Basel Action Network*, for example, the ships were launched from Virginia—much as most satellite systems being launched from U.S. territory—yet NEPA did not follow the ships onto the high seas. And in *NEPA Coalition of Japan* and *Consejo de Desarrollo*, decisions were made in the United States that had effects abroad, yet that did not mean NEPA applied to the foreign consequences of those domestic decisions. As discussed below, the 2023 NEPA Amendments ground these judicial interpretations in express language.

Second, these cases reinforce the point that NEPA is not to be applied abroad if doing so might cause foreign-policy problems. Just as the Germans in *Greenpeace USA* wanted the weapons stockpile out of their country, many a nation here likely wants to share in the advances in scientific knowledge and services delivered from space. If applying NEPA to outer space could delay foreign countries' receipt of the desired good or service, NEPA should not be applied to outer space.⁹⁵

Third, the cases confirm that NEPA should not apply abroad when, regardless of whether it is so applied, the challenged action will happen anyway. Just as Mexico was going to use its water as it saw fit in *Consejo de Desarrollo*, and Swaziland was going to deal with its elephants as it saw fit in *Norton*, other countries are going to undertake outer space exploration and commercial operations as they see fit. If NEPA delays the ability of a U.S. company to conduct activities in space, that will simply hasten their launch from elsewhere—a reality that confirms Congress's lack of legislative control over space.⁹⁶

Granted, *Environmental Defense Fund, Inc. v. Massey* applied NEPA to a federal government plan to incinerate food waste in Antarctica.⁹⁷ But *Massey* is quite distinct from this issue.

policy concerns which federal action abroad necessarily entails.”); *Born Free USA v. Norton*, 278 F. Supp. 2d 5, 20 (D.D.C. 2003), vacated as moot, No. 03-5216, 2004 WL 180263 (D.C. Cir. Jan 21, 2004) (NEPA did not apply to the transfer of elephants from Swaziland to the United States, particularly because the federal government was “not [in] a position to control whether the elephants should be removed from the[ir] herds.”).

⁹⁵ See *NRDC*, 647 F.2d 1345 (foreign-policy value of nuclear exports counts against applying NEPA to the export process); NATIONAL SPACE POLICY, *supra* note 89, at 20, 22 (confirming the foreign-policy value of exporting “commercial space goods and services”).

⁹⁶ *Cf. Public Citizen*, 541 U.S. at 767 (“Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect. Hence, under NEPA . . . , the agency need not consider these effects in its EA[.]”).

⁹⁷ 986 F.2d 528 (D.C. Cir. 1993).

Antarctica, *Massey* declares, is “an area over which the United States has a great measure of legislative control.”⁹⁸ As we’ve explained, that is not true of outer space.⁹⁹

Massey treats NEPA as a domestic statute in part on the ground that it governs “the decisionmaking processes of federal agencies,” which “take place almost exclusively in this country.”¹⁰⁰ But as *Basel Action Network* explains, this was only one “of the four factors relied on . . . in *Massey*.”¹⁰¹ In declining to apply NEPA abroad, *Basel Action Network* thought it much more important that “the United States does not have legislative control over the high seas.”¹⁰² In addition, *Massey* concluded that the facts before it presented no weighty issues of foreign policy.¹⁰³ In that way, too, is it distinguishable from both the Court’s decision in *NRDC* (involving the export of nuclear material to the Philippines) and to whether NEPA can be weaponized to kneecap U.S. companies seeking to “export” space products and services to the world. Finally, even if *Massey* were on point in every other respect, it still would not be a case about outer space. Nothing in *Massey* is pertinent to whether a statute aimed at humanity’s environment and the biosphere governs off planet.

⁹⁸ *Id.* at 529.

⁹⁹ As we’ve also noted, it’s probably not true of Antarctica, either. *Massey* is undermined by a later Supreme Court decision, *Smith*, 507 U.S. 197, in which the justices ruled that the Federal Tort Claims Act does *not* apply in Antarctica. According to *Smith*, “Antarctica is best described as ‘an entire continent of disputed territory.’” 507 U.S. at 198 n.1 (quoting F.M. AUBURN, ANTARCTIC LAW AND POLITICS 1 (1982)). Countries’ various “sovereign claims” to Antarctica, *Smith* notes, “have all been suspended by the terms of the Antarctic Treaty.” *Id.* Much like space, therefore, Antarctica is “a sovereignless region.” *Id.* at 198. Although *Massey* says that Antarctica is “frequently analogized to outer space” on its way to *applying* American law, 986 F.2d at 529, that claim only further highlights the tension between *Massey* and *Smith*. *Massey* relies for its claim on *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984), which *Smith* overturns. What both *Massey* and *Beattie* fail to understand is that American law cannot be applied in an exotic place simply because that place has no sovereign. As *Smith* explains, “Congress generally legislates with domestic concerns in mind.” 507 U.S. at 1183 n.5; see also *NEPA Coalition of Japan*, 837 F. Supp. at 467 n.3 (distinguishing *Massey* as out of step with *Smith*); *Basel Action Network*, 370 F. Supp. 2d at 71 (“The power of *Massey* remains unclear in light of *Smith*[.]”); *Born Free USA*, 278 F. Supp. 2d at 20 n.3 (similar).

¹⁰⁰ 986 F.2d at 532.

¹⁰¹ 370 F. Supp. 2d at 72.

¹⁰² *Id.* See also *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207, 1235-38 (D. Nev. 2006) (declining to apply NEPA abroad in a case that clearly involved domestic decisionmaking).

¹⁰³ 986 F.2d at 535.

B. The 2023 Amendments to NEPA Make Even Clearer That NEPA Does Not Apply to Activities in Outer Space

The discussion above attempts to resolve the issue of the applicability of the pre-2023 NEPA statute using sound statutory construction arguments. The 2023 NEPA amendments slam the door shut on the issue by adding new Section 4336e(10)(B)(vi), by which Congress *excludes* from the definition of a “major federal action” or “MFA”:

extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;¹⁰⁴

It is critical to parse the exact language of this section. Note that “effects” here is a noun, not the verb “affects.” In other words, Congress has told agencies to examine where the impacts occur, and if the location is “outside the jurisdiction of the United States,” then the activity is not an MFA. As discussed in Section III(A)(2)(d) above, this language is consistent with prior case precedent interpreting NEPA, specifically, *Argentine Republic v. Amerada Hess Shipping*.¹⁰⁵ The statute at issue there said it applied in “territory and waters, continental and insular, *subject to the jurisdiction* of the United States.”¹⁰⁶

Similarly, Section 4336e(10)(B)(vi) talks in terms of “decisions” made by government agencies that might have effects “outside of the jurisdiction of the United States,” and exclude those decisions from the definition of an MSA. This follows the case law discussed above, specifically, *Basel Action Network*,¹⁰⁷ *NEPA Coalition of Japan*,¹⁰⁸ and *Consejo de Desarrollo*.¹⁰⁹

Since outer space, under international law, is not within the jurisdiction of the United States, licensing decisions which may impact outer space do not constitute an MFA. This is true even though the United States retains jurisdiction over its nationals as they explore and use outer

¹⁰⁴ 42 U.S.C. § 4336e(10)(B)(vi).

¹⁰⁵ 488 U.S. 428 (1989).

¹⁰⁶ *Id.* at 440 (emphasis added).

¹⁰⁷ See *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57 (D.D.C. 2005).

¹⁰⁸ See *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 468 (D.D.C. 1993).

¹⁰⁹ See *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006).

space and are obligated under Article VI of the OST to “authorize” and “supervise” those activities.¹¹⁰

C. NASA Should Revise Section 1216.200 to Make Clear That NEPA Does Not Apply to Activities Conducted in Outer Space That Do Not Impact the Human Biosphere

The 2023 NEPA Amendments provide the blueprint for NASA to modify its NEPA rules. Section 4336e(10)(B)(vi) excludes the following from NEPA review: “extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States.”¹¹¹ Proposed Section 1216.200 instructs NASA to “determine when NEPA applies.”¹¹² Subsection (b) specifies six categories of actions where “NEPA does not apply to a proposed agency action.”¹¹³ NASA should add a seventh category which would read:

(7) the proposed activity consists of extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States within the meaning of 42 U.S.C. § 4336e(10)(B)(vi).

Only by adding this new subsection can NASA ensure that its application of NEPA is consistent with the statute and Congressional will.

NASA’s decision to include this provision clearly will be granted deference by the courts, especially if it tracks the statutory language Congress inserted into NEPA in 2023. As the Interim Rule Order indicates,¹¹⁴ notwithstanding the reversal of *Chevron* deference in *Loper Bright v. Raimondo*,¹¹⁵ the Supreme Court has made clear that when it comes to implementing NEPA, agency actions are subject to substantial deference.¹¹⁶

¹¹⁰ OST Art. VI.

¹¹¹ See *supra* note 104.

¹¹² NASA NEPA Interim Rule Order, 39884, § 1216.200.

¹¹³ *Id.* § 1216.200(b)(1)-(6).

¹¹⁴ *Id.* 39879.

¹¹⁵ *Loper Bright Ent. v. Raimondo*, 603 U.S. 400, 412 (2024) (“*Chevron* is overruled.”).

¹¹⁶ *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168, 173, 179, 183 (2025) (“the statute “imposes no substantive environmental obligations” is “a procedural cross-check, not a substantive roadblock,” and that “the central principle of judicial review in NEPA cases is deference” under a rule of reason analysis).

CONCLUSION

TechFreedom urges NASA to take two actions in this proceeding: Issue a notice of proposed rulemaking and accept full public comment on its proposed changes, and in its final decision and rules, amend Section 1216.200 to make clear that NEPA does not apply to any NASA-supported activity that relates exclusively to operations in outer space.

Respectfully submitted,

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