IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Environmental Justice Health Alliance; Center For Community Action And Environmental Justice; East Yard Communities For Environmental Justice; New Jersey Environmental Justice Alliance; Texas Environmental Justice Advocacy Services; Natural Resources Defense Council, Inc.; National Audubon Society; New York Civil Liberties Union; Sierra Club,

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, Laborers' International Union of North America, and National Cattlemen's Beef Association,

Defendants-Intervenors.

No. 1:20-cv-06143

Hon. Colleen McMahon

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS-INTERVENORS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

The complaint in this case challenges a final rule of the Council on Environmental Quality (CEQ) titled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," and published at 85 Fed. Reg. 43,304 (July 16, 2020). This rule—which we refer to as the NEPA Rule—updates CEQ's implementing regulations for the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the environmental impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Before the Court can consider the merits of plaintiffs' challenges, it first must conclude that plaintiffs have standing. That, the Court cannot do. Plaintiffs' challenge to the NEPA rule is a generalized grievance, and their theories of environmental and informational harm are predicated on speculation and hypothesis. This Court rejected nearly identical theories of standing in *Natural Resources Defense Council v. Bodine*, 471 F. Supp. 3d 524 (S.D.N.Y. 2020) (McMahon, C.J.) for the same basic reasons, and the same outcome is required here. The Court accordingly should dismiss the case for lack of standing.

BACKGROUND

NEPA provides that, for any "major Federal action[] significantly affecting the quality of the human environment," the federal agencies with jurisdiction over the action must prepare "a detailed statement" on "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). The first step in this process is an environmental assessment, or EA, which determines whether the federal action is "major" and whether it will have a "significant" effect on the environment. *See* 40 C.F.R. § 1508.9. If a proposed action meets these requirements, the agency must prepare an environmental impact statement, or EIS. *See id*. § 1502.4.

To address the growing burdens of NEPA reviews and associated litigation, CEQ published an advanced notice of proposed rulemaking on June 20, 2018 (83 Fed. Reg. 28,591) and a notice of

proposed rulemaking on January 10, 2020 (85 Fed. Reg. 1,684) proposing to "modernize and clarify the CEQ regulations" and "to facilitate more efficient, effective, and timely NEPA reviews" by "simplifying regulatory requirements, codifying certain guidance and case law relevant to these proposed regulations, revising the regulations to reflect current technologies and agency practices, [and] eliminating obsolete provisions." *See* 85 Fed. Reg. at 1,685.

CEQ published the final NEPA Rule on July 16, 2020, and it became effective September 14, 2020. The NEPA Rule reforms the NEPA review process in numerous respects, including by clarifying the proper scope of NEPA reviews, facilitating coordination for reviews involving more than one agency, and identifying presumptive page and time limits for reviews.

Plaintiffs, a group of environmental organizations, commenced this lawsuit on August 6, 2020 (Dkt. 1) and filed a First Amended Complaint on December 23, 2020 (Dkt. 55 ("FAC")). They allege that the NEPA Rule violates the Administrative Procedure Act and exceeds CEQ's statutory authority (*id.* ¶¶ 273-277), and they ask for its invalidation. *Id.* at p. 112.

LEGAL STANDARD

As the parties invoking the Court's jurisdiction, plaintiffs bear the burden of establishing that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Lee v. Bd. of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 910 (2d Cir. 1997). To plead Article III standing, a plaintiff must identify "injury flowing from the challenged [action]" by plausibly alleging: "(1) that [it has] suffered an injury in fact—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there [is] a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lee*, 118 F.3d at 910 (quotation marks omitted) (quoting *Bennett v. Spear,* 520 U.S. 154, 167 (1997)).

At the pleading stage, "a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003). Instead, a plaintiff "must allege that he faces a direct risk of harm which rises above mere conjecture," based on plausible facts. *Id*. at 636.

ARGUMENT

Plaintiffs assert two overarching theories of injury-in-fact: environmental harm and informational harm. Both theories fail to satisfy Article III. NEPA does not regulate primary conduct, nor does it dictate substantive outcomes for permitting decisions or other major federal actions. Plaintiffs pretend otherwise, but in doing so, they offer only hypotheticals about how future NEPA reviews *might* play out, without tying the NEPA Rule to a certainly impending injury experienced personally by them or their members. At this stage in the regulatory process, plaintiffs' complaint amounts to a generalized grievance. The complaint accordingly must be dismissed.

A. Plaintiffs' theory of environmental injury is general and speculative, meaning both that they lack standing and that their claims are not yet ripe

Plaintiffs first allege that they and their members will suffer environmental harm under the NEPA Rule. They say, in particular, that under the NEPA Rule, "agencies will make decisions that are less informed about the cumulative and indirect impacts of [projects], and therefore less protective of health and the environment. FAC ¶ 31; *see also id.* ¶¶ 46, 57, 99 (similar); *id.* ¶ 35 (expressing concern that "additional air and water pollution will affect the reliability and safety of . . . local food sources").

This conditional speculation about possible future events is unsupported by plausible allegations that such injuries will actually come to pass. To qualify as a constitutionally sufficient injury-in-fact, the asserted injury must be both (1) "concrete" and (2) "actual or imminent." *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 45 (2d Cir. 2017) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla*., 508 U.S. 656, 663-664

(1993)). "The first prong," concreteness, "requires that the alleged injury is 'particularized' to the plaintiff" and not merely a generalized grievance; "[t]he second prong," actuality or imminence, "requires that the alleged injury is, if not actual, at least 'certainly impending' and 'not too speculative.'" *Id*. (emphasis omitted) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)). Plaintiffs' theory of environmental injury fails both prongs.

1. Plaintiffs do not allege environmental harm particularized to them

In evaluating whether an alleged injury is concrete and particularized, the Court must assess whether the injury "affect[s] the plaintiff in a personal and individual way" (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)), which reflects that federal courts are not "merely publicly funded forums for the ventilation of public grievances" (*Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 473 (1982)). Thus, "[t]he relevant showing for purposes of" environmental harm "is not injury to the environment[,] but injury to the plaintiff [himself or herself]." *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 181 (2000). To allege a concrete, particularized injury in this context, plaintiffs must demonstrate that "[they] use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183-184. In other words, plaintiffs must (1) identify at least one particular NEPA review—pending or imminent—that will be conducted under the NEPA Rule's revised procedures and standards, *and* (2) plausibly allege that application of the NEPA Rule to that review will impact the environment in an identifiable way, causing them a personal injury.

The First Amended Complaint does not make any such allegations. For the most part, plaintiffs express mere generalized "concern[]" about how the Rule *might* impact future NEPA reviews as a general matter, without tying it to an outcome that they do or will experience personally. *E.g.*, FAC ¶ 35. The Supreme Court "ha[s] repeatedly held that such a generalized grievance, no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). "A litigant 'raising only a generally available [concern]—claiming only harm

to his and every citizen's interest in proper application of the [law], and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Id*. (quoting *Lujan*, 504 U.S. at 573-574).

Plaintiffs do cite a handful of currently-pending or impending NEPA reviews that they say the NEPA Rule will affect. *E.g.*, FAC ¶¶ 44, 62, 73-75, 117. But in general, plaintiffs do not squarely allege that the NEPA Rule in fact will be applied to these reviews; they merely speculate that it is "likely to apply." *E.g.*, *id.* ¶ 45. That speculation is not enough to show a concrete and particularized impact from the NEPA Rule, particularly given that some of the agencies mentioned are still in the process of completing their own rulemakings to implement the NEPA Rule. *See, e.g.*, https://beta.regulations.gov/docket/DOT-OST-2020-0229/ (Department of Transportation's implementing rule is still in process).[1] In any event, plaintiffs express nothing more than repeated "concern[s]" that the Rule *might* have some unspecified impact on the course of these reviews and do not back up those concerns with plausible allegations of an actual, demonstrable impact. In this prospective posture, all plaintiffs can offer are conclusory assertions of nebulous effects, dependent entirely on speculation.

In addition to lacking factual specificity, those assertions are facially implausible. The NEPA Rule does not regulate primary conduct; it neither permits nor requires regulated entities to undertake or avoid any particular conduct affecting the environment. It is, instead, a regulation of *other agencies*' conduct, and how they undertake NEPA reviews. Consistent with the procedural character of NEPA itself, the NEPA Rule clarifies the proper scope of NEPA reviews, facilitates coordination for reviews involving more than one agency, and identifies presumptive page and time limits for reviews. The Rule's effect on the environment, if there is to be any, is wholly unknowable

[1] Plaintiffs cite one review, an environmental impact statement in Thurston County, Washington, for which the Forest Service prepared a *scoping notice* under the NEPA Rule. 85 Fed. Reg. 65,861, 65,861 (Oct. 16, 2020). That project is still at the scoping stage and it is speculative what impact, if any, the NEPA Rule will have on the ultimate outcome of the project.

until it is actually applied in the course of a NEPA review that produces a particular outcome. That is especially so because "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

These shortcomings cannot be pled around. Given this lawsuit's prospective posture, it is impossible to allege a potential future harm plausibly particularized to a specific "affected area" or any specific "persons 'for whom the aesthetic and recreational values'" will be harmed. *Friends of the Earth*, 528 U.S. at 183. Such allegations must await application of the Rule to an actual NEPA review that produces (or imminently will produce) a concrete and particularized outcome. It is not possible to satisfy that burden in the context of a speculative, prospective challenge like this one, which amounts to a generalized grievance.

2. Plaintiffs' theory of environmental harm is speculative and hypothetical

In addition to lacking the kind of "particularized" injury required by Article III, plaintiffs' theory of environmental harm is also impermissibly speculative. To satisfy Article III, a plaintiff's injury must be real and "imminent" and cannot be "conjectural." *Lujan*, 504 U.S. at 560; *accord id.* at 564 n.2. The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and . . . '*possible* future injury' [is] not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Failure to allege a non-speculative injury demonstrates not only that the plaintiff lacks standing, but also that the plaintiffs' claim is unripe. To say that a claim is unripe "is really just . . . to say the plaintiff's claimed injury, if any, is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013); *accord New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130 n.8 (2d Cir. 2008) ("Standing and ripeness are closely related doctrines that overlap most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical.") (cleaned up). Thus, a claim

"under the APA" ordinarily 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).[2]

Plaintiffs' conjectural allegations do not meet these requirements. Again, all plaintiffs offer are vague concerns about how the NEPA Rule might apply in the future, without tying application of the Rule to any concrete difference in their experience of the environment. They note, for example, that *if* the NEPA Rule is applied to particular reviews in certain possible ways, it would "deprive decisionmakers of information . . . increasing the likelihood that an alternative less protective . . . will be selected." FAC ¶ 68. That is speculation layered on top of speculation. Indeed, not even plaintiffs will hazard a guess at how future NEPA reviews might produce different substantive outcomes in the various hypotheticals they imagine. And even if they did, it would be only that—a guess.

Such conditional hypotheticals about possible future events do not establish standing. The Supreme Court has cautioned against "standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413. A plaintiff must offer more than allegations of "purely probabilistic" injuries and show, 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*. Here, all plaintiffs offer is a series of speculative future events producing a mere possibility of future harms. That is not enough.

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[2] The Court has recognized two exceptions to this general rule, neither applicable here: First, some statutes provide expressly for programmatic, prospective judicial review "even before the concrete effects normally required for APA review are felt." *Nat'l Wildlife Fed'n*, 497 U.S. at 891. Second, an "agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided" when "as a practical matter [it] requires the [regulated parties] to adjust [their] conduct immediately." *Id*.

This Court's decision last year in *Bodine* underscores the point. There, EPA announced a policy allowing entities that are subject to monitoring and reporting requirements to temporarily cease compliance with those requirements due to COVID-19. The plaintiffs petitioned EPA to promulgate a rule requiring any entity that relied on this policy to notify EPA of its noncompliance with applicable requirements so that EPA could in turn provide notice to the public. When EPA refused, the plaintiffs sued, alleging that they had standing because the agency's actions threatened environmental harm. The plaintiffs claimed that "because the Policy announces to regulated entities that EPA will not seek enforcement penalties for certain noncompliance—and because the Policy does not require entities to disclose when they are availing themselves of EPA's perceived lenience—it will naturally lead to increased noncompliance, not just with monitoring and reporting obligations but with polluting activity." *Bodine*, 471 F. Supp. 3d at 537.

This Court rejected that theory of injury, which was "built on multiple layers of speculation." *Bodine*, 471 F. Supp. 3d at 537. The Court noted that the plaintiffs had adduced "articles asserting that the failure to report and monitor correlates with increased pollution," alongside declarations from members who lived near EPA-regulated facilities and "fear[ed] an increase in environmental emissions." *Id.* at 538. Yet plaintiffs "offer[ed] not a scintilla of evidence that pollution is increasing" at facilities affected by the Policy and thus "fail[ed] to offer more than speculation" that the environmental harms they feared would actually materialize. *Id.* The Court declined to rely on this "chain of possibilities." *Id.* at 539.

The same outcome is called for here. Like the plaintiffs in *Bodine*, plaintiffs here rely on a chain of speculative inferences about the future: They allege—without even the most basic factual elaboration—that if the NEPA Rule remains in effect, agencies will engage in less rigorous examination of proposed projects, which in turn will cause agency decisionmakers to "make many decisions less protective of the health and environment" which in turn will lead to harm to the environment. *E.g.*, FAC ¶ 57. But plaintiffs do not allege that even the first step in this "chain of possibilities" is

actually occurring, let alone that the environmental harm they fear is imminent as a result. *Bodine*, 471 F. Supp. 3d at 539. Nor can they do so plausibly on a prospective basis. Their environmental-harm theory thus "does not comport with Article III's requirement that an injury be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

For the same reasons, the complaint does not sufficiently allege that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lee*, 118 F.3d at 910 (quotation marks omitted). Because NEPA establishes procedural standards without dictating substantive outcomes, there is no way to allege (except in a conclusory manner) that vacatur of the NEPA Rule would actually forestall the environmental effects that plaintiffs imagine. The NEPA Rule does not alter the requirements for the substantive federal decisions that implicate environmental reviews; thus, the same outcomes could be obtained with or without the Rule.

At bottom, plaintiffs allege that violations of the law are "rampant" within the NEPA Rule, which concerns them. *Nat'l Wildlife Fed'n*, 497 U.S. at 891. But Article III does not permit plaintiffs to seek "programmatic" invalidation of the Rule prospectively, based on generalized concerns that could be held equally by all. *Id*. The NEPA Rule, taken alone, is not an "agency action that causes [plaintiffs] harm." *Id*. (quotation marks omitted). For that, they must await a "concrete action applying the regulation to [their] situation in a fashion that harms or threatens to harm [them]." *Id*. Before then, plaintiffs lack standing, and their claims are unripe.

B. Plaintiffs have not established concrete informational injury

Unable to rely on a concrete or imminent environmental harm, plaintiffs turn to an alternative theory of standing: They allege that the NEPA Rule will "depriv[e]" them and their members of "information" needed to carry out their missions and "understand the . . . environmental impacts of proposed federal actions." FAC ¶ 48; *see also id.* ¶¶ 22, 36, 47, 59, 77, 90, 104, 134. Plaintiffs relatedly allege that they will have to divert resources to "address the informational deficits caused

by the Rule." *Id.* ¶ 23; *see also id.* ¶¶ 58, 77, 101, 105, 122, 132. Neither of these contentions satisfies Article III, either.

1. Plaintiffs do not allege an identifiable deprivation of information leading to a concrete harm

"A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21-22 (1998)); *accord Bodine*, 471 F. Supp. 3d at 535. The complaint fails this test. Indeed, plaintiffs' "informational harm" theory is every bit as generalized and speculative as their environmental harm theory.

a. First, plaintiffs cannot plausibly assert that they actually have been (or imminently will be) denied access to particular information that NEPA requires to be disclosed. *Friends of Animals*, 828 F.3d at 992. Plaintiffs' claim is that the NEPA Rule will constrain the scope of agencies' NEPA analyses and that as a result, NEPA reviews will generate less information of the kind plaintiffs consider valuable. That is not informational injury, and once again *Bodine* shows why. Just as plaintiffs do here, the plaintiffs in *Bodine* argued that agency's conduct would "degrade[] the integrity of environmental monitoring data, thereby harming Plaintiffs in their educational and advocacy efforts." *Bodine*, 471 F. Supp. 3d at 535. But as this Court noted, informational harm requires that there be an affirmative statutory right to the disclosure of particular information. *Id*. There was no such right in *Bodine*; the plaintiffs stated an interest in receiving information but had not "identified any 'record, report or information' that [the agency was] statutorily obligated to disclose," which the Court found fatal to their informational harm theory. *Id*.

The same is true here. Even assuming plaintiffs were correct that the NEPA Rule will lessen the overall volume of information disclosed through NEPA reviews, their claim of informational harm does not turn on a statutory right to the disclosure of any particular kind of information. They merely state an interest in continuing to receive extraneous information made available gratuitously by agencies undertaking NEPA reviews. Absent application of the NEPA Rule to an actual NEPA review, moreover, there is no way to know whether plaintiffs will in fact be denied the information they assert a right to receive. "[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]." *Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 111 (D.D.C. 2020).

In this way, plaintiffs' informational injury theory turns on the same speculation as before—a generalized concern that unidentified agencies will withhold unidentified information at unidentified times in the future. That sort of prospective, hypothetical approach is not sufficient to satisfy the first stage of the informational-injury analysis. To show informational injury, plaintiffs must wait to challenge those agency actions that actually and demonstrably deprive them of information to which they believe they are entitled. *Nat'l Wildlife Fed'n*, 497 U.S. at 891.

b. This shortcoming has direct implications for the second stage of the informational-injury analysis, as well. The point of information disclosure under NEPA is to foster public participation in the statute's notice-and-comment process. *E.g.*, 40 C.F.R. §§ 1503.1, 1503.4, 1508.22. Yet it is well settled that "a plaintiff cannot establish organizational standing based solely on 'the deprivation of the right to participate in [a] notice-and-comment'" process, considered in a vacuum. *Chesapeake Climate Action Network v. Exp.-Imp. Bank of the United States*, 78 F. Supp. 3d 208, 237 (D.D.C. 2015) (quoting *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 983 F. Supp. 2d 170, 177 (D.D.C. 2013)). Rather, a plaintiff must allege that it was actually *harmed* by the withholding of information. *See, e.g.*, *Int'l Brotherhood of Teamsters v. TSA*, 429 F.3d 1130, 1135 (D.C. Cir. 2005) (the "mere inability to comment effectively or fully, in and of itself, does not establish an actual injury"); *Air*

Transport Ass'n of Am. v. Civil Aeronautics Bd., 732 F.2d 219, 224 n.11 (D.C. Cir. 1984) (finding harmless error where the challenger "[did] not explain what it would have said" in comments if had been given timely "access" to particular information).

Here, plaintiffs cannot meet that requirement precisely because they do not identify any specific information required to be disclosed under NEPA to which they have been (or imminently will be) denied access. Consequently, they cannot demonstrate how any such withholding was (or imminently will be) prejudicial to them or their participation in a pending notice-and-comment process. Nor, finally, can they establish that the prejudicial denial of any such particular information would be traceable to the NEPA Rule.

These omissions are both unavoidable and fatal. Divorced from actual agency action implicating NEPA, it is not possible to identify what particular missing information might cause a concrete and adverse injury to plaintiffs, if any. Until the NEPA Rule is applied materially to an actual federal action, any claim based on an informational injury is a mere generalized grievance, unripe for judicial review. *See United States v. Broad. Music, Inc.*, 275 F.3d 168, 178–179 (2d Cir. 2001) (issue was not ripe because "at this juncture Applicants have suffered no injury, and the threat of an injury is speculative—a 'contingent future event' that 'may not occur at all'") (quoting *Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 63 (2d Cir. 1988)).

Attempting to dodge this conclusion, plaintiffs allege that the amended version of 40 C.F.R. § 1508.1(q)(1)(vii) will define certain actions as no longer "major," thereby removing those actions from NEPA's purview and "depriving" them of "the ability to make their voices heard in the decisionmaking process." FAC ¶ 101. Various plaintiffs also allege that the NEPA Rule precludes agencies from considering alternatives proposed after a project's scoping period and that as a result, they or their members will have reduced opportunities to propose alternatives to agencies. *See, e.g.*, *id.* ¶¶ 45, 68, 91, 102, 120. But these allegations do not improve plaintiffs' position, for two reasons. *First*, even assuming that plaintiffs have adequately alleged the loss of opportunities to comment on

specific pending or imminent actions—they mention only one such action, the Link Project—plaintiffs are not injured by a denial of the opportunity to comment in the abstract. Rather, as noted above, plaintiffs must allege non-speculative harm resulting *from* that denial. Plaintiffs have not shown that the alleged loss of opportunity to comment will cause them any concrete harm. *Second*, the heads of the Small Business Administration and Farm Service Agency both have sworn in court that they will promulgate their own regulations before implementing 40 C.F.R. § 1508.1(q)(1)(vii). *See* Decl. of Steven Peterson, *Wild Virginia v. CEQ*, No. 3:20-cv-45 (W.D. Va. Sept. 2, 2020) (Dkt. 75-2); Decl. of William Manger, *Wild Virginia v. CEQ*, No. 3:20-cv-45 (W.D. Va. Sept. 2, 2020) (Dkt. 75-3). Both agencies will maintain the status quo in the interim. *Id*. Thus, any challenge to 40 C.F.R. § 1508.1(q)(1)(vii) implicates future rulemaking and is unripe.[3]

2. Diversion of resources does not create injury in fact

Plaintiffs' allegations that they will have to divert resources to "address the informational deficits" caused by the Rule (FAC ¶ 23) do not change matters. As the Supreme Court held in *Clapper*, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. The Second Circuit has recognized the same, holding that plaintiffs "cannot manufacture standing based on any present injuries incurred due to their expressed fears." *Hedges v. Obama*, 724 F.3d 170, 204 (2d Cir. 2013) (quotation marks omitted). Just so here. It is plaintiffs' prerogative to expend resources to gather information of which they worry the NEPA Rule might deprive them—but doing so does not create an Article III injury in fact.

The same principle applies to NRDC's and Audubon's allegations that, because the NEPA Rule gives agencies discretion whether to apply the rule to projects initiated before its effective date,

[3] In addition, because plaintiffs must establish standing claim-by-claim, their theory of injury concerning 40 C.F.R. § 1508.1(q)(1)(vii) would confer standing, at most, to challenge that provision 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.").

they have "been forced to, and will continue to be forced to, divert resources from other core activities" to "persuade lead agencies to follow the prior CEQ NEPA regulations" in particular NEPA reviews. FAC ¶¶ 107, 126. Again, plaintiffs cannot "manufacture standing" by making voluntary expenditures based on concerns about how agencies might exercise their discretion. That is so even if, as plaintiffs allege, the expenditures divert resources from plaintiffs' other activities: It is well established that this kind of budgetary impact on a plaintiff does not constitute an injury in fact. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995); *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011).

NYCLU alleges another variation on the theme by arguing that, under the NEPA Rule, it will "lose investments it has made in preparing for a full environmental review of the I-81 Viaduct Project." FAC ¶ 79. It alleges that it has dedicated resources to preparation for the review and has "held over 100 meetings to educate and gather input from the community on the project." *Id.* The value of this investment will be diminished under the NEPA Rule, NYCLU alleges, because the scope of the review of the project will be constrained and public participation will be "curtailed." *Id.*

That is wrong in both premise and conclusion. To begin, NYCLU is mistaken that it will not have an opportunity to comment fully on the I-81 Viaduct project; nothing in the NEPA Rule constrains individuals from submitting, or agencies from considering, any and all comments upon a proposed EIS. It is also wrong to suggest, as do plaintiffs, that the NEPA Rule forbids agency consideration of all indirect and cumulative effects. Rather, the Rule aligns the NEPA's causation standard with proximate cause, as dictated by Supreme Court precedent. *See* 85 Fed. Reg. at 43,343 (discussing *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767-768 (2004)). Such effects sometimes do inform the proximate cause inquiry. *E.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (cumulative effects properly considered in NEPA review).

But even if it were otherwise, NYCLU's allegation is just another version of the "diversion of resources" theory: having committed resources to a course of conduct under the old regulations,

NYCLU will apparently now spend additional resources to accommodate its fear of hypothetical future harms. As noted above, a financial impact upon an organization's advocacy initiatives does not constitute injury in fact. *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434.

CONCLUSION

The motion to dismiss should be granted.

Dated: January 22, 2021

Respectfully submitted,

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