UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SIERRA CLUB, *et al.*,	)	
	)	
Plaintiffs,	)	**Case No. 1:11-cv-00041-CMH -TRJ**
	)	
v.	)	
	)	
UNITED STATES DEFENSE ENERGY SUPPORT CENTER, *et al.*,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
AMERICAN PETROLEUM INSTITUTE, *et al.*,	)	
	)	
Defendant-Intervenors.	)	

REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS-MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Despite its length, Plaintiffs' Opposition[1] brief fails to establish standing and rebut the justiciability and merits arguments advanced in Defendant-Intervenors' Cross-Motion to Dismiss or, in the Alternative, for Summary Judgment ("Int. Cross-Mot.") and in Federal Defendants' Motion to Dismiss and, in the Alternative, for Summary Judgment (Docket Nos. 88-91) ("Def. Mot."). In short, Plaintiffs have an affirmative burden to establish constitutional and prudential standing. In their Opposition, they misstate applicable legal standards and rely on out of context quotations in support for their positions. They offer bare allegations and breathtaking

[1] Plaintiffs' Combined Memorandum in Opposition to Federal and Intervenor Defendants' Dispositive Motions and in Reply to Federal and Intervenor Defendants' Oppositions to Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Opposition" or "Pls. Opp.") (Docket No. 103).

oversimplifications to deflect this Court's attention from the astonishingly attenuated link between Defense Logistics Agency Energy's ("DLA-Energy's") conduct at issue and the alleged climate harms which concern Plaintiffs' members. Having failed in their First Amended Complaint ("Complaint") (Docket No. 56) and Motion for Summary Judgment (Docket Nos. 75-78, 81) ("Plaintiffs' Motion" or "Pls. Mot.") to satisfy their burden, Plaintiffs append to their Opposition eight never-before-seen declarations. *See* Pls. Opp., Exhs. C – J. While these declarations are untimely and should be disregarded, they nevertheless do not enable Plaintiffs to meet their burden to establish Article III and prudential standing.

Should the Court reach the merits despite these jurisdictional deficiencies, Defendant-Intervenors are entitled to summary judgment on all counts. As to Count One (alleging a violation of Section 526 of the Energy Independence and Security Act of 2007 ("EISA")), Plaintiffs merely recycle arguments made earlier rather than refuting Defendant-Intervenors' and Federal Defendants' positions. As to Count Two (alleging a procedural violation of the Administrative Procedure Act ("APA")), Plaintiffs fail to establish that the Interim Plan created by DLA-Energy pursuant to the EISA is anything other than an "interpretive rule[] or general statement[] of policy" which "involve[s] – a military … function of the United States; or a matter relating to … public property, loans, grants, benefits, or contracts[,]" 5 U.S.C. § 553(a), and therefore excluded from the procedural requirements of APA Section 553(b). This conclusion is not undermined by Plaintiffs' new claim, asserted for the first time in their Opposition, that Federal Defendants violated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Finally, as to Count Three (alleging a violation of the National Environmental Policy Act ("NEPA")), Plaintiffs offer no substantial rebuttal to the proposition that this claim is moot and therefore should be dismissed.

I. PLAINTIFFS HAVE THE BURDEN TO ESTABLISH STANDING TO AVOID DISMISSAL, OR ALTERNATIVELY, SUMMARY JUDGMENT

Plaintiffs fundamentally misconstrue their burden to establish constitutional and prudential standing. They appear to believe that all that is required are allegations. *See* Pls. Opp. 8. They are wrong in two ways. First, the Supreme Court and other courts have long held that citizen plaintiffs have the burden of establishing standing at all phases of litigation, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("*Lujan*"), and that such plaintiffs must establish each element of standing "by sufficient evidence[,]" *Piney Run Preservation Ass'n v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255, 263 (4th Cir. 2001), which must not include "unwarranted inferences, unreasonable conclusions, or arguments[,]" *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (internal quotation marks and citation omitted), or a "legal conclusion disguised as a factual allegation." *See Ashcroft v. Iqbal*, 129 S. Ct. 1937; *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Thus, merely alleging facts tending to support the elements of standing is not sufficient.

Second, Plaintiffs neglect the fact that *they*, as well as Defendant-Intervenors and Federal Defendants, have moved for summary judgment. Even if Plaintiffs' standing allegations were sufficient to survive dismissal, Plaintiffs neither satisfy *their* initial burden of establishing standing for their motion nor put forward a genuine issue of material fact so as to survive the summary judgment sought against them.[2]

[2] Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561 (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990)) (other citations omitted). Here, Plaintiffs sought summary judgment without meeting their affirmative burden to establish standing. They cannot make up for that failure by presenting new evidence in their combined opposition and reply brief, as they have done here with the submission of eight new declarations. Those declarations are tardy and should not be considered.

II. PLAINTIFFS' BASES FOR INJURY-IN-FACT AND PRUDENTIAL STANDING REMAIN DEFECTIVE

Foremost among the several fatal defects to standing here is the lack of particularity of the climate change harms which Plaintiffs assert – harms which their members do not suffer in the requisite "personal and individual way[,]" so as to establish injury in fact. *Lujan*, 504 U.S. at 560 n.1. As the new declarations submitted with their Opposition attest, Plaintiffs' harms are instead shared by every person on the globe.[3] For similar reasons, Plaintiffs' expanded allegations of climate harms are still "generalized grievances" which deprive them of prudential standing. *See, e.g.*, *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004).

Plaintiffs quote case law purportedly holding that universally shared harms can form the basis of standing. Pls. Opp. 6, 13-14. But these cases – which include a (misattributed) quote to Justice Kennedy's concurring opinion in *Lujan*[4] and *dicta* in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) – at best are inapposite and at worst illustrate the extremity of Plaintiffs' position. For example, Plaintiffs cite *Pye v. United States*, a case in which landowners, living in the corridor for a proposed new road and whose land was adjacent to and overlapped with historic properties which could be harmed by the road project, had standing to challenge the project. 269 F.3d 459, 467-69 (4th Cir. 2001). In contrast to the facts here, the court in that case noted that the landowners' injuries *do not* stem from a "*common concern* for obedience to law … but from individual concerns about the integrity and cohesiveness of historical sites in their own

[3] Plaintiffs apparently concede that they do not have standing based on the allegations of localized pollution harms that they originally made, having neglected to address the issue in their Opposition or in any supplemental standing declaration. *See* Int. Cross-Mot. 14, n. 11.

[4] Plaintiffs quote *Lujan* for purportedly "holding that '[I]t does not matter how many persons have been injured by the challenged action' as long as the 'party bringing suit … shows[s] that the action injures him in a concrete and particularized way'." Pls. Opp. 14 (citing *Lujan*, 504 U.S. at 555). The court in *Lujan* held no such thing; Plaintiffs' quote comes from Justice Kennedy's concurring (in part) opinion. *See Lujan*, 504 U.S. at 579.

backyard." *Id*. at 469 (citation omitted; emphasis added). Plaintiffs also cite *Federal Election Commission v. Akins*, in which a taxpayer group's interest in obtaining Federal Election Commission-ordered disclosure of the American Israel Public Affairs Committee's membership, contributions, and expenditures – an interest potentially shared with other taxpayers – was "sufficiently concrete and specific" to avoid dismissal as a "generalized grievance." 524 U.S. 11, 13-16, 23-25 (1998).

Yet, Plaintiffs' alleged harms here are not merely shared as among a subset of taxpayers interested in information about one public interest group. Rather, the climate change harms alleged by Plaintiffs, from sea level rise to storm intensification, are shared by essentially every person on the globe. Indeed, it is difficult to conceive a more generalized grievance. The Declaration of Michael MacCracken ("MacCracken Dec.") (Pls. Opp. Exh. J), at paragraphs 18-21 and 32-35, confirms this point by offering a list of fundamentally global harms, to which Plaintiffs' various other declarations correspond, *see* Pls. Opp. Exhs. C-I. Hence, under Plaintiffs' theory, standing would extend to essentially everyone in the world.[5]

III. PLAINTIFFS CANNOT ESTABLISH CAUSATION THROUGH IMPLAUSIBLE AND CONCLUSORY ALLEGATIONS

Plaintiffs' claims must also fail because they cannot demonstrate that the harms they allege are "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." *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997); *see also Lujan*, 504 U.S. at 560-61 (citation omitted). Plaintiffs vastly oversimplify

[5] Plaintiffs point to *Massachusetts v. EPA*, 549 U.S. 497 (2007), in support of their standing. Pls. Opp. at 5-6, 8-9, 10. Although the dispute in *Massachusetts* also concerned allegations of harm related to climate change, that case does not rehabilitate Plaintiffs' standing here, as the Supreme Court expressly grounded its holding on standing in that case in what it called the "special solicitude in [the Court's] standing analysis" to which the Commonwealth of Massachusetts, as a sovereign entity, was "entitled[.]" 549 U.S. at 516-521. As previously noted, Plaintiffs here are not entitled to any such special solicitude.

and mischaracterize the lengthy and severely attenuated causal chain between DLA-Energy's conduct at issue here and the alleged climate change harms – a causal chain which depends on overly broad assertions and is founded on legally invalid assumptions regarding the behavior of numerous third parties not before this Court.

First, not only are Plaintiffs' causation and traceability allegations conclusory, they are unreasonable and implausible in light of the available facts. Plaintiffs' Opposition neglects to address the staggering complexity, as detailed in Defendant-Intervenors' Cross-Motion, underlying the asserted causal chain between DLA-Energy's alleged failure to apply Section 526 to its contracts for mobility-related fuels and the alleged harms to Plaintiffs' members. That chain includes, among other elements: decisions by refineries regarding use of oil sands crude, decisions by oil sands producers in Alberta regarding development of resources and extraction, greenhouse gas emissions from extraction of those fuels, accumulation of greenhouse gases in the global atmosphere over centuries, the mechanisms of global climate change, manifestations of global climate change, and, ultimately, the harms alleged by Plaintiffs' members (such as sea level rise and more intense storms on the Florida coast, flooding in Nashville, Tennessee, or more intense forest fires in northern California[6]). The causal links between each of these individual steps are complex and attenuated, and cannot be assumed.

Second, Plaintiffs misapprehend not only the pleading standard, but also the standard for demonstrating causation for Article III standing. They quote *Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974 (4th Cir. 1992), and *American Canoe Association, Inc. v. Murphy Farms, Inc.,* 326 F.3d 505 (4th Cir. 2003), in support of their assertion that Plaintiffs "must merely show that a defendant discharges a pollutant or causes or contributes to the kinds

[6] *See* Declaration of Edward Mainland (Pls. Opp. Exh. D) ¶ 7; Declaration of Percy Angelo (Pls. Opp. Exh. F) ¶ 4; Declaration of John Noel (Pls. Opp. Exh. H) ¶ 5.

of injuries alleged" at some small increment. Pls. Opp. 8-9. But these cases do not support Plaintiffs' position. Both predicate standing on proportionally large discharges of regulated pollutants into discrete geographic areas. *See Murphy Farms, Inc.,* 326 F.3d at 520 (finding causation/traceability where "it is uncontroverted that the Farms discharged large quantities of swine waste into" waters in "a geographic area of concern" in which plaintiffs' affiants were present); *Watkins,* 954 F.2d at 976-80 (finding standing for plaintiffs' preliminary injunction motion against proposed operation of a nuclear reactor at DOE's Savannah River Site without a cooling tower, where such operation would result in discharges of large volumes of cooling water, in excess of the thermal limits in the reactor's Clean Water Act permit, into areas of Savannah River where plaintiffs' members recreate).

More importantly, these cases are inapposite because each was raised pursuant to the citizen's suit provision of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), under which pollutant discharges above permitted thresholds are statutorily presumed harmful to public health and welfare. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 157 (4th Cir. 2000) ("discharge restrictions are set at the level necessary to protect the designated uses of the receiving waterways"); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 184 (2000).[7]

Here, in sharp contrast, no presumption of causation is available. The volume of oil sands crude at issue represents *a fraction of a percentage* of US petroleum consumption[8] – let

[7] Plaintiffs omit a portion of the *Watkins* holding describing this presumption: "the 'but-for' standard employed by the district court is inappropriately stringent for determining standing *under the Clean Water Act*," and thus the plaintiffs are not deprived of standing if they can show that "the K reactor discharge contributes to the pollution that interferes with the affiants' use of the Savannah River." *Watkins*, 954 F2d at 980 (emphasis added).

[8] The source on which Plaintiffs rely, the LMI Report, establishes that DLA-Energy's fuel purchases represent less than 2% of domestic consumption of petroleum products, of which, the

alone global petroleum consumption or total greenhouse gas emissions from electric generation, industrial, agricultural, residential, land use, and other sources. By contrast, global contributors of greenhouse gases are innumerable, and always expanding. Such gases are emitted by, among other sources, nearly every electric utility, factory, motor vehicle, farm, home, and office building on the planet – not to mention every human being and animal. *See* Int. Cross-Mot. 16-19.[9] Moreover, because greenhouse gases are well-mixed and long-lived in the atmosphere, today's or tomorrow's climate change may be the result of past, present, and future emissions across the globe. *See* Int. Cross-Mot. 16-19.

Third, Plaintiffs' facile assertion, based on Michael MacCracken's new declaration, that *every* increment of greenhouse gas emissions worsens climate change and thus the harms alleged by the other declarants, *see* MacCracken Dec. ¶ 28, is outrageous.[10] Under this theory, all

---

fuel supplied by most refineries to DLA-Energy is refined from crude, less than 2% of which is derived from oil sands. *See* Int. Cross-Mot. 4-5. In their Motion and again in their Opposition brief, Plaintiffs misleadingly assert that the fuels supplied under DLA-Energy's contracts contains "up to 27% tar sands fuel" and that "[s]ome of the contested contracts are from *refineries* that produce on average as much as 27% tar sands fuel[,]" Pls. Opp. 31 (emphasis added), *see also id*. 20, 21 n. 18, 22. In fact, the LMI Report concluded that fuel supplied by *most* refineries to DLA-Energy is refined from crude, less than 2% of which is derived from oil sands. LMI Report 6-16 to 6-19 [AR 81-84]. It also noted that a single refinery (not "refineries") supplying fuel to DLA-Energy (the BP Husky refinery in Lima, Ohio) had the *capacity* to refine fuels comprised of up to 27% oil sands crude, *see id*. 6-16 [AR 81], but that the refinery in question *had not yet begun* refining *any* oil sands crude. *Id*. 6-18 [AR 83].

[9] In this country alone, EPA estimates that millions of residential, commercial, and industrial stationary sources emit sufficient quantities of greenhouse gases to potentially trigger regulation under the Clean Air Act, an estimate that excludes the emissions from millions of cars and other mobile sources, as well as agricultural operations. *See, e.g., Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,540 (June 3, 2010) (Table V-1).

[10] Plaintiffs also cannot credibly offer Dr. MacCracken, a climate modeler without any demonstrated expertise on the petroleum supply chain, *see* MacCracken Dec. ¶¶ 1-10, as a source for their assertion that refined from oil sands have greater lifecycle greenhouse gas emissions than fuels from some other sources, such as fuels refined from light crude oil from the Middle East, see *id.* ¶ 26. This use of the MacCracken declaration is particularly suspect given that this is an assertion without which Plaintiffs' argument on causation and redressability collapses.

alleged climate change harms would be "fairly traceable" to every single emission of greenhouse gases anywhere on the planet. Plaintiffs' reasoning would render the Article III causation requirement for standing a dead letter.

Finally, Plaintiffs' theory relies impermissibly on assumptions about the behavior of third parties not before this Court. In order to connect DLA-Energy's "failure" to include a lifecycle greenhouse gas emissions certification in its fuel contracts to the alleged climate change harms, Plaintiffs must make assumptions about the independent behavior of producers of fuel from Canadian oil sands, persons who would purchase that fuel if the U.S. military did not, and countless emitters of greenhouse gases around the globe whose emissions will continue unabated regardless of what happens in this lawsuit. Because Plaintiffs' "claimed injuries are 'highly indirect' and result from 'the independent action of some third party not before the court,' too much speculation is required to connect the links in the chain of causation." *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 849-50 (D. Md. 2010) (*quoting Allen v. Wright*, 468 U.S. 737, 757-59 (1984)).

IV. PLAINTIFFS HAVE NOT CURED THE DEFICIENCIES IN THEIR REDRESSABILITY ARGUMENT

Because Plaintiffs rely on nearly identical reasoning to establish redressability as they have done for causation, Plaintiffs similarly cannot establish that a favorable decision in this case is likely to redress the harms they allege. This failure provides an independent basis for dismissal of Plaintiffs' suit. *See Allen*, 468 U.S. at 751.

First, Plaintiffs again misapprehend their burden. The implausible and bald allegation that "the relief [Plaintiffs] seek, if granted, will reduce the impacts of greenhouse gas emissions on their members[,]" Pls. Opp. 11, does not suffice to meet that burden.

Second, Plaintiffs' articulation of the standard for redressability in a case involving alleged procedural injuries is inaccurate. They assert that, "[a] litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *See* Pls. Opp. 11 (citation, internal quotations omitted). This is incorrect. Although litigants who establish a procedural interest need not demonstrate that their injuries "will be *fully* remedied by a favorable decision by the court," or that "the result of the agency's deliberations will be different if the statutory procedure is followed[,]" *Pye*, 269 F.3d at 471-72 (emphasis added), litigants must still "show that the procedural step was connected to the substantive result[,]" *Massachusetts*, 549 U.S. at 518 (citation omitted), and must demonstrate a non-speculative likelihood that the injury would be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61 (citations omitted). Plaintiffs have not done so.

Regardless, this reasoning does not apply to Plaintiffs' Count One –which does not allege a "procedural injury" – *i.e.*, the "government's failure to follow statutorily prescribed *procedures*." *See, e.g.*, *Pye*, 269 F.3d at 467 (*citing Lujan*, 504 U.S. at 571-73) (emphasis added). While cast as an APA claim because EISA contains no private right of action (*see* 42 U.S.C. § 17142), Count One plainly alleges that DLA-Energy's fuel purchase contracts violate EISA Section 526 by failing to include a purportedly required contractual provision (*see* Complaint ¶ 65), not that DLA-Energy violated a procedural requirement of the APA. The APA is invoked solely as an avenue for seeking judicial review of agency action. *See* 5 U.S.C. §§ 702, 706; Complaint ¶¶ 8, 10, 65. Because no procedural obligation is at issue in Count One, Plaintiffs must meet the traditional standing test for redressability: that that "relief from the injury [is] 'likely' to follow from a favorable decision." *Allen*, 468 U.S. at 751.

Finally, Plaintiffs' redressibility allegations are deficient because, as articulated in the causation discussion, *supra*, they are implausible and dependent on the conduct of third parties not before the Court. For example, Plaintiffs assert that "[w]hile Federal Defendants' compliance with Section 526 will not by itself end climate change and its deleterious environmental impacts, Mr. MacCracken's Declaration makes it clear that every increment of greenhouse gas emissions avoided reduces those impacts." Pls. Opp. 11-12 (citing MacCracken Dec. ¶28). Yet, DLA-Energy does not extract or refine oil sands crude – and it is the extraction of oil sands crude which Plaintiffs have identifies as contributing the relevant increment of greenhouse gas emissions. *See* Pls. Opp. 9, 12; MacCracken Dec. ¶ 26. And Plaintiffs offer no evidence that the relief requested here, if granted, would materially impact the extraction or refinement of oil sands crude.[11] Hence, Plaintiffs' claims depend "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.) (*quoted in Lujan*, 504 U.S. at 562).

V. DLA-ENERGY'S MOBILITY-RELATED FUEL PURCHASES DO NOT CONTRAVENE EISA SECTION 526

Plaintiffs expend considerable pages in their Opposition recapitulating, with little additional insight or elaboration, arguments already refuted by Defendant-Intervenors and Federal Defendants. *Compare* Pls. Opp. 20-39 *with* Int. Cross-Mot. 24-26; Def. Mot. 20-24. These arguments, by which Plaintiffs attempt to circumvent the plain meaning of Section 526,

[11] *See* Int. Cross-Mot. 3-4. Indeed, a recent study prepared on behalf of the U.S. Department of State concluded that with or without the addition of pipeline capacity to export to the United States, development of oil sands production in Alberta would continue unaffected. *See* Keystone XL Project Supplemental Draft Environmental Impact Statement at 3-202 (April 2011), available at http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/04_KXL_SDEIS.pdf?OpenFileResource.

are unavailing. Put simply, there is no violation of Section 526 because that provision requires only that "[n]o Federal agency shall enter into a *contract for procurement* of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, for any mobility-related uses" absent the specified lifecycle greenhouse gas certification, 42 U.S.C. § 17142 (emphasis added). The DLA-Energy contracts at issue are not for the procurement of any such specialty fuels, but simply for commercially-available fuels based on general commercial specifications, or in the case of jet fuel, closely-related military specifications, *see*, *e.g.*, Interim Plan ii, 1, 6-8 [AR 4-5, 10-12]. Fuel derived from Canadian oil sands crude are not required by those contracts or specifications.

Among the arguments in their Opposition, Plaintiffs again contend that this plain meaning cannot be the correct one because it would result in an illogical outcome which would do violence to the statutory scheme. Pls. Opp. 28-32. But in contrast, under other statutory schemes federal agencies are *required* to contract for the procurement of specialty fuels such as those specified in EISA Section 526. *See* Int. Cross-Mot. 24-25. Thus, it is logical that Congress would have intended to apply Section 526 only where federal agencies expressly sought to procure specialty fuels.

Plaintiffs also expend four and a half pages of their brief pinning their interpretation of Section 526 of EISA 2007 to a provision in the National Aeronautics and Space Administration ("NASA") Authorization Act for Fiscal Year 2009. Pls. Opp. 24-29. Plaintiffs' argument is perplexing. On pages 23-24 of their Opposition, Plaintiffs assert that communications made shortly after the passage of EISA by the chairman of the congressional committee from which Section 526 originated are entirely irrelevant to this Court's construction of that provision. In their next breath, however, Plaintiffs argue that a provision in a separate statute, passed nearly a

year later, and which applies only to NASA, conclusively establishes the plain meaning of EISA Section 526. *See* Pls. Opp. 24-29. Even if Plaintiffs were correct, that later provision in the NASA Authorization Act merely clarifies that *NASA* need not apply EISA Section 526 to fuel purchases where, *inter alia*, "the purpose of the contract is not to obtain an alternative or synthetic fuel or fuel from a nonconventional petroleum source," Pub. L. 110–422 (HR 6063) (October 15, 2008) § 1112, and does not purport to determine whether other agencies must apply Section 526 when purchasing in similar circumstances.

Plaintiffs' remaining argument turns on specifications for military jet fuel which permit the feedstock from which the fuel is derived to include "crude oils derived from petroleum, tar sands, oil shale, or mixtures thereof." *See* Pls. Opp. 21-22; AR 10221. However, among the numerous contracts and purchase orders in the Administrative Record, not one expressly contracts for the procurement of fuels covered by Section 526. Yet Plaintiffs have seized upon the permissive language in the military jet fuel specifications as evidence of intent. This argument overreaches – an agency is not contracting to procure fuel refined from crude oil from a particular source solely because the underlying fuel specification provides a list of common sources of crude oil from which the fuel (like commercially available fuels[12]) may be refined.

VI. THE INTERIM PLAN IS NOT SUBJECT TO THE PROCEDURAL RULEMAKING REQUIREMENTS OF APA SECTION 553(B)

Because the Interim Plan is an "interim" document developed "to provide guidance to [the agency's] workforce, suppliers, and customers on how [DLA-Energy] will comply with

[12] The Interim Plan reveals the similarity between the portion of the military jet fuel specification highlighted by Plaintiffs and the comparable provision in the standard specification for commercial jet fuel, which states that "[a]viation turbine fuel … shall consist of refined hydrocarbons derived from conventional sources including crude oil, natural gas, liquid condensates, heavy oil, shale oil, and oil sands." Interim Plan 14, n. 17 [AR 18]. This parallel commercial specification highlights the inclusive nature of the list of potential petroleum sources.

Section 526[,]" Interim Plan [AR 2], it is an "interpretive rule[]" or "general statement[] of policy" and therefore is expressly excluded from the procedural requirements of APA Section 553(b). *See also Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) ("interpretive rules are those which … explain existing law or regulations" and "go more to what the administrative officer thinks the statute or regulation means when applied in particular, narrowly defined, situations") (citations, internal quotations removed).

Plaintiffs' argument to the contrary, aside from thinly veiled and unsupported allegations of bad faith, *see* Pls. Opp. 43, appears to be that an interpretive rule which makes an alleged error in interpretation is thereby transformed into a substantive or legislative rule because the error "ma[kes] new law and change[s] existing law by adding substantive content" to the statute at issue. Pls. Opp. 41-42. Under this theory, then, a document that explains and interprets regulations is an "interpretive rule" if those interpretations are correct but is a "substantive rule" if there is an error in interpretation. The Court should resist this arbitrary theory. Even if Plaintiffs were correct in their assertion that the Interim Plan misinterprets EISA Section 526, that fact does not transform the plan into a substantive rule which has the force of law.

Regardless, the Interim Plan is excluded from the procedural requirements of APA Section 553(b) on two additional, independent bases. First, the Interim Plan – prepared by DLA-Energy to address purchases of mobility-related fuels predominantly for the U.S. military – clearly "involve[s] … a military … function of the United States[,]" 5 U.S.C. § 553(a)(1), under the plain language of that exclusion, and therefore was never subject to the procedural requirements of APA Section 553(b). Plaintiffs argue generically that the exception should be narrowly construed. But this broadly phrased exception has remained substantively unchanged since 1946, *see* APA, § 4, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946), despite the purported

concerns about its misuse, as asserted by Plaintiffs. Pls. Opp. 43-44. Plaintiffs point to a 1974 recommendation by the Administrative Conference of the United States that this exception be narrowed or eliminated, *id*. 44, n. 55 – but this proposal was not accepted then or in the intervening decades.

The only case cited by Plaintiffs on this point, *Independent Guard Association of Nevada, Local No. 1 v. O'Leary*, did not find otherwise. Instead, an order on safety certification rules for agency and contractor employees of the U.S. Department of Energy ("DOE"), a civilian agency, assigned to security duties at DOE facilities was found by the Ninth Circuit to involve the *civilian* function of personnel management, and therefore was not subject to the military function exclusion. 57 F.3d 766, 768-70 (9th Cir. 1995). In so doing, the court emphasized the plain language of the exclusion – *i.e*., that the agency action must "involve[] … a military … function of the United States[,]" which the court said would apply to DOE's military tasks, such as researching and developing nuclear weapons. *Id*.

Given that the Interim Plan was prepared by DLA-Energy to address purchases of mobility-related fuels predominantly for the U.S. military, it plainly involves a military function of the United States. Plaintiffs' only rebuttal is to point to the fact that DLA-Energy also serves some civilian clients. Pls. Opp. 43-45. This is a red herring. DLA, an administrative unit of the U.S. Department of Defense, "is America's combat logistics support agency responsible for sourcing and providing nearly every consumable item used by our military forces worldwide."[13] DLA-Energy (formerly the Defense Energy Support Center) addresses fuel needs within that

[13] DLA-Energy History, available at http://www.desc.dla.mil/DCM/DCMPage.asp?LinkID=DESCHISTORY.

rubric, and is "the principal purchaser of petroleum products for the U.S. military."[14] The supply of mobility-related fuels, including fuels for combat and support aircraft, tanks, trucks, personnel carriers, ships, and other vehicles, is as essential to the U.S. military as, *e.g.*, the supply of ammunition or vehicle parts. The majority of the fuel purchased by DLA-Energy domestically is destined for military installations as well as ships and military aircraft.[15]

An examination of the individual contracts at issue, as identified by Plaintiffs, bears this out, as those contracts call exclusively for fuel under military specifications and/or for delivery to military installations.[16] DLA-Energy's own global figures further corroborate the predominance of U.S. military clients over other (defense contractor, other federal agency, other civilian) clients.[17] The mere fact that DLA-Energy – in addition to serving its primary, military

---

[14] LMI Report iii, 1-1 [AR 30, 36]; *see also id*. 3-1 [AR 40]. Indeed, according to its Abstract, the LMI Report was prepared because DLA-Energy, "as the principal purchaser of petroleum products for the U.S. military, wanted to examine the impacts of section 526 on its domestic bulk purchases of *military* fuels…." LMI Report p. 73 of 74 (Docket No. 59-3) (emphasis added).

[15] The LMI Report notes that DLA-Energy "is the principle purchaser of [mobility-related] fuels on behalf of the U.S. military … supplying military specification petroleum products such as jet, diesel, and maritime fuels to installations and active operations." LMI Report 3-1 [AR 40]. The Report further notes that "[m]ost fuel purchased domestically is supplied to U.S. installations, where it is principally used in the training process" although "some is supplied to ships for use at sea and to military aircraft headed elsewhere." *Id*.

[16] Nearly all of the contracts specifically identified by Plaintiffs, Complaint ¶ 55, call exclusively for JP-5 or JP-8 military spec jet fuel, and many of them also specifically call for delivery to military installations. *See* DLA600-09-D-0512 [AR 193]; 10-D-0480 [AR 207]; 09-D-0499 [AR 219]; 09-D-0478 [AR 225]; 09-D-0462 [AR 228]; 09-D-0471 [AR 242]; 09-D-0464 [AR 249]; 09-D-0466 [AR 255]; 10-D-0460 [AR 275]; 09-D-0480 [AR 283]; 10-D-0463 [AR 296]; 10-D-0475[AR 299]; 10-D-0470 [AR 305]; 10-D-0472 [AR 313]; 10-D-473 [AR 320]; 10-D-0478 [AR 325]; 10-D-0477 [AR 341]; 10-D-0465 [AR 10270]; 09-D-0498 [AR 10265]. The remaining contract identified by Plaintiffs and included in the Administrative Record calls for delivery to military installations. *See* DLA600-09-D-0503 [AR 234]. Plaintiffs have pointed to no contracts or similar evidence supporting their suggestion that DLA's fuel purchasing is not a military function.

[17] DLA-Energy's petroleum, natural gas, and aerospace energy sales to its military clients dwarf the small fraction of such sales to other clients. *See, e.g.*, Fact Book for Fiscal Year 2010, p. 23, available at http://www.desc.dla.mil/dcm/files/Fact%20Book%20FY10%20Final%20Web.pdf.

clients – also supplies to civilian clients a fraction of the bulk fuel that it purchases does not change the fundamentally military nature of DLA-Energy's fuel purchasing.

Second, and similarly unavailing, is Plaintiffs' opposition to the exclusion for agency actions which "involve[] … a matter relating to … contracts." Plaintiffs contend that construing the Interim Plan – which expressly provides contracting guidance – as being within that exclusion would "impermissibly broaden the scope" of the exclusion, because the exclusion applies only to contracts themselves. *See* Pls. Opp. 46. This argument cannot be squared with the plain language of the provision, which states that "[t]his section applies, according to the provisions thereof, except to *the extent that there is involved … a matter relating to* agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2) (emphasis added). Plaintiffs read the highlighted text out of the statute entirely.

Moreover, the only case which Plaintiffs cite in support of their reading actually undermines their reasoning. In *Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.*, the Ninth Circuit concluded that the plain language of 553(a)(2) clearly applied to the Federal Crop Insurance Corporation's decision to reclassify as uninsurable the Rainbow Valley, thereby effectively terminating crop insurance contracts in that region. 506 F.2d 467, 468-69 (9th Cir. 1974). In support, the court quoted a scholarly article for the proposition that "[t]he contracts exemption clearly has a very wide scope … [i]n addition to General Services Administration rulemaking relating to contracts for the procurement of land, goods, and services, and to construction contracts of all kinds, the exemption applies, as do all of the other (a)(2) exemptions, to rulemaking of that sort by every federal agency…" *Id.* at 469, n. 1 (citation,

internal quotations omitted).[18] Thus, the contracts exclusion is not limit to just contracts, but to "matter[s] relating to … contracts[,]" such as the Interim Plan.

VII. THE COURT SHOULD IGNORE PLAINTIFFS' BELATED CLAIM UNDER THE FREEDOM OF INFORMATION ACT, WHICH NEVERTHELESS DOES NOT PROVIDE THE REMEDY THAT PLAINTIFFS SEEK

Plaintiffs assert for the first time in their Opposition that, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(1)(D), "Federal Defendants were … required to publish the [Interim] Plan in the Federal Register" and that, in the absence of such publication, the Court should "find that the [Interim Plan] is unenforceable." Pls. Opp. 47-48. This claim appears nowhere in Plaintiffs' original or Amended Complaint and was not even asserted in their Motion for Summary Judgment. The Court should not hear a novel cause of action raised for the first time at this late stage of the briefing.

However, even if such a claim had been timely asserted, FOIA does not authorize the remedy Plaintiffs' seek. Section 552(a)(1) does not authorize a court to invalidate or render generally unenforceable "a matter required to be published in the Federal Register and not so published" – rather, it provides that "a person may not in any manner be required to resort to, or be adversely affected by" such a matter. 5 U.S.C. § 552(a)(1); *see also Pitts v. U.S.*, 599 F.2d 1103, 1107-08 (1st Cir. 1979) (explaining that "[t]he purpose of publication in the Federal

[18] The court also expressly premised its application of Section 553(a)(2) on the reasoning in two parallel cases. In those cases, the Seventh and Eighth Circuits affirmed that the U.S. Department of Housing and Urban Development's promulgation of regulations requiring local housing authorities to institute grievance procedures for their tenants was excluded from Section 553 notice-and-comment requirements, because the regulations "represented a 'proprietary' matter within the public contracts exception" of Section 553(a)(2). *Rainbow Valley Citrus Corp*., 506 F.2d at 469 (citing *Brown v. Housing Authority of City of Milwaukee*, 471 F.2d 63 (7th Cir. 1972); *Housing Auth. of Omaha, Neb. v. U.S. Housing Auth*., 468 F.2d 1 (8th Cir. 1972)). In short, *Rainbow Valley* confirms that the Section 553(a)(2) exclusion applies not only contracts themselves, but also to agency actions which "involve[] … a matter relating to … contracts."

Register is public guidance" and this provision of FOIA does not provide a basis for, among other things, "invalidating the regulations" which have not been published).

Appalachian Power Company v. Train, cited by Plaintiffs in support of their FOIA theory, is inapposite. There, EPA promulgated regulations governing power plant cooling water intake structures and incorporated by reference substantive technology standards contained in a separate, 273-page "Development Document" which had never been published in the Federal Register. 566 F.2d 451, 454-57 (4th Cir. 1977). The court in that case held that the Development Document's substantive standard could not be enforced to impose obligations on the electric utility petitioners, and remanded to EPA. *Id*. Here, Defendants do not seek to enforce the Interim Plan on Plaintiffs, which imposes no substantive obligations on Plaintiffs. They merely seek to follow it themselves as guidance.

VIII. PLAINTIFFS OFFER NO SUBSTANTIAL RESISTANCE TO DISMISSAL OF COUNT THREE AS MOOT

As noted in their Opposition, Plaintiffs have entered into settlement negotiations with Federal Defendants regarding Count Three of their Complaint. The parties anticipate a settlement that would result in a voluntary dismissal of that Count, with DLA-Energy agreeing to voluntarily conduct environmental analyses of its mobility-related fuel contracts and purchases without any concession that such analyses are required by NEPA.

However, should such an outcome not be achieved, Defendant-Intervenors contend that Count Three should be dismissed as moot – a position unrebutted by Plaintiffs[19] – or, in the alternative, Defendant-Intervenors and Federal Defendants should be granted summary judgment on the merits of that Count. *See* Int. Cross-Motion at pages 23-24, 28-30.

[19] Plaintiffs only response is a bare averment that they "dispute Defendants' contentions that their prospective NEPA compliance moots Plaintiffs' NEPA claims." Pls. Opp. 49, n. 58.

Dated: April 27, 2011

Respectfully submitted,

____/s/_____
Timothy K. Webster
Virginia State Bar No. 33246
Peter R. Steenland (*pro hac vice*)
Counsel for Defendant-Intervenors
American Petroleum Institute, National
Petrochemical & Refiners Association, and
Chamber of Commerce of the United States
of America
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Ph. 202-736-8138
Fax 202-736-8711
twebster@sidley.com
psteenland@sidley.com

Additional Counsel

Harry Ng
Janice K. Raburn
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8251
Counsel for American Petroleum Institute

Robin S. Conrad
National Chamber
Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
Counsel for Chamber of Commerce
of the United States of America

Gregory M. Scott
National Petrochemical & Refiners
Association
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 552-8474
Counsel for National Petrochemical
& Refiners Association

CERTIFICATE OF SERVICE

I hereby certify that on this, the 27th day of April, 2011, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of electronic filing to the following filing users:

Dennis C. Barghaan, Jr.
Lauren A. Wetzler
United States Attorney Office
2100 Jamieson Ave
Alexandria, VA 22314
dennis.barghaan@usdoj.gov
Lauren.wetzler@usdoj.gov
ATTORNEYS FOR DEFENDANTS

David S. Bailey
Tammy L. Belinsky
The Environmental Law Group, PLLC
5803 Staples Mills Road
Richmond, VA 23228
dbailey@envirolawva.com
tambel@hughes.net
ATTORNEYS FOR PLAINTIFFS

____/s/_____
Timothy K. Webster
Virginia State Bar No. 33246
Counsel for Defendant-Intervenors American Petroleum Institute, National Petrochemical & Refiners Association, and Chamber of Commerce of the United States of America
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Ph. 202-736-8138
Fax 202-736-8711
twebster@sidley.com