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Attorneys for Proposed Intervenors

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALASKA COMMUNITY ACTION ON TOXICS, et al.,

Plaintiffs,

v.

COUNCIL ON ENVIRONMENTAL QUALITY and MARY NEUMAYR, in her official capacity as chair of the Council on Environmental Quality,

Defendants.

Case No. 3:20-cv-05199-RS

Related Case: No. 3:20-cv-6057-RS

PROPOSED INTERVENORS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: December 3, 2020
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg

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TO ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 3, 2020, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Richard Seeborg, at 450 Golden Gate Avenue, 17th Floor, Courtroom 3, San Francisco, CA 94102, Proposed Intervenors 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 Council, Interstate Natural Gas Association of America, Laborers' International Union of North America, and National Cattlemen's Beef Association will move to dismiss this case pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

RELIEF SOUGHT BY THE MOVANTS

The Proposed Intervenors seek an order dismissing this case for lack of subject matter jurisdiction under Rule 12(b)(1) and/or for failure to state a claim under Rule 12(b)(6).

DATED: October 19, 2020 By: */s/ William P. Donovan, Jr.*
William P. Donovan, Jr. (SBN 155881)
Attorney for Proposed Intervenors

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 ("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).

The Proposed Intervenors—the American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Forest Resource Council, 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—have moved to intervene to defend the NEPA Rule against plaintiffs' various

challenges. *See* Dkt. 37. But before the Court can consider the merits of plaintiffs' challenges, it must first satisfy itself that plaintiffs have properly invoked this Court's jurisdiction. It is at this threshold that plaintiffs' cause must end: plaintiffs lack Article III standing to pursue their challenges to the NEPA rule. For the reasons explained below and in the defendants' motion to dismiss, as incorporated, the Court must dismiss the case for lack of standing.

ISSUE TO BE DECIDED

1. Whether Plaintiffs have Article III standing to bring this lawsuit.

2. Whether Plaintiffs' claims are ripe for review.

STATEMENT OF FACTS

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, filed this lawsuit on July 29, 2020. Dkt.

1. They allege that the NEPA Rule violates NEPA, the Administrative Procedure Act, and the Endangered Species Act. *See* Dkt. 22 ("First Am. Compl.") ¶¶ 256-315. Plaintiffs ask the Court to vacate the NEPA Rule as unlawful and enjoin CEQ from implementing or enforcing it. *Id.* at pp. 118-19.

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); *Tedards v. Ducey*, 951 F.3d 1041, 1068 (9th Cir. 2020). To plead Article III standing, a plaintiff must plausibly allege that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Montana Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Srvs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

At the pleading stage, a plaintiff cannot rely solely on "conclusory allegation[s]" of injury in order to demonstrate standing. *Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1007 (9th Cir. 2011). Instead, the plaintiff "must allege that he faces a direct risk of harm which rises above mere conjecture," based on plausibly supported allegations. *Baur v. Veneman*, 352 F.3d 625, 636 (2d Cir. 2003).

ARGUMENT

Plaintiffs assert two 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, that under the NEPA Rule, agency decisionmakers will take actions that negatively impact the environment and thereby interfere with plaintiffs' members' "past, present, and future enjoyment of the scientific, recreational, aesthetic, economic, and conservation benefits" of NEPA. First Am. Compl. ¶ 157; *see also, e.g.*, *id.* ¶¶ 51, 159.

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 particularized" and (2) "actual or imminent." *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quotation marks omitted). "To be 'concrete' the injury 'must actually exist,'—that is, it must be 'real' and 'not abstract' or purely 'procedural.'" *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1173 (9th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016)). And "[a]n injury is imminent 'if the threatened injury is "certainly impending," or there is a "substantial risk" that the harm will occur.'" *Montana Envtl. Info. Ctr.*, 766 F.3d at 1189 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Plaintiffs' theory of environmental injury fails as to both requirements.

1. Plaintiffs do not allege environmental harm particularized to them

In evaluating whether an alleged injury is concrete and particularized, the Court must determine 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). This requirement 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*, 528 U.S. at 181.

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." *Friends of the Earth*, 528 U.S. at 183-84. 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 complaint does not meet this requirement. 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.*, First Am. Compl. ¶ 18. 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 573-74).

Plaintiffs do cite some currently-pending or impending NEPA reviews that they say the NEPA Rule will affect. *E.g.*, First Am. Compl. ¶¶ 22, 25, 36, 38, 62, 95. But plaintiffs express nothing more than repeated fears that the Rule might have some unspecified impact on the course of those reviews, without backing 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 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, in turn, to any specific "persons 'for whom the aesthetic and recreational values'" are at stake. *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. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). 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).[1]

[1] 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.*

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, the full range of the proposed projects' effects "*may* not be assessed." *E.g.*, First Am. Compl. ¶ 106. 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 to satisfy Article III's requirement that an injury be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548.

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." *Prescott v. Cty. of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002) (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, what plaintiffs are really asserting is the public's general "interest[] in CEQ's lawful implementation of NEPA." First Am. Compl. ¶ 157. 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. *Nat'l Wildlife Fed'n*, 497 U.S. at 891. 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 allege that the NEPA Rule will "impede" their "ability to obtain information vital to their central conservation missions." First Am. Compl. ¶ 158; *see also id.* ¶¶ 32, 50, 71, 102, 106, 110. Plaintiffs relatedly allege that they will have to "divert scarce organizational resources from other programs to support their engagement in ongoing and upcoming NEPA processes." *Id.*; *see also id.* ¶ 50. Neither of these contentions satisfies Article III, either.

a. A "procedural injury, standing on its own, cannot serve as an injury-in-fact." *Wilderness Soc'y v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010). Rather, "[a] concrete and particular project must be connected to the procedural loss." *Id*. More generally, a "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id*. at 1255 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). Accordingly, to plausibly allege a "sufficiently concrete and particularized informational injury," a plaintiff must show not only that "it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it," but also that "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)).

The complaint here fails that test for three reasons. *First*, although a statutory "right to process and to participation" as granted by NEPA "necessarily involve[s] the dissemination of information," it is "*not* thereby tantamount to a right to information per se." *Wilderness Soc'y*, 622 F.3d at 1259. NEPA's goal, like the statute at issue in *Wilderness Society*, "is simply to increase public participation in the decision-making process." *Id*. (quoting *Bensman v. U.S. Forest Serv.*,

408 F.3d 945, 958 (7th Cir. 2005)). *See* 40 C.F.R. §§ 1503.1, 1503.4, 1508.22. In this respect, NEPA is distinct from statutes like the Freedom of Information Act, which have an express and affirmative "goal of providing information to the public." *Wilderness Soc'y*, 622 F.3d at 1259. An alleged limitation on the dissemination of information under NEPA, which is merely a public-participation statute, is therefore not a basis for Article III standing. *Id*. To hold otherwise would mean that a plaintiff could "reframe[] every procedural deprivation in terms of informational loss," providing an "end run around the Supreme Court's procedural injury doctrine." *Id*.

Second—even supposing NEPA did confer a judicially-enforceable right to receive particular information—plaintiffs have not plausibly alleged that they actually have been (or imminently will be) denied access to any such information. Rather, plaintiffs' informational injury argument turns on speculation 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-harm analysis. *Wilderness Soc'y*, 622 F.3d at 1259.

Third, concerning the concreteness requirement, 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 America, Inc. v. U.S. Dep't of Transp.*, 983 F. Supp. 2d 170, 177 (D.D.C. 2013)). Rather, a plaintiff must show that it was concretely *harmed* by the denial of a meaningful opportunity to comment. *See, e.g.*, *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 America v. Civil Aeronautics Board*, 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. Divorced from actual agency action, it is not possible to identify what particular missing information might cause a concrete and adverse injury to plaintiffs, if any. Put

another way, "the failure to identify what non-disclosure" plaintiffs are challenging "means that [they can] not assert with particularity how that non-disclosure has harmed [them]" under NEPA's notice-and-comment procedures. *Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 111 (D.D.C. 2020). Until the NEPA Rule is applied materially to an actual federal action, any claim based on an informational injury is a mere "contingent," generalized grievance, unripe for judicial review. *See Hodgers-Durgin*, 199 F.3d at 1044 (quotation marks omitted).

b. 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 and their members of the ability to participate in the NEPA process. *E.g.*, First Am. Compl. ¶¶ 68, 70-71.

This allegation does not improve plaintiffs' position, for two reasons. *First*, even if plaintiffs had pointed to specific pending or imminent actions on which they will be unable to comment (which they have not), they are not injured by a denial of the opportunity to comment in the abstract; they must allege non-speculative harm resulting *from* that denial. Again, they have not done so. *Second*, the heads of the Small Business Administration and Farm Service Agency both have sworn in court that they must and will promulgate their own agency regulations before implementing CEQ's changes at 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 have committed to maintaining 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.[2]

c. Plaintiffs' allegations that the NEPA Rule will force them to divert organizational resources to new information-gathering efforts (First Am. Compl. ¶¶ 24, 32, 50, 158, 251) do not change matters. As the Supreme Court held in *Clapper*, plaintiffs "cannot manufacture standing

[2] 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.").

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 Ninth Circuit has recognized the same, holding that plaintiffs may not manufacture standing by taking voluntary "preventative measures" against a harm that they fear. *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1235 (9th Cir. 2017). Just so here. It is plaintiffs' prerogative to expend resources to gather information that they worry will be unavailable to them under the NEPA Rule—but doing so does not create an Article III injury in fact.

CONCLUSION

The complaint should be dismissed for lack of Article III jurisdiction.

Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

DATED: October 19, 2020

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