Friends of the Everglades v. Secretary of the United States Department of Homeland Security: The Eleventh Circuit's Bright-Line Gloss on the Amended Definition of a "Major Federal Action" Under NEPA

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I. INTRODUCTION

The grant of a preliminary injunction concerning violations of environmental statutes has long been a hazy and complex area of environmental procedural jurisprudence. The Supreme Court's tests and mandates have proven unwieldy in the lower courts. *Friends of the Everglades v. Noem* attempts to apply this opaque standard to the construction of an immigrant detention site located in the Florida Everglades. In doing so, the majority proposes a novel narrowing interpretation of what constitutes a "major federal action" under the National Environmental Policy Act (NEPA), which, in turn, leads to a troubling application of their cyclical rationale to the review of NEPA violations under the Administrative Procedure Act (APA).

This note begins with a review of the interplay between NEPA and the APA before discussing the special preliminary injunction standard applied to environmental injunctions and the standard for a stay pending appeal on the merits. The facts and a review of the district court's decision in *Friends* follow. The analysis of this Note argues that the *Friends* majority substantively ignored the appropriate level of deference given to the district court and engaged in improper factfinding in order to claim that no "major federal action" had occurred. Furthermore, the analysis argues that the majority created a doctrinal loop by refusing to recognize a "major federal action" without a "formal" federal decision to fund the project, therefore exempting projects from NEPA's requirements and APA judicial review for failure to act by mere absence of traditional procedural steps.

II. BACKGROUND

NEPA was signed into law in 1970 and remains the nation's most comprehensive procedural framework for integrating environmental considerations into federal decision-making. Congress's purpose is to "use all practicable measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony."[1] When federal agencies propose or approve new projects, NEPA requires them to "include in every recommendation . . . on proposals for legislation and other major federal actions significantly affecting the human environment, a detailed statement . . . ." that takes the form of an environmental impact statement (EIS) in cases where the proposal *will* have an effect on the natural environment, or an environmental assessment (EA) showing that the project will have little or no impact on the natural environment.[2] Furthermore, NEPA demands that these proposals and closely related supervisory agencies' comments be "made available . . . to the public.[3] These mechanisms are central to the procedural character of NEPA; the Supreme Court has recently reaffirmed that NEPA is "a purely procedural statute . . . ." and has acknowledged the procedural requirements imposed.[4] Scholars describe

1. 42 U.S.C. § 4331(a).
2. 42 U.S.C. § 4332(D).
3. 42 U.S.C. § 4332(C)(v); 5 U.S.C. § 552.
4. Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Co., 605 U.S. 168, 173 (2025) (holding that an agency must prepare an EIS or EA for informational purposes, but NEPA is not a "substantive roadblock" on which denials should be solely based.); *see* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756-57 (2004) ("NEPA . . . require[s] agencies to undertake analyses of the

NEPA as an environmental disclosure statute used by the government to encourage informed decision-making regarding federal projects "rather than [to] justify[] decisions already made."[5]

Importantly, two conditions must be present to invoke judicial review of an alleged NEPA violation: There must be a "major federal action" and the action must be a "final agency action" as defined by the APA.[6] NEPA's EIS requirement attaches only to "major Federal actions significantly affecting the quality of the human environment," and prior to the BUILDER Act amendments in 2023, judicial tests of what constitutes a "major federal action" looked to the extent of federal funding, approval, or operational control, producing overlapping doctrines with emphasis on whether the federal agency *functionally* "controlled" or "funded" the project.[7] After 2023, a "major federal action" is limited to one that "the agency carrying out such action determines is subject to substantial Federal control and responsibility," but does not include "a non-federal action (I) with no or minimal Federal funding; or (II) with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project . . . ."[8] Because NEPA provides no private right of action, plaintiffs must challenge agency noncompliance through the APA, which authorizes review of "final agency action."[9]

The APA instructs that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review."[10] Subsequently, the APA authorizes courts to set aside actions that are "arbitrary, capricious, [or] not in accordance with [the] law," while § 551(14) permits review of an agency's *failure* to perform a discrete,

environmental impact of their proposals and actions." (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989))).

5. Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL'Y 293 (2010); 40 C.F.R. 1502.2(g).

6. 5 U.S.C. §551(14) (defining "agency action" under the APA); 42 U.S.C. § 4336(e)(10) (defining "major federal action").

7. 42 U.S.C. § 4332(C); *see* Fund for Animals v. Clark, 27 F. Supp. 2d 8 (D.C.C. 1998); Sierra Club v. Van Antwerp, 526 F.3d 1353 (11th Cir. 2008). The BUILDER amendments were enacted to limit the scope of environmental review of major federal actions and to establish other requirements intended to expedite environmental review of those federal actions; *see* H.R. 1577, 118th Cong. (2023) https://www.congress.gov/bill/118th-congress/house-bill/1577 (incorporated by the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (2023)).

8. 42 U.S.C. §§ 4336(e)(10)(A)-(B)(i)(II).

9. 5 U.S.C. § 704.

10. 5 U.S.C. § 704.

mandatory duty as an unlawful agency action.[11] Per the test set forth in *Bennett v. Spear*: A "final agency action" must have occurred, and the action must constitute the "'consummation' of the agency's decision process . . . [and] be one by which 'rights or obligations have been determined.'"[12] Consequently, a plaintiff alleging a NEPA violation for failure to prepare an EIS or EA, where operative standing is granted under the APA, must identify a final agency action *or* a nondiscretionary duty that the agency has unlawfully withheld in order to obtain standing for judicial review.[13]

Substantively, NEPA violations are commonly litigated through requests for injunctive relief. Courts weigh the traditional four factors applied for equitable relief: likelihood of success on the merits, irreparable injury, a balance of the equities, and the public interest.[14] The Court clarified its position on the standard in *Winters v. National Resources Defense Council*, "foreclose[ing] the use" of the irreparable harm standard as applying to the *possibility* of irreparable harm, citing that the standard was too lenient.[15] Instead, the standard now "requires plaintiffs seeking preliminary relief to demonstrate that an irreparable injury is *likely* . . . ."[16]

The *Friends of the Everglades* litigation arose amid heightened political attention to immigration policy and federal-state cooperation. On January 6, 2023, Florida's Governor Ron DeSantis declared a state of emergency, directing the Division of Emergency Management (FDEM) to "seek direct assistance and enter into agreements with any and all agencies of the *federal* government as may be needed to meet this emergency."[17] Acting under this authority, FDEM identified the Dade-Collier Training and Transition Airport (the "TNT Site," "Site," or

11. 5 U.S.C. § 551(13) (including "failure to act" in the definition of an "agency action"); *see* Norton v. S. Utah Wilderness All., 542 U.S. 55, 62-63 (2004) (clarifying that only legally required, discrete actions are reviewable under a "failure to act" theory).

12. Bennett v. Spear, 520 U.S. 154, 178 (1997) (citations omitted).

13. 5 U.S.C. § 704. *See* U.S.C. § 706, Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004), *Bennett*, 520 U.S. at 178.

14. William S. Eubanks II, *Damage Done? The Status of NEPA After Winter and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 652 (2009). Leslye A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263, 1276-1286 (1992).

15. Eubanks, *supra* note 14, at 656.

16. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 22 (2008); Eubanks, *supra* note 14.

17. Fla. Exec. Order No. 23-03 (2023) https://www.flgov.com/eog/sites/default/files/executive-orders/2024/EO-23-03-1.pdf. Governor DeSantis reaffirmed this commitment in EO 25-29. *See* Exec. Order No. 25-29 (2025) https://www.flgov.com/eog/sites/default/files/executive-orders/2025/EO%2025-29.pdf.

"Facility") as a suitable location for a temporary migrant detention and processing facility and began refurbishing the facility to detain immigrants with the promise of federal funding.[18] The Site lies within the Big Cypress Preserve and is adjacent to federally managed wetlands of a UNESCO world heritage site, the Florida Everglades ecosystem. The Facility was subsequently built on the TNT Site without preparation of an EIS or EA.[19]

The record before the district court showed that FDEM commenced preparation of the Site in March 2025 using a combination of state emergency funds and private contracts retained through the state's procurement authority.[20] Construction was completed on an expedited basis: Existing airfield hangars were retrofitted into dormitory-style units, and modular housing, sanitation, and medical facilities were installed over six weeks.[21] Public contracts indicate that no federal funds were disbursed at the time.[22] By June 10, 2025, Department of Homeland Security (DHS) Secretary Kristi Noem publicly stated on social media that the new facility provided essential support to federal partners in managing migrant flows.[23] Governor DeSantis, on the same day, told reporters at a press conference that the project was "requested by the federal government" and would be "fully fund[ed]" by it, publicly characterizing the project as a cooperative venture between Florida and DHS.[24]

The district court concluded that the federal and state defendants' failure to produce an EIS or EA prior to beginning construction on the project constituted a "final agency action" under Section 706(1) of the APA.[25] In particular, the court found that there was a "major federal action" because the facility was federally controlled, as "any state officials working on the site with detainees are doing so as deputized federal immigration officers pursuant to 287(g) agreements," citing the official Florida Department of Highway Safety and Motor Vehicles (FDHSMV) announcement designating deputized Florida Highway Patrol (FHP) troopers as "[Immigration and Customs Enforcement, or ICE] Task Force

18. Friends of the Everglades v. Noem, No. 25-22896-cv-Williams, 2025 WL 2423258, at *1, *21 (S.D. Fla. 2025); Cecilia Barria and Walter Fojo, *The Virtually Abandoned Florida Airport Being Turned into 'Alligator Alcatraz'*, BBC (June 25, 2025) https://www.bbc.com/news/articles/cwyrnrnxy7yo.

19. *Friends*, 2025 WL 2423258 at *21.

20. *Id.* at *25-26.

21. *Id.* at *21

22. *Id.* at *23.

23. *Id.* at *26.

24. *Id.*

25. *Id.* at *21.

Officers."[26] The district court also concluded that the Facility would be federally funding based on DHS's announcement that "$600 million in federal funding [would be applied] for the Detention Support Grant Program" where the *only eligible* applicant is FDEM.[27] The district court spent five pages detailing the level of federal involvement in the project.[28] Finding that the plaintiffs had sufficiently established a likelihood of success that the decision to not produce an EIS or EA constituted a reviewable final agency action, and that the action was a violation of NEPA's procedural requirements, the district court considered the irreparable injury prong.[29] Judge Williams found a "myriad of risks" stemming from the project that would cause serious environmental harm to the Everglades ecosystem.[30] In response to the government's objection that the plaintiffs had established any irreparable injury, Williams noted that the "harms Plaintiffs fear take time to accrue; and time and access for study is precisely what NEPA procedures are meant to afford."[31]

The court also considered the mitigation tactics offered by the defendants, concluding that they were insufficient to address the "direct risks to communities who depend on water from the Everglades for their supply . . . ."[32] Finally, the district court concluded that the balance of equities and the public interest weighed in favor of an injunction despite the defendants' claim that the Site was integral to "the significant national interest in combatting unlawful immigration . . . ."[33] Judge Williams specifically highlighted that the state and federal defendants had provided no evidence, beyond the importance of immigration enforcement, as to "why this detention camp, in this particular location, is uniquely suited and critical to that mission."[34]

III. COURT'S DECISION

The Eleventh Circuit held that the district court improperly granted a preliminary injunction to the plaintiffs because there was neither a "major federal action" under NEPA nor a "final agency action" under the

26. *Id.* at 1273.
27. *Id.* at 1277.
28. *Id.* at 1245. The plaintiffs presented nine witnesses while the federal and state defendants put one witness on the stand.
29. *Id.* at *1279.
30. *Id.*
31. *Id.* at 1281, n. 31.
32. *Id.*
33. *Id.* at 1284.
34. *Id.*

APA that would subject the action to judicial review and granted a stay of the district court's injunction. The panel noted that appellate review of a district court's decision to grant a preliminary injunction is conducted for abuse of discretion, underlying legal determinations are reviewed de novo, and factual findings checked for clear error. After establishing this construct, the court turned to the factors individually.[35]

A. No "Major Federal Action" Is Present in the Action

The court reviewed the district court's interpretation of the "major federal action" requirement of § 4336e(10) de novo, establishing that no "major federal action" as defined by NEPA had actually occurred.[36] Section 4336e(10) expressly excludes actions in which the federal government has no or minimal involvement or provides no or minimal funding, with the majority reading the statute disjunctively for either criterion to be met in order to exclude a project as a "major federal action."[37] On the funding issue, the panel argued that "without an application [for funding], there is simply nothing on which a decision [about a final agency action] can be made" because "the possibility that federal funding will be provided in the future is not sufficient to federalize a state project, even when such funding is likely."[38] Furthermore, the majority stated that the operations of the facility were not sufficiently federalized to satisfy the "federal control" prong.[39] They argue that since "ICE has not procured any detention space from Florida at the TNT Site," and that the "Facility is wholly run by Florida State Troopers," that there is no federal control present.[40] The court turned briefly to the district court's waiver of the defendants' improper venue defense before beginning its discussion of staying the preliminary injunction.[41]

35. Friends of the Everglades v. Sec'y of the U.S. Dep't of Homeland Sec., No. 25-12873, 2025 WL 2598567, at *1, *3 (11th Cir. 2025).

36. *Id.* at *7-9.

37. *Id.* at *5.

38. *Id.* at *7 (citing Atlanta Coal. on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333, 1347 (5th Cir. 1979).

39. *Id.* at *9.

40. *Id.*

41. *Id.* at *10 (arguing that there is a "closed universe of documents that constitute pleadings within the plain meaning of Rule 7," and the defendants have not filed any motions which would waive their venue defense).

B. Stay of Preliminary Injunction

Having established that the Site's construction was neither a "major federal action" nor a final agency action, the majority considered the factors relevant for staying a preliminary injunction: The movant for a stay must establish (1) a likelihood of success on the merits, and whether there will be irreparable harm to the degree that (a) the party *seeking* a stay will be irreparably injured in its absence, (b) the stay will substantially injure the *opposing* parties, and (c) the public interest is implicated.[42]

1. Movant's Likelihood of Success on the Merits

The majority first considered the likelihood of plaintiffs success on their APA claim and concluded that the plaintiffs had not established reviewability under the APA, so the federal defendants were likely to succeed on the merits of their appeal.[43] They explained that an action is only final when the "'agency failed to take a *discrete* agency action that it is *required to take*,'" and the plaintiffs had failed to show such a required action here.[44] Therefore, because NEPA's duty to prepare an EIS only attaches when an agency undertakes a "major federal action," no discrete duty to prepare an EIS exists without a major federal action under § 4336e.[45] The majority also found guidance from *Seven County Infrastructure Coalition v. Eagle County* in support of the assertion that "review of an agency's EIS is not itself the "agency's final decision concerning the project,'" because preparation of an EIS is merely an input into the ultimate final agency action.[46] The majority found no discrete duty to prepare an EIS or EA here because, beyond their finding of no major federal action, the EIS would not have impacted implementation of the project, and NEPA does not require agencies to give any particular weight to the information gleaned from an EIS or EA.[47]

42. *Id.* at *10-11.
43. *Id.* at *5-6.
44. *Id.* at *5 (citing Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004)).
45. *See* H.R. 1577, 118th Cong. (2023), *supra* note 7.
46. *Friends*, 2025 WL 2598567, at *6 (citing Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Co., 605 U.S. 168, 169 (2025)).
47. *Id.* at *5.

2. Showing of Irreparable Harm

The court also found that the irreparable harm prong of the stay analysis weighed handily in favor of the state and federal defendants.[48] The court gave significant weight to the immigration enforcement emergency order issued by Governor DeSantis and the ability of states to meet their emergencies using methods they deem appropriate.[49] The court concluded that the federal defendants would suffer injury because the injunction "compromise[s] DHS's ability to keep aliens detained, protect the law-abiding public, enforce immigration laws, and maintain border security."[50] Further, the majority disagreed with the district court's order instructing DHS to dismantle the site within sixty days based on the cost of removing, and potentially reconstructing, the new installments on the facility, finding it an improper exercise of authority and as contributing to the irreparable harm suffered by defendants.[51]

In their discussion of the last two prongs of the stay test, the court began by noting that "where the government is the party opposing the preliminary injunction, the balance of the equities and the public interest 'merge.'"[52] They concluded that, for matters of national security, the balance of equities tip handily in the defendants' favor and "'the public interest demands effective measures to prevent the illegal entry of aliens' at the border, in light of the 'significant economic and social problems' stemming from illegal immigration."[53] They argue that the "harmful consequences" of unlawful immigration are primarily felt by the state, and those conditions are present and evidenced by Governor DeSantis's state of emergency.[54] The majority concludes with a single paragraph dismissing the plaintiffs' environmental harm arguments as "down-the-line harm" while the injury suffered by the defendants are deemed "critical, immediate, and concrete."[55]

48. *Id.* at *10-11.
49. *Id.* at *10.
50. *Id.* at *11.
51. *Id.*
52. *Id.* at *10.
53. *Id.* at *12.
54. *Id.*
55. *Id.* (explaining that the Eleventh Circuit argues that "it is unclear whether [plaintiffs'] declarations have accounted for the Site's former use as an airport," but the district court judge set forth her findings of significant alteration and subsequent increased environmental impact in her opinion.) *See* Friends of the Everglades v. Noem, No. 25-22896, 2025 WL 2423258, at *17.

C. Judge Jordan's Dissent

In his dissent, Judge Jordan presents numerous counterarguments to the majority's conclusions, offering particular service to the majority's deficiency in applying the applicable standard of review to the district court's findings. In his view, the majority conducted its analysis in a manner that "reads like that of a trial level factfinder exercising discretion in the first instance."[56] Judge Jordan concludes that the majority erred in its determination that no "major federal action" or "final agency action" had occurred in the instant case, describing the case as "the first of its kind anywhere in the country."[57] He explains that the four-day evidentiary hearing held by the district court and the subsequent finding of a federal funding decision were based on the "unique factual circumstances of the case," like an agency's completion of a project through a state actor with entirely no procedural oversight.[58] Judge Jordan cited two additional facts weighing in favor of a finding of federal action: (1) the facility was constructed at the request of DHS, and (2) numerous statements from public officials were made regarding the federal government's commitment to fund the facility.[59] Furthermore, Judge Jordan individually distinguishes the facts of each authority cited by the majority in support of their proposition that no reviewable "final action" had occurred, highlighting that the "facts here could not be further from the circumstances presented" in those cases.[60]

After establishing that there *had* been a major federal action, Judge Jordan turned to consider whether that action was "final" in order to permit reviewability, noting that the Supreme Court explained in *Kleppe* that an "agency's failure to issue an EIS becomes ripe for judicial review at 'the time at which it makes a recommendation or report on a proposal for federal action.'"[61] From this judicial rule, Judge Jordan concluded that

56. *Id. at *16*.
57. *Id.* at *17.
58. *Id.* at *18.
59. *Id.* at *20.
60. *Id.* at *19-20. *See* Atlanta Coal. on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333 (5th Cir. 1979) (finding that federal funds used solely during the planning process did not federalize the project), *see* City of Bos. v. Volpe, 464 F.2d 254 (1st Cir. 1972) (finding a project completed with state funds where federal funds were used during development was not a federal action); *see* Coal. for Underground Expansion v. Mineta, 333 F.3d 193 (D.C. Cir. 2003) (holding that the expectation of federal funding after project construction was completed is insufficient to federalize the project)*; see* Save Barton Creek Ass'n v. Fed. Highway Admin., 950 F.2d 1129 (5th Cir. 1992) (finding no federal involvement in an exclusively state-funded highway development project).
61. *Id.* at *21.

> the failure of the federal defendants to prepare an EIS or EA for the construction of the detention facility constituted final agency action. It is sophistry to pretend otherwise . . . . NEPA[] require[s] that an agency prepare an EIS or EA *before* commencing construction, [and] the court reasonably concluded that the decision to not issue an EIS or prepare an EA was not tentative or interlocutory.[62]

In conclusion, Judge Jordan starkly reminded the public that "[e]nvironmental injury is 'often permanent or at least of long duration, *i.e.*, irreparable.'"[63]

IV. ANALYSIS

A. The Majority Improperly Applied the Appropriate Standard of Review to the District Court's Findings of Fact

The majority misapplied the appropriate standard of review and engaged in improper factfinding to reach their legal conclusions in *Friends*.[64] In particular regard to factfinding, district court findings may *not* be overturned if they are "'plausible' in light of the full record—even if [others are] equally or more so . . . ."[65] Here, the majority engaged in extensive factfinding, openly reviewing testimony and documents from the district court in order to determine the level of federal control or funding *in fact*. Conversely, their opinion essentially disregards the available evidence of significant federal involvement to determine that, since no official grant had been submitted to and approved by a federal agency, no federal funding had yet to occur.[66] However, the majority gives practically no weight to facts relied on by the district court in support of the notion that federal funding is imminently forthcoming, and fails to recognize the lower court's finding that the Facility was funded by a continuing resolution in 2025 which authorized $45 billion in ICE detention capacity funding, bringing it under the federal umbrella.[67] In doing so, the majority substituted their own fact-intensive inquiry to hold that there was no substantial federal control or funding; a review of the district court's findings for "clear error" in name only. The majority thus departs from the idea that projects can be "functionally controlled" by the federal government in favor of a bright-line test requiring a showing of a

62. *Id.*
63. *Id.*
64. *Id.* at *16-18.
65. *Id.* at *17.
66. *Id.* at *7.
67. *Id.* at *18.

submitted and approved funding application to defeat § 4336e(10)(b)(i)(I).[68]

B. The Eleventh Circuit's Interpretation of a "Major Federal Action" Is Applied Inconsistently to the Facts Found by Judge Williams

After applying this thinly veiled de novo review of the district court's findings, the majority constructed a novel threshold for exactly what kind of federal funding will cause a project to become a "major federal action," overturning the district court's disjunctive reading of the definition. In *Friends*, the majority reads § 4336e(10) to require the disbursement of funds *in fact* and in *addition* to major federal involvement in the project before a project may be considered a major federal action. Here, the majority draws their threshold test from a variety of authorities which purport to foreclose a finding of federal involvement when no funding decision has been formally made.[69] Further, the majority states that the record is "devoid of credible evidence that a legally binding payment decision has been made," despite the district court's finding that a DHS grant program involving $600 million was *exclusively available* to FDEM.[70] As Judge Jordan notes, "[t]his characterization ignores the unique factual circumstances of the case" and nowhere in the 2023 amendments is it required that "federal funds [] have actually been formally awarded."[71] The interpretation of the district court pragmatically recognizes the fact that state-federal partnerships often begin with heavy input from federal agencies without final disbursement decisions having been made. The majority's representation of the case law concerning project federalization and refusal to acknowledge significant relevant facts found by the district court presents a concerning level of judicial lawmaking by limiting the scope of what constitutes "federal funding" to *only* those projects in which disbursement decisions have been made.

Aside from pragmatic considerations, the majority's reading of a "major federal action" conflicts with NEPA's structure and congressional intent. NEPA was born out of a congressional desire for agencies to, at a minimum, *consider* the environmental impacts of a project before making

68. Friends of the Everglades v. Noem, No. 25-12873 2025 WL 2598567, at *1, *9 (S.D. Fla. 2025) ("There may come a time when FDEP applies for FEMA funding. If the Federal Defendants ultimately decide to approve that request and reimburse Florida for its expenditures related to the Facility, they may need to first conduct an EIS.")

69. *Id.* at *19-20.

70. *Id.* at *8. *See* Friends of the Everglades, Inc. v. Noem, 796 F. Supp.3d 1234, 1277 (S.D. Fla. 2025).

71. *Id.* at *18.

final decisions about approval or implementation.[72] In making NEPA applicable to all federal decisions, Congress intended to impose this environmental "check" broadly, consisten with its stated purpose. Nowhere in the 2023 amendments did Congress evidence intent that "major federal actions" be defined as narrowly as the Eleventh Circuit would propose; their reading thus fails to uphold the flexibility preserved by Congress and offends the essential function of NEPA: to encourage *informed* decision-making.

C. The Majority Creates a Concerning Doctrinal Loop Permitting Agency Discretion to Abide by NEPA's Procedures and Mandates

Concluding that the majority improperly cabined the definition of a "major federal action," it follows that the district court's finding of the project's federalization thus subjected the project to NEPA's requirements as DHS and FEMA had actually and effectively committed federal resources to the project, triggering the NEPA duty. Therefore, DHS and FEMA's failure to prepare an EIS or EA before beginning construction at the Facility was a reviewable final agency action.

The Eleventh Circuit's logic that the absence of an EA or EIS *in fact* means that an action cannot be a "final agency action" is a concerning doctrinal loop inconsistent with NEPA's framework. NEPA expressly requires all federal agencies to prepare an EIS or EA when the action "significantly affect[s] the quality of the human environment"; it is not a discretionary duty that is immune from judicial review simply because an agency involves itself at a later date.[73] The majority cites *Public Citizen v. Office of U.S. Trade Representatives* to support the notion that the "failure 'to prepare an EIS is not *itself* a final agency action,'" but the issue there involved an agency's failure to prepare an EA whilst in the middle of *negotiating* the proposed agreement.[74] Here, the majority deceptively cites *Public Citizen*'s holding despite fact-finding from the district court concluding that the detention Facility was not only not at the negotiation stage, but was actually completed and active. The majority's logic collapses the statute's procedural requirement *into* its trigger by treating the failure to prepare an EA as *proof* that no federal action occurred. This holding would allow agencies to avoid environmental review by simply

72. *See* Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL'Y 293, 311 (2010).

73. 11 U.S.C. 4332(C).

74. *Friends*, No. 25-12873 2025 WL 2598567, at *5; *see* Pub. Citizen v. Off. of U.S. Trade Reps., 970 F.2d 916, 918 (D.C. Cir. 1992).

defining themselves out of NEPA's reach, rendering mandatory procedures optional and obsolete.

The obligation imposed by 4332(2)(C) attaches *before* an agency commits irretrievable resources, and the majority inverts this sequence by treating a failure to act as evidence that a duty never arose. They disregard the fact that, when a major federal action is present, the requirement to prepare an EIS is *not* a discretionary duty; it is required by the plain text of the statute. Therefore, going forward with a project without completing this nondiscretionary duty *is* a "final agency action" reviewable under the APA.[75] The Court in *Seven County* affirmed that "the goal of [NEPA] is to inform agency decision-making, not to paralyze it," which necessitates the prerequisite of *information*.[76]

V. CONCLUSION

The Eleventh Circuit's decision adds to a troubling trend of agencies attempting to escape judicial review through procedural exclusion of judicial review.[77] By converting the absence of environmental documentation into evidence of a non-reviewable action, the Eleventh Circuit creates a self-fulfilling loophole: NEPA duties disappear whenever agencies choose not to recognize them. Furthermore, the absolute deprivation of a notice and comment period forecloses future plaintiffs from bringing their concerns in front of a a decisionmaker. The majority's arguments for narrowing the scope of a "major federal action" further permits projects, which are federal in actuality, to skirt disclosure requirements imposed by NEPA by waiting to actually advance funding. By this logic, the court blesses retroactive funding by the federal government in order to circumvent NEPA's mandates. In fact, this is exactly what has occurred in the case of the TNT Site; on October 3, 2025, federal officials confirmed that Florida had been approved for the same $600 million reimbursement emphasized by the district court.[78] The majority's reasoning that federal involvement must be "formal" or "traditional" is particularly concerning in light of recent actions by the executive where traditional procedure seems to be of later concern, a

75. *See* 5 U.S.C. §704; 5 U.S.C. §551(13).

76. Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Co., 605 U.S. 168, 173 (2025).

77. *See e.g.* Jeffery S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109 (2018).

78. Mike Schneider, *Feds Approved Florida for a $608 Million 'Alligator Alcatraz' Reimbursement*, AP NEWS, (Oct. 3, 2025), https://apnews.com/article/florida-immigration-alligator-alcatraz-federal-officials-8a7fce9f41aff8f6d32865db425afca0; *see also* Friends of the Everglades v. Noem, 796 F. Supp.3d 1234, 1277 (S.D. Fla. 2025).

context which defines the rationality of a preliminary injunction in this case.

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