IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Wild Virginia, Virginia Wilderness Committee, Upstate Forever, South Carolina Wildlife Federation, North Carolina Wildlife Federation, National Trust for Historic Preservation, Mountaintrue, Haw River Assembly, Highlanders for Responsible Development, Defenders of Wildlife, Cowpasture River Preservation Association, Congaree Riverkeeper, The Clinch Coalition, Clean Air Carolina, Cape Fear River Watch, Alliance for the Shenandoah Valley, *and* Alabama Rivers Alliance,

Plaintiffs,

v.

Council on Environmental Quality *and* Mary Neumayr, in her official capacity as Chair of the Council on Environmental Quality,

Defendants,

American Farm Bureau Federation, American Forest Resource Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, Chamber of Commerce of the United States of America, Federal Forest Resource Coalition, Interstate Natural Gas Association of America, *and* National Cattlemen's Beef Association,

Defendants-Intervenors.

Civ. No. 3:20-cv-45-JPJ

Hon. James P. Jones

BUSINESS ASSOCIATIONS' REPLY
IN SUPPORT OF THEIR TO MOTION TO DISMISS

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BUSINESS ASSOCIATIONS' REPLY

A. Plaintiffs have not established standing based on environmental harm

1. To establish standing based on harm to the environment, plaintiffs must provide "specific facts" showing that their members' enjoyment of the environment "will be lessened" if the Court does not grant the requested relief. *Friends of the Earth, Inc. v. Laidlaw Envnt'l Servs. (TOC)*, 528 U.S. 167, 183 (2000). The asserted injury must be "actual or imminent" and not "conjectural." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

We showed in the opening memorandum (at 5-7) that plaintiffs cannot satisfy that requirement. The NEPA Rule applies not to private parties, but to federal agencies; it regulates how those other agencies undertake independent, follow-on decisionmaking. For the NEPA Rule to effect private parties like plaintiffs in a concrete way, its standards must actually be adopted by federal agencies and applied during an actual NEPA review. Until then, plaintiffs cannot say what the actual or imminent differences will be between a particular review under the NEPA Rule and that same review under the old regulations.

This essential feature of the rule has implications for both standing and ripeness. Plaintiffs lack standing because their theory of injury is speculative and depends on "a series of hypothetical events" that have yet to happen. *South Carolina v. United States*, 912 F.3d 720, 727 (4th Cir. 2019). And their claims are unripe because, in these circumstances, a claim "under the APA" ripens only when "its factual components [are] fleshed out[] by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The complaint here fails both tests.

2. Plaintiffs counter that a mere "risk of environmental harm caused by the rule" is enough to confer standing. Opp. 2 (Dkt. 77); *see also id.* (asserting that "[a]n increase in risk is a harm" cognizable under Article III). Inversely framed, they assert that they have standing to challenge the

NEPA Rule because the 1978 regulations "increase the odds that agencies will make decisions with better environmental outcomes." Opp. 22.

Such speculative, risk-based reasoning is inadequate to satisfy Article III. When plaintiffs assert a mere risk of future harms, they must establish more than "purely probabilistic" injuries and demonstrate, instead, a "substantial probability that they will be injured" "imminent[ly]" in a "nontrivial," particularized way. *Sierra Club v. EPA*, 754 F.3d 995, 1001 (D.C. Cir. 2014) (quotation marks omitted). "[H]ypothetical[s]" and "vague generalities" ungrounded in specific facts will not do. *Id*. Put another way, a theory of standing predicated on mere "increased risk of future" harm that turns on an "attenuated chain" of uncertain events "cannot confer standing." *South Carolina*, 912 F.3d at 727-728. That spells the end to plaintiffs' case.

The same rationale underlies the Supreme Court's decision in *National Wildlife Federation*: Article III injuries do not inhere in future harms based on vague possibilities. 497 U.S. at 891. Plaintiffs attempt to distinguish *National Wildlife Federation* on the ground that it did not involve a formal "notice and comment rulemaking." Opp. 15. But that makes no difference; that case reaffirmed a general principle (that agency action is not reviewable prospectively) that applies to all agency actions, including notice-and-comment rules.

Crucially, the Court acknowledged one "major exception" to the general rule against prospective APA review: An agency action *is* reviewable pre-enforcement, the Court explained, when it constitutes "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *National Wildlife Federation*, 497 U.S. at 891. That is precisely the distinction that we drew in our opening memorandum (at 4), where we explained that "NEPA does not regulate primary conduct" or "dictate substantive outcomes." Because the NEPA Rule does not, by itself, govern the conduct of private regulated parties, the exception to the general rule against prospective APA review is not applicable here. *Id*.

3. Plaintiffs also point to Section 1508.1(q)(1)(vii) of the NEPA Rule, which excludes from NEPA review loan guarantees of private activities for which a federal agency does not exercise sufficient control. Concerning this provision, plaintiffs say (Opp. 35) that they "have alleged specific facts making clear that loan guarantees will be given" to concentrated animal feeding operations (CAFOs), causing environmental harm (and thus personal injury) sufficient to establish standing. *Accord, e.g.*, Opp. 6, 12, 26, 40 (similar).

Plaintiffs' allegation on this score is simply wrong: It does not follow from Section 1508.1-(q)(1)(vii) that loan guarantees necessarily will be granted without NEPA review. Pursuant to Sections 1501.1(b) and 1507.3(d)(4) of the NEPA Rule, both the Farm Service Agency and Small Business Administration first must promulgate their own regulations to establish the sorts of guarantees that do and do not constitute "major" federal actions under Section 1508.1(q)(1)(vii). That process will take months or longer to complete. Between now and then, the status quo will be preserved. *See* Peterson Decl. (Dkt. 75-2); Manger Decl. (Dkt. 75-3). The impact of Section 1508.1-(q)(1)(vii) on the environment thus remains speculative, and judicial review premature.[1]

So, too, regarding other specific provisions called out in plaintiffs' opposition brief. They assert, for example, that the NEPA Rule permits preliminary steps, such as the purchase of real property or equipment, before completion of a review, "prejudicing the consideration of alternatives." Opp. 23. They contend further that "[t]he Rule removes key procedural safeguards" including by "remov[ing] mandatory requirements and replac[ing] them with discretion." Opp. 23 & n.33. The

[1] It also bears emphasis that, because plaintiffs must establish standing claim-by-claim, their theory of injury concerning Section 1508.1(q)(1)(vii) would confer standing, at most, to challenge Section 1508.1(q)(1)(vii) alone. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[S]tanding is not dispensed in gross," and "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought."). Moreover, success on such a claim would not permit an invalidation of the entire NEPA Rule. *See, e.g., Arizona Public Service Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (a court "may partially set aside a regulation if the invalid portion is severable"); *see also* 85 Fed. Reg. at 43,358 (new 40 C.F.R. § 1500.3(e) ("The sections of this subchapter are separate and severable from one another.")).

problem with all of this is clear: It is impossible to say whether and when any entities will actually purchase real estate or equipment, whether and how those purchases will actually prejudice an ongoing review, and whether and when agencies will exercise their discretion in a way that might implicate plaintiffs' interests. All plaintiffs offer on these points are bare possibilities, insufficient to establish standing. *See South Carolina*, 912 F.3d at 727; *National Wildlife Federation*, 497 U.S. at 891; *see also Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact 'remains wholly speculative.'").

4. At bottom, plaintiffs' theory of environmental harm reflects only a generalized "concern" about the Rule and how it "might" impact the environment moving forward. *See* PI Motion 76-85 & nn.145-205. A generalized fear of this sort is neither "concrete," nor "particularized," nor "actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Plaintiffs' declarations do not solve the problem; they merely cite pending or forthcoming NEPA reviews and express a corresponding worry that those reviews will proceed unlawfully (in uncertain ways), producing outcomes the declarants may not like (again, in uncertain ways). It is not enough to allege a "loss of statutory and regulatory 'guarantees'" in the abstract like this. *Sierra Club*, 754 F.3d at 1002. At this stage—before applying the NEPA Rule to an actual review, producing a concrete result—plaintiffs' complaint is "tantamount to an abstract, and uncognizable, interest in seeing the law enforced." *Id.* at 1001. Article III does not permit such advisory opinions. *Id.*; *accord Nat'l Wildlife Fed'n*, 497 U.S. at 891.

B. Plaintiffs have failed to establish informational or procedural harm

1. With respect to procedural injury, plaintiffs offer two distinct theories: *first*, that they were denied their procedural rights in the rulemaking itself because CEQ ignored their comments, and, *second*, that the NEPA Rule will deprive them of procedural protections in NEPA reviews moving forward. Both theories falter for the same reason: Plaintiffs must (but fail to) show that the

alleged procedural deprivation has actually affected some concrete personal interest. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009).

Plaintiffs do not deny their obligation on this score. Instead, they offer up a red herring, pointing to footnote 7 from *Defenders of Wildlife* for the proposition that they need not prove with certainty that their preferred "NEPA procedure would produce a different substantive outcome." Opp. 34. That is not the point, as *Defenders of Wildlife* itself makes clear. The point, instead, is that mere invocation of "procedural rights," unconnected with any "concrete interests affected" by an alleged deprivation of procedure, is insufficient to confer standing. 504 U.S. at 572 n.7. For example, a plaintiff asserting that an agency did not satisfy the "procedural requirement for an environmental impact statement" would have to show, separate and apart from the procedural violation, a personalized injury resulting from the breach, such as "construct[ion of a federal facility] next door to them." *Id*. at 572. Again, that is precisely what is missing here: Plaintiffs assert procedural violations divorced from particularized, imminent impacts—because no such impacts yet exist.

Plaintiffs counter that the Rule "drastically weakens the requirements for NEPA evaluations" and, furthermore, that "their members live, work, and recreate in specific places affected by specific projects subject to the Rule's weakened NEPA evaluations." Opp. 38. But, again, the declarations attached to the preliminary injunction motion offer only vague concerns that various pending and future NEPA reviews *might* change in unspecified and unknowable ways. *See* PI Motion 82 n.182; 83 nn.187 & 194. Of course, that concern could be asserted by almost anyone in the United States, nearly all of whom "live, work, or recreate" in areas that might be affected by federal actions subject to NEPA review. Plaintiffs' declarations thus show only that they have asserted "harm to [their] and every citizen's interest in proper application of the [law], and seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Defenders of Wildlife*, 504 U.S. at 573-74).

We made these points in the opening memorandum (at 6-7), and plaintiffs do not deny our characterization of the declarations. They insist only that behind the 40+ declarations attached to their motion "are real people who live, work, and play in the specific areas" that they worry might be impacted by federal actions subject to review under the NEPA Rule. Opp. 36. That no doubt is true, but the question is not whether the people are real—it's whether their asserted injuries are "concrete, particularized, and actual or imminent." *Clapper*, 568 U.S. at 409. They are not.

2. Much the same goes for plaintiffs' assertion of informational injury. *See* Opp. 38-44. As we explained in our opening memorandum—and plaintiffs do not deny—a party asserting informational injury must show not only the deprivation of information required by law to be disclosed, but also that "he 'suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.'" *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Like all the rest of plaintiffs' asserted injuries, plaintiffs cannot prove such a harm prospectively, in the abstract.

Plaintiffs inadvertently prove the point. They begin by asserting that they and their members will be "deprive[d]" of information by the NEPA Rule because Section 1508.1(q)(1)(vii) defines most loan guarantees as non-major federal actions that will not be subject to NEPA review at all. Opp. 40. But, again, FSA and SBA must first promulgate their own regulations defining the contours of that new standard. Plaintiffs thus cannot presently show actual or imminent harm. Stated alternatively in terms of ripeness, "[a] claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact 'remains wholly speculative.'" *Doe*, 713 F.3d at 758.

Plaintiffs continue that the Rule "removes the requirement that agencies consider the indirect and cumulative effects of proposed actions" and "eliminates the requirement that agencies 'rigorously explore and objectively' evaluate 'all' reasonable alternatives." Opp. 40. On the face of it, there is no way to tell how these highly fact-dependent assertions will play out in any given review. For example, it is true that the Rule *permits* rather than *requires* consideration of cumulative effects.

But so far as proximate cause is concerned, "the infinite variety of [facts] that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536 (1983) (antitrust case). All the NEPA Rule does is "identify factors that circumscribe and guide the exercise of judgment in deciding" how to evaluate environmental effects under the circumstances of each case. *Id*. at 537 (describing proximate cause generally).

Plaintiffs are therefore wrong to presume that, for example, the "relicensing [of] seven dams" in Alabama will necessarily proceed following a "NEPA process that ignores . . . cumulative effects." Opp. 40-41. Whether or not cumulative effects are considered in that review will depend on the actual facts on the ground. For the same reason, plaintiffs cannot baldly assume that the information they believe might be withheld in the future will be "crucial" to their "ability to advocate" for their interests. Opp. 42. "[T]he failure to identify what non-disclosure" plaintiffs are challenging "means that [they can]not assert with particularity how that non-disclosure has harmed [them]," as required to establish standing on an informational-harm theory. *Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 111 (D.D.C. 2020).

For this same reason, plaintiffs' reliance (Opp. 43-44) on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is premature. To avail themselves of *Havens Realty*, plaintiffs must first establish the "connection between the information [they] seek[] and the alleged impact on [their] organizational mission[s]," which they cannot do prospectively, in the abstract. *Biological Diversity*, 442 F. Supp. 3d at 110. We cited *Biological Diversity* in our opening memorandum (at 7) for exactly these propositions, but plaintiffs decline to respond.

Plaintiffs also insist that the prospective denial of information through the NEPA review process confers standing because they have had to "divert their limited resources" to accommodate reduced information flow. Opp. 43. As we explained in the opening memorandum (at 9), however, plaintiffs cannot transform speculative future injury into concrete present injury by "inflicting harm

on themselves." *Beck v. McDonald*, 848 F.3d 262, 272 (4th Cir. 2017) (quoting *Clapper*, 568 U.S. at 416). Were it otherwise, plaintiffs could "manufacture standing . . . based on their fears of hypothetical future harm that is not certainly impending." *Id.* (quoting same). Thus, "prophylactically spending money to ease fears of speculative future [harm] is not sufficient to confer standing." *Id.* at 277 (quoting *Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011)) (cleaned up). We made this point in the opening memorandum (at 9), as well, but plaintiffs look past our argument without taking it on.

C. At minimum, plaintiffs have not established irreparable harm sufficient to warrant a preliminary injunction

The foundation of plaintiffs' theory on standing is that they face an enhanced "risk" that agencies will violate NEPA in the future, causing environmental damage that may injure their members. Opp. 1-2. They contend that, although they cannot prove a particular and imminent injury in connection with a specific NEPA review, it is enough to assert a greater "risk of environmental harm caused by the rule." Opp. 2. We have shown that such speculation is, in fact, insufficient to establish standing; plaintiffs must instead await "some concrete action applying the regulation to [their] situation in a fashion that harms or threatens to harm [them]" in an immediate, concrete, and particularized way. *Nat'l Wildlife Fed'n*, 497 U.S. at 891.

Whatever the Court may conclude about standing, though, plaintiffs' risk-based theory of injury falls distantly short of demonstrating irreparable harm, which is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. 2020 update). On this score, the law is clear: A mere "possibility of irreparable harm" is not enough to grant the "extraordinary remedy" of preliminary injunctive relief. *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017); *accord* 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. 2020 update) ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury."). That is all that plaintiffs offer.

What is more, "[t]he key word in this consideration is *irreparable*." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (emphasis added). Thus, "[t]he possibility that adequate . . . corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id*. This presents plaintiffs with an insurmountable hurdle. As we observed in our opposition to the motion for a preliminary injunction (at 17), "if and when" the supposed risk of a NEPA violation comes to pass—that is, if and when an agency actually "runs afoul of NEPA" in the course of a review of a particular federal action—plaintiffs "may file a new suit challenging such action and seeking appropriate preliminary relief" at that time. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010) (finding no irreparable harm on that basis). Plaintiffs have therefore failed to establish the kind of concrete, imminent, and irremediable harm needed for a preliminary injunction.

So too with respect to plaintiffs' theory of informational injury, which depends on the same speculation concerning the NEPA Rule's uncertain influence on future NEPA reviews. Whatever the Court may say about informational harm as a basis for standing, it cannot possibly support plaintiffs' bid for a preliminary injunction. Plaintiffs' theory of concrete injury on this score is that they will have to "divert their limited resources" to accommodate reduced information flow. Opp. 43; *accord* PI Mem. 91. But as counsel for plaintiffs conceded at the September 4 hearing—and as the Fourth Circuit has held repeatedly—mere "injuries . . . suffered in terms of time, money and energy expended" adapting to new agency rules cannot justify a preliminary injunction. *Di Biase*, 872 F.3d at 235. Otherwise, irreparable harm would be established as a matter of course any time an agency established a new rule or changed an old one. That is not the law. *See generally Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21-24 (2008).

CONCLUSION

The motion to dismiss should be granted.

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Respectfully submitted,

/s/ Joshua D. Rogaczewski

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CERTIFICATE OF SERVICE

I certify that on September 9, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ *Joshua D. Rogaczewski*