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

SIERRA CLUB and SOUTHERN ALLIANCE FOR CLEAN ENERGY,	)	
Plaintiffs	)	
v.	)	**No. 1:11-cv-00041-CMH –TRJ**
U.S. DEFENSE LOGISTICS AGENCY ENERGY, f/k/a U.S. DEFENSE ENERGY SUPPORT CENTER; KURT KUNKEL, in his official capacity as Commander of the U.S. Defense Logistics Agency Energy; U.S. DEPARTMENT OF DEFENSE; ROBERT GATES, in his official capacity as Secretary of the Department of Defense; U.S. DEFENSE LOGISTICS AGENCY; and ALAN S. THOMPSON, in his official capacity as Director of the Defense Logistics Agency,	)	
Defendants,	)	
and	)	
AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,	)	
Defendants-Intervenors.	)	

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

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STATEMENT OF UNDISPUTED ISSUES OF MATERIAL FACT

It is undisputed that the federal defendants have not attempted to comply with Section 526 of the Energy Independence and Security Act in their contracts for mobility related fuels, despite knowing that some of the fuels being purchased are derived from Canadian oil sands and have greater lifecycle greenhouse gas emissions than conventional fuels. The administrative record is clear in this regard, and Plaintiffs only dispute the manner in which Defendants have characterized certain documents in the record. Federal Defendants focused their Statement of Facts [Doc. 90, at 10-16], on correspondence between members of Congress and/or the Department of Defense, written after the passage of Section 526, making various statements about the interpretation of Section 526.[1] Plaintiffs object to Defendants' attempt to use these letters as "subsequent legislative history" to support an illogical interpretation of the clear language of Section 526 and request that the Court follow the guidance of the U.S. Supreme Court and ignore them. Plaintiffs also dispute the conclusion drawn by Federal Defendants from the LMI Report and the Interim Implementation Plan, where they repeatedly argue that that DLA does not "target any particular source of crude oil nor do they specify that the refined products must be produced from oil sands crude …"[2] This repeated assertion is contradicted by contract specifications in the record which specifically require that "[t]he feedstock from which the fuel is refined *shall* be crude oils derived from petroleum, *tar sands,* oil shale, or *mixtures thereof*" [emphasis added]."[3]

Intervenors' Statement of Undisputed Facts, [Doc. 96, at 9-14], contains the contention that the increased supply of Alberta oil sands "serves national security." This contention should

[1] AR at Tabs 4-8.
[2] AR at Tab 1, 3, 4.
[3] *See* Exs. 22 and 23 to Plaintiffs' Motion for Summary Judgment. AR at 10221 and 10251.

be disregarded because it is completely unsupported by anything in the administrative record.[4] Plaintiffs further dispute Intervenors' mischaracterization of the allegations in Plaintiffs' amended complaint, because the complaint speaks for itself. Intervenors' "Disputed Issues of Material fact" do not create any factual issues that would preclude summary judgment. [Doc. 95 at 7]. These are simply erroneous assertions about what the record says. For instance, Intervenors dispute that the Implementation Plan has been broadly applied to DLA contracts, when the Implementation Plan, by its express terms, was intended to implement Section 526 for all of DLA Energy's fuel purchases.[5] Intervenors also dispute that Federal Defendants have been contracting for mobility related fuels produced from COSRC, when the specifications for aviation fuels require that "[t]he feedstock from which the fuel is refined *shall* be crude oils derived from petroleum, *tar sands,* oil shale, or *mixtures thereof*" [emphasis added].[6] Finally, Intervenors attempt to dispute the statement in the LMI Report that "[P]etroleum products derived from oil sands crude are estimated to have life-cycle emissions exceeding those from conventional oil," but can point to nothing in the administrative record which contradicts this fact.[7]

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISIDCTION OVER PLAINTIFFS' CLAIMS.

A. PLAINTIFFS HAVE ESTABLISHED STANDING TO MAINTAIN THEIR APA AND NEPA CLAIMS AGAINST DEFENDANTS.

[4] Moreover, nowhere in the Record of Decision/National Interest Designation (which is not part of the record in this matter) cited to by intervenor defendants in support of this contention does it state that increased supply of Alberta oil sands serves national security.
[5] Action Memo. AR at 121. Implementation Plan. AR at 3.
[6] *See* Exs. 22 and 23 to Plaintiffs' Motion for Summary Judgment. AR at 10221 and 10251.
[7] Intervenors' argument is further refuted by the fact that some of the Congressional letters that Defendants want to rely upon as "subsequent legislative history" for the interpretation of Section 526 contain definitive statements that the lifecycle greenhouse gas emissions associated with COSRC are greater than those for conventional fuels. AR at 100-101, 108-109. 112.

Defendants argue that Plaintiffs have not established standing to maintain this action, and thus seek to have this Court dismiss this matter pursuant to Fed. R. Civ. P. 12(b)(1). However, Defendants misapprehend the showing that Plaintiffs must make to survive a Rule 12(b)(1) motion as it pertains to constitutional standing. Moreover, Defendants' arguments that Plaintiffs do not have prudential standing are without merit. Finally, Plaintiffs have demonstrated that they possess standing as matter of law for purposes of summary judgment. Therefore, defendants' arguments in regard to standing must fail and their motions to dismiss should be denied by the Court.

1. Plaintiffs Have Established Constitutional Standing.

In order to establish standing under Article III of the United States Constitution, "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be addressed by the requested relief. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 154 (4th Cir. 2000) ("*Gaston Copper*") (internal citations omitted). This formula includes three elements: (1) injury in fact; (2) traceability; and (3) redressability. *Id.* (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)). Moreover, an association, like each of the Plaintiffs, has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *Gaston Copper, supra* at 155 (citing *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)).[8]

In response to a Rule 12(b)(1) challenge, general factual allegations of injury resulting

[8] Federal Defendants do not contest that both Sierra Club and SACE meet elements two and three of the associational standing inquiry. [Doc. 90, at P. 21, n. 8].

from the defendant's conduct suffice, for on a motion to dismiss the court presumes that general allegations embrace those specific facts that are necessary to support a claim. *South Carolina Wildlife Federation v. Limehouse,* 549 F.3d 324, 329 (4th Cir. 2008) ("*Limehouse"*) (*citing Lujan, supra* at 561); *see also Management Association For Private Photogrammetric Surveyors v. United States,* 467 F.Supp.2d 596, 602 (E.D.Va. 2006) (noting that "as *Lujan* teaches, general allegations of injury are sufficient at this stage of the litigation"). In the instant matter, Plaintiffs have sufficiently alleged factual allegations demonstrating their standing to maintain this action as a result of federal defendants' willful failure to comply with the statutory mandate of Section 526, and thus defendants' Rule 12(b)(1) motions should be denied.

To demonstrate standing at the summary judgment stage, a plaintiff must set forth evidence of an injury in fact in addition to that provided in the complaint, which will be taken as true for purposes of deciding the motion. *Lujan, supra* at 561. Plaintiffs have provided additional declarations, which, together with those filed with their original memorandum, more than support their standing. These include the Declaration of Michael C. MacCracken, a well-known climate scientist whom the U.S. Supreme Court relied heavily upon in finding standing for plaintiffs to assert greenhouse gas related APA claims in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

(a) Plaintiffs Have Established Injury In Fact.

In regards to injury in fact, a plaintiff must suffer an invasion of a legally protected interest that is "concrete and particularized." *See, e.g., Lujan, supra* at 560 (stating that the alleged injury must affect the plaintiff in a "personalized and individual way"). Thus, the injury in fact requirement blocks suit by those whose allegations of injury are based on mere conjecture

rather than an actual or threatened invasion of their legally protected interests.[9] *Id.* However, the claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing. *Conservation Council of North Carolina v. Costanzo,* 505 F.2d 498, 501 (4th Cir. 1974); *see also Sierra Club v. Cedar Point Oil Co.,* 73 F.3d 546, 557 (5th Cir. 1996). In the environmental litigation context, standing requirements are not onerous. *American Canoe Association, Inc. v. Murphy Farms, Inc.,* 326 F.3d 505, 517 (4th Cir. 2003). "[E]nvironmental Plaintiffs adequately allege injury in fact when they aver 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, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)).

For purposes of their motions to dismiss, Defendants contend that Plaintiffs' alleged harm is "generalized and non-particularized" and that, as a result, Plaintiffs have failed to demonstrate injury in fact. Plaintiffs' amended complaint [Doc. 56, ¶¶ 13, 18], however, includes both general and specific factual allegations pertaining to Plaintiffs' injuries that more than satisfy the *Limehouse* test, as discussed *supra*, for a motion to dismiss. Moreover, defendants' contention that Plaintiffs have not differentiated their harm from the general public ignores binding precedent and is thus without merit.

Defendants seem to suggest that the harms of climate change are so widespread that they cannot create injury in fact for any person to establish individual standing. The Supreme Court put this idea to rest in *Massachusetts v. EPA,* 549 U.S. 497, 521-22 (2007) ("The harms

[9] Threats or increased risk constitute cognizable harm. The Supreme Court has consistently recognized that threatened, rather than actual, injury can satisfy Article III standing requirements. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982). "One does need to await the consummation of a threatened injury to obtained preventative relief." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979).

associated with climate change are serious and well recognized.") The fact that the harms associated with climate change are "widely shared" does not minimize Plaintiffs' interest in the outcome of this litigation. *Id.* at 522; *see also Federal Election Commission v. Akins,* 524 U.S. 11, 24 (1998) (holding that "[W]here a harm is concrete, though widely shared, the [Supreme] Court has found injury in fact"). Similarly, in *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 687-688 (1973), the Court stated:

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Plaintiffs have sufficiently pled factual allegations of injury, and thus defendants' Rule 12(b)(1) motions relating to injury in fact should be denied.

Plaintiffs have gone far beyond allegations of injury in their motion for summary judgment by submitting for the Court's consideration declarations of Sierra Club and SACE members demonstrating concrete and particularized injuries they have suffered in personal and individual ways, which differentiates them from the general public. *See, e.g.,*: Declaration of Voss, attached hereto as Exhibit A (diminished recreational and aesthetic enjoyment of various outdoor activities in specific areas of California due to climate change impacts); Declaration of Mannchen, attached hereto as Exhibit C (diminished recreational and aesthetic enjoyment of specific areas in Texas due to the impacts of climate change and sea level rise); Declaration of Mainland, attached hereto as Exhibit D (diminished recreational and aesthetic enjoyment of vacations to the Sierra and Cascade mountain ranges due to climate change impacts); Declaration of Welter, attached hereto as Exhibit E (diminished recreational and aesthetic enjoyment of specific areas of Colorado due to climate change impact); Declaration of Angelo, attached hereto as Exhibit F, (adverse affects to family and property due to rise in sea level and intensified

storms in Florida caused by climate change); Declaration of Hummert, attached hereto as Exhibit G (personal harm resulting from intensified storms in the Gulf Coast Region as a result of climate change); Declaration of Noel, attached hereto as Exhibit H (property damage and economic injury due to massive flooding in Tennessee as a result of intensified storms, as well as diminished recreational and aesthetic enjoyment of specific areas of the U.S. due to climate change impacts); and Declaration of Sisskin, attached hereto as Exhibit I (property damage and economic injury due to intensified storms and diminished recreational and aesthetic enjoyment of specific areas in Florida due to climate change impacts).

(b) Plaintiffs Have Established Traceability.

Defendants argue that Plaintiffs have not established traceability because they contend all that is at issue in this litigation is "incremental increases" in greenhouse gas emissions, and Plaintiffs' injuries cannot be traced solely to the complained of activity of the Federal Defendants because there are "countless contributors" to greenhouse gas emissions. However, this argument is without merit as it misapprehends applicable legal precedent for demonstrating traceability. As a result, defendants' arguments should be rejected by the Court.

The "fairly traceable" requirement ensures that there is a genuine nexus between a plaintiff's injury and a defendant's alleged illegal conduct. *Gaston Copper, supra* at 161 (citing *Lujan,* 504 U.S. at 560). However, traceability does not mean that Plaintiffs must show to a scientific certainty that defendant's conduct caused the precise harm suffered by the Plaintiffs. *Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 n.7 (4th Cir. 1992); *see also Gaston Copper, supra* at 162 (holding that "[w]e decline to transform the fairly traceable requirement into the kind of scientific inquiry that neither the Supreme Court nor Congress

intended").[10] Moreover, to establish standing in the environmental context, Plaintiffs need not show that a particular defendant is the only cause of their injury, or that, absent the defendant's activities, the plaintiffs would enjoy undisturbed use of a resource. *Watkins, supra* at 980 (emphasis added). Thus, rather than pinpointing the origins of particular molecules, a plaintiff "must merely show that a defendant discharges a pollutant or causes or contributes to the kinds of injuries alleged." *Id*.; *see also American Canoe Association, supra* at 520 (holding that it would be "strange indeed" if polluters were protected from suit simply by virtue of the fact that others were also contributing to the injury).

Plaintiffs have alleged that the continued use by federal defendants of fuels derived from COSRC, in express contravention to the plain language of Section 526, results in increased greenhouse gas emissions and thus causes or contributes to Plaintiffs' injuries. [Doc. 56, at ¶ 13, ¶ 18]. This is all that is required to establish traceability for standing in response to a motion to dismiss. *See Watkins, supra* at 980; *see also Massachusetts v. EPA, supra* at 1457 (finding causation element established based on the fact that EPA's refusal to regulate greenhouse gas emissions "contributes" to the injury). Contrary to defendants' arguments, Plaintiffs simply do not have to show that federal defendants are the only cause of their injury, or that absent federal defendants' challenged activities, there would be no greenhouse gas emissions. The fact that defendants contend that only "incremental increases" in greenhouse gas emissions are at issue does not change this conclusion. As the Supreme Court stated in *Massachusetts v. EPA,* in response to EPA's argument that its decision not to regulate greenhouse gases from new motor vehicles contributed "so insignificantly" to climate change that the agency should not have to be haled into court to answer for them*:*

[10] Stated differently, the "fairly traceable" requirement is not the equivalent to a requirement of but/for tort causation. *Watkins, supra* at 980, n. 7 (internal citations omitted).

> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, generally do not resolve massive problems in one fell regulatory swoop.

For these reasons, defendants' Rule 12(b)(1) challenges to traceability should be denied by the Court, as Plaintiffs have demonstrated traceability as it pertains to the standing inquiry.

Plaintiffs have gone further by submitting the Declaration of Michael C. MacCracken (attached hereto as Exhibit J), a well-respected climate scientist, for purposes of demonstrating causation, along with EPA's Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act. 74 Fed. Reg. 66,496 (Dec. 15, 2009).[11] As is clear from the Supreme Court's decision in *Massachusetts v. EPA,* Mr. MacCracken' declaration in that matter was essential to the Court's finding that standing existed based on the impacts of climate change. *Id.* at 521-524. Similarly, Mr. MacCracken's Declaration submitted herewith supports Plaintiffs' standing. Mr. MacCracken states, *inter alia:* that the transportation sector is a major source of greenhouse gas emissions in the U.S. (¶23, ¶31); that mobility related fuels derived from tar sands have higher lifecycle greenhouse gas emissions than those of conventional fuels (¶14, ¶26, ¶ 37); that these higher emissions will have global consequences by contributing to global warming impacts in the U.S. and abroad (¶27); that each increment of greenhouse gas emissions, including those from tar sands derived fuels, no matter how small, will have climate impacts for years to come (¶ 28); that the impacts of climate change identified by the members of Plaintiffs, including, but not limited to, property damage from sea level rise, damage from intensified rains; and biodiversity and recreation related impacts, are all types of impacts now occurring due to greenhouse gas induced climate change (¶32-¶34); and that

[11] As discussed in Mr. MacCracken's declaration, the Endangerment Finding found, amongst other findings, that "greenhouse gases taken in combination endanger both the public health and the public welfare or current and future generations." 74 Fed. Reg. 66,496 (Dec. 15, 2009).

purchase and use of tar sands derived fuels should be avoided, as called for by Section 526, because every emission pushes total emissions near the established "critical threshold" where the impacts of climate change will intensify (¶37).

(c) Plaintiffs Have Established Redressability.

Defendants contend that because Plaintiffs' injuries cannot be solely traced to the purchasing of fuels by Federal Defendants, and because others emit greenhouse gases, then it follows that the relief that Plaintiffs seek cannot redress those injuries. The redressability requirement ensures that a plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin,* 422 U.S. 490, 508 (1975). However, to establish standing to redress an environmental injury, plaintiffs need not show that a particular defendant is the only cause of their injury, or that, absent the defendant's activities, the plaintiffs would enjoy undisturbed use of a resource. *Watkins, supra* at 980. As the Supreme Court stated in dealing with the same argument made by Defendants here:

> A plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable injury will relieve his *every* injury.
>
> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow or reduce* it….Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Massachusetts v. EPA, supra at 525-26 (emphasis in original) (internal citations omitted); *see also Pye v. United States,* 269 F.3d 459, 471 (4th Cir. 2001) (holding that Plaintiffs need not establish that their injuries will be fully remedied by a favorable decision, only that there is a procedural remedy by which the Plaintiffs'' concerns may be aired before the agency).

Furthermore, in the instant matter, all of Plaintiffs' claims are based on procedural injuries, *i.e.,* violations by federal defendants of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* Litigants to whom Congress has accorded a procedural right to protect their concrete interests can assert that right without meeting all of the normal standards for redressability and immediacy. *Lujan, supra* at 572, n.7. Specifically, when a litigant is vested with a procedural right, that 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." *Id.* (emphasis added); *see also Sugar Cane Growers Cooperative of Florida v. Veneman,* 289 F.3d 89, 94-95 (D.C. Cir. 2002) (holding that a litigant who alleged a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered).

In their Amended Complaint, Plaintiffs alleged that the relief they seek, if granted, will reduce the impacts of greenhouse gas emissions on their members. [Doc. 56, at ¶ 13, ¶ 18]. These factual allegations are sufficient to withstand defendants' 12(b)(1) motions. In fact, it is already clear that there is "some possibility" that the relief requested by Plaintiffs in their amended complaint will cause defendants to reconsider the decisions which have caused injury to Plaintiffs. In fact, in response to Plaintiffs' NEPA claim, Federal Defendants have already agreed to take steps to comply with NEPA. *See* Declaration of Paul Rogers [Doc. 90-1]. Similarly, there is indisputably some possibility that the declaratory and injunctive relief sought by Plaintiffs in regards to their APA claims will cause the defendants to reconsider their decisions, *i.e.,* their deliberate and willful noncompliance with Section 526, which is contributing to Plaintiffs' actual and procedural injuries.

While 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. MacCracken Decl., ¶28. This Court has jurisdiction to decide whether defendants have a duty to comply with Section 526, and in so doing, slow or reduce climate change. For these reasons, Plaintiffs have established redressability for purposes of summary judgment.

2. Plaintiffs Have Prudential Standing.

Defendants further contend that this matter should be dismissed because Plaintiffs' asserted harm is nothing more than a "generalized grievance" and as a result Plaintiffs do not have prudential standing. However, as set forth below, Plaintiffs meet the two-part zone of interest inquiry. Moreover, as demonstrated *supra,* Plaintiffs have suffered concrete and particularized injuries, and thus it is irrelevant that others may have suffered the same injury. For these reasons, Plaintiffs have prudential standing, and defendants' contentions to the contrary are without merit.

In cases brought under the APA, the standing inquiry includes both a constitutional analysis and a prudential inquiry. *Pye v. United States, supra* at 466. Thus, in addition to constitutional standing, Plaintiffs must demonstrate that their injury is within the zone of interests protected by the statute at issue. *Id.* at 467. The zone of interests test consists of a two-part inquiry: first, determining which interests the statute at issue arguably protects; and second, determining whether the agency action affects those interests. *Id.* at 470. This inquiry "must be determined not by reference to the overall purpose of the statute in question but, instead, *by reference to the particular provison(s) of law upon which the plaintiff seeks redress. Taubman Realty Group Limited Partnership v. Mineta,* 198 F.Supp.2d 744, 755, n. 22 (E.D. Va. 2002) (emphasis added). In the instant matter, Plaintiffs have prudential standing, because their

injuries are within the zone of interests protected by Section 526, and Federal Defendants' willful noncompliance with Section 526, has clearly affected those interests.

As enacted, the Energy Independence and Security Act of 2007 ("EISA") included certain provisions, including Section 526, of the House of Representatives bill the "Carbon Neutral Government Act." H.R. 2635, 110th Cong. (2007). The Carbon Neutral Government Act had the overall purpose "[t]o reduce the Federal Government's contribution to global warming through measures that promote efficiency in the Federal Government's management and operations." *Id.* Given this purpose, Plaintiffs' injuries, which are the result of federal defendants' deliberate refusal to comply with Section 526, are within the zone of interests intended to be protected by Section 526.[12] In direct contravention of the statutory purpose of Section 526, federal defendants' noncompliance with Section 526 is not reducing the Federal Government's contribution to global warming; in sharp contrast, it is exacerbating the Federal Government's contribution to global warming. Similarly, federal defendants' willful and deliberate refusal to comply with Section 526 clearly affects the interests for which Section 526 was enacted.

Furthermore, defendants' arguments that this matter should be dismissed because Plaintiffs' asserted harm is nothing more than a "generalized grievance" is without merit. Whether members of the broader public have an interest in this case does not divest or diminish Plaintiffs' interests. "[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton, supra* at 734; *see also Massachusetts v. EPA, supra* at 517

[12] In fact, as originally drafted, the Carbon Neutral Government Act contained a citizen's suit provision allowing citizens to sue the Federal Government to require compliance with the Act's provisions. This certainly evidences a specific intent that the provisions of the Acct are within the zone of interests of all members of the public, including Plaintiffs.

(rejecting EPA's argument that "because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents are insuperable jurisdictional obstacle"). As conceded by defendants, "merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable." *Pye, supra* at 469 (quoting *Federal Election Commission v. Akins,* 524 U.S. 11, 24 (1998)). So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury. *See Akins,* 524 U.S. at 24; *see also Lujan, supra* at 555 (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"). As discussed in more detail *supra,* Plaintiffs have demonstrated concrete and particularized injuries and, as a result, have demonstrated prudential standing.[13] Therefore, Defendants' arguments to the contrary are without merit, and should be rejected by this Court.

B. PLAINTIFFS HAVE ESTABLISHED JURISDICTION FOR THEIR APA CLAIMS.

Federal Defendants resort to blatant mischaracterization of the nature of Plaintiffs' action in an attempt to persuade the Court that it does not have jurisdiction to hear Plaintiffs' claims based on the APA. Specifically, regarding Count I of Plaintiffs' amended complaint, Federal Defendants argue that Plaintiffs are not challenging specific contracts, but rather are citing to individual contracts in order to justify a challenge to a broad, undefined program, which defendants contend does not constitute final agency action. However, Plaintiffs are clearly challenging individual contracts in this matter, which constitute final agency action. Applicable precedent is clear that Plaintiffs can challenge a "universe" of these particular contracts under the

[13] Interestingly, one of the findings contained in the Carbon Neutral Government Act bill was that "[T]hat these climate change risks are widely shared does not minimize the adverse effects individual persons have suffered and will suffer because of global warming." H.R. 2635, 110th Cong. (2007).

APA without the case becoming a challenge to a broad, undefined program. Moreover, the Implementation Plan constitutes final agency action because it is being applied in a binding manner by federal defendants.

1. The Challenged Contracts Constitute Final Agency Action.

In *Bennett v. Spear,* 520 U.S. 154 (1997), the United States Supreme Court set out the test for what constitutes "final agency action." The Court stated:

> As a general matter, two conditions must be satisfied for an agency action to be 'final': First the action must mark the consummation of the agency's decision-making process – it must not be or a merely or tentative or interlocutory nature. And second, the action must be one by which 'rights and obligations have been determined,' or from which 'legal consequences will flow.'"

Id. at 177-78. The contracts at issue in the instant matter meet both of the *Bennett* requirements. These contracts are clearly the consummation of the agency's decision-making process; further, for no other reason than the fact that they are contracts, it cannot reasonably be disputed that these contracts determine rights and obligations, and are actions from which legal consequences will flow. Therefore, the contracts at issue constitute final agency action, and this Court has jurisdiction to review the contracts under the APA. *See, e.g., State of Alabama v. United States Army Corps of Engineers*, 382 F. Supp. 2d 1301 (N.D. Ala. 2005) (holding that the Corps action of entering into contracts for water supply storage was final agency action).

Moreover, Plaintiffs' challenge to the DLA Energy contracts for mobility related fuels which contain COSRC is a challenge to particular and discrete agency actions, not to a broad, undefined program as contended by federal defendants. In their amended complaint, Plaintiffs specifically identified over twenty (20) contracts which Plaintiffs' are challenging in this matter.[14] [Doc. 56, ¶ 55]. Plaintiffs also alleged that "[n]one of the contracts that DLA Energy

[14] Federal Defendants have also asserted that the current contracts cited in Plaintiffs' amended complaint expire on April 30, 2011, and thus are moot. However, Federal Defendants have agreed to supplement the record with

has entered since the enactment of Section 526 for fuels for mobility-related uses that include fuels derived from Canadian oil sands recovered crude have included the specification required by Section 526 of EISA that the 'lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.'" [Doc. 56, ¶ 57].[15]

As such, Plaintiffs' challenge to these DLA Energy contracts is not a "broad programmatic attack" such as the one rejected in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 890 (1990). In *National Wildlife Federation,* which is inapposite to the instant matter, the Supreme Court struck down a challenge to the so-called "land withdrawal review program," which the Court found was not even "agency action," much less final agency action. The Court stated:

> The term 'land withdrawal review program' (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations.

Id. at 890 (emphasis added). More analogous to the case at hand are the project-specific insurance, loans, and loan guarantees provided by the Overseas Private Investment Corporation which the Court found to be final agency action for APA review in *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D. Cal. 2005). In rejecting defendants' argument that Plaintiffs' challenge was a prohibited "broad programmatic attack," the court stated:

> Merely because Plaintiffs' suit concerns the environmental impacts of the projects

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extensions of previously identified contracts, and with new contracts with refineries previously identified by plaintiffs. Therefore, this argument re: mootness is no longer applicable.

[15] In their respective Answers to Plaintiffs' Amended Complaint, both federal defendants and intervenor defendants have admitted that none of the contracts that DLA Energy has entered into since the enactment of Section 526 for mobility related fuels containing COSRC have included the lifecycle greenhouse gas specification required by Section 526. [Doc. 61, ¶ 57]; [Doc. 60, ¶ 57]. Furthermore, the record demonstrates that DLA Energy has admitted that is has no contracts that contain this required specification. AR at 211, 216.

> supported by Ex-Im and OPIC as a group, rather than individually, does not convert Plaintiffs' challenge into a broad programmatic attack prohibited by *National Wildlife Federation.* As the Supreme Court itself noted in *National Wildlife Federation, it would be appropriate to challenge a 'universe' of particular orders under the APA.* Plaintiffs' suit does not challenge the day-to-day operations of Ex-Im or OPC, but rather, challenges those agencies discrete determinations that the projects they support do not, on a cumulative basis, have a significant environmental impact.

Id. at *6 (emphasis added). In the case at hand, Plaintiffs are challenging a "universe" of contracts under the APA, not the day-to-day operations of DLA Energy. Plaintiffs are challenging Federal Defendants' decision for each of a specific group of contracts, those for fuels derived from COSRC, which violate Section 526. Similarly, in *Cobell v. Babbitt,* 30 F.Supp.2d 24 (D.C. Cir. 1998), the court struck down defendants' argument that its accounting system used in its individual Indian Money trust was not final agency action pursuant to the holding in *National Wildlife Federation,* and that the accounting system was a prohibited broad, programmatic attack. The court stated:

> *Lujan,* however, is clearly distinguishable from this case. In *Lujan,* the Supreme Court held that no final agency action existed when the plaintiffs challenged the Bureau of Land Management's 'land withdrawal review program.' That so-called program was not an order, regulation, or universe of orders or regulations. Instead, the 'program' was simply the name attached to the general activities of the agency … In this case, the defendants have enacted a concrete accounting system which it currently administers and which the plaintiffs claim …constitutes arbitrary and capricious action. *The plaintiffs do not seek to generically challenge the defendants' actions. The plaintiffs have named specific actions ...which have been administered 'across the board.' These agency actions are final, ripe and allegedly adversely affect the plaintiffs.*

Id. at 34, n. 10 (emphasis added) (internal citations omitted). As was the case in *Cobell,* Plaintiffs are not generically challenging defendants' actions; rather, Plaintiffs have identified specific action, *i.e.,* numerous contracts, which constitute final agency action and have adversely affected Plaintiffs and their members. As a result, this Court has jurisdiction to entertain Plaintiffs' challenge to specific contracts, as well as the universe of contracts, all of which are for

fuels for mobility related purposes and contain COSRC, but, by defendants' own admission do not comply with Section 526.

2. The Interim Implementation Plan Constitutes Final Agency Action.

As referenced *supra*, agency action is final when it (1) marks the consummation of an agency's decision-making process and (2) determines rights and obligations. *Bennett v. Spear, supra* at 177-178. In the instant matter, the Implementation Plan constitutes final agency action, because it is a substantive rule that was promulgated absent the notice and comment rulemaking procedures of the APA. Alternatively, should the Court determine that the Implementation Plan is not a substantive rule, it still constitutes final agency action because Federal Defendants' designation of the plan as "interim" is not dispositive, especially given the fact that it is being applied in a binding manner by federal defendants. Moreover, the Implementation Plan clearly determines rights and obligations providing the Court jurisdiction to hear Plaintiffs' challenge to the Implementation Plan.

As discussed in more detail *infra,* the Implementation Plan constitutes final agency action because it is a substantive rule that was promulgated absent the notice and comment rulemaking procedures of the APA. *See Center For Auto Safety v. National Highway Traffic Safety Administration,* 452 F.3d 798, 806 (D.C. Cir. 2006) (holding that an agency's adoption of a binding norm obviously would reflect final agency action). Federal Defendants argue that the Implementation Plan is not final because it is termed an "interim" plan, and because it is subject to further revision. However, the mere designation of the Plan as "interim" is not dispositive of this issue. *National Mining Ass'n v. Jackson,* 2011 WL 124194 at *5-6 (D.C. Cir. 2011) (noting that the challenged Guidance Memorandum qualified as final agency action despite the agency's representation that it was an interim document). Moreover, the fact that the Implementation Plan

may be subject to further revision does not mean that it is not final agency action. In *Appalachian Power Company v. Environmental Protection Agency,* 208 F.3d 1015 (D.C. Cir. 2000), the court stated in regards to EPA's argument that its Clean Air Act guidance document did not constitute final agency action:

> EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action ….But all laws are subject to change ….The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.

Id. at 1022.

In contrast to these bare assertions, what does matter is the manner in which defendants are applying the Implementation Plan. In *Appalachian Power Company,* the Court of Appeals stated:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule ….then the agency's documents is for all purposes 'binding.'

Id. at 1021. In the instant matter, as evidenced by the contracts in the record, none of which contain the lifecycle greenhouse gas specification required by Section 526, despite the fact they contain COSRC derived fuels, Federal Defendants are clearly applying the Implementation Plan as a binding document that is controlling in the field – or, as a legislative rule. *See National Mining Ass'n, supra* at *6 (noting that the Guidance document constituted final agency action because it "is being treated and applied in practice as if it were final"); *see also General Electric Company v. Environmental Protection Agency,* 290 F.3d 377, 383 (D.C. Cir. 2002) ("if the language in a document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter). Furthermore, the Implementation Plan has clearly determined rights and obligations, because it has concluded that

federal defendants' purchases of petroleum are not within the purview of Section 526, even if those purchases contain COSRC.

The Implementation Plan meets both part of the *Bennett* analysis, and therefore constitutes final agency action.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON ALL COUNTS IN THEIR AMENDED COMPLAINT.

A. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON COUNT ONE BECAUSE SECTION 526 APPLIES TO THE FUEL CONTRACTS AT ISSUE.

Plaintiffs are entitled to summary judgment on Count One of their amended complaint, because "the pleadings … admissions, and affidavits show 'that there is no genuine issue as to any material fact and that [Plaintiffs are] entitled to a judgment as a matter of law." *Magill v. Gulf & W. Indus., Inc.*, 736 F.2d 976, 979 (4th Cir. 1984) (*quoting* Fed. R. Civ. P. 56).

The pertinent facts of the case are undisputed. The administrative record contains numerous contracts that Federal Defendants have entered into for the procurement of mobility related fuel(s). While the contracts do not specifically state that they are for fuels derived from COSRC, many of them are for purchase of aviation fuels that comply with a military specification calling for COSRC fuels or mixtures of COSRC fuels.[16] Furthermore, DLA Energy is well-aware that the fuels procured under these contracts actually contain tar sands-derived fuel. Federal Defendants knows this because DLA's own LMI Report analyzes which refineries and suppliers are likely processing tar sands crude.[17] For example, the LMI Report concludes that the fuel procured by these refineries contains at least up to 27% tar-sands derived fuel, depending on the supplier. *Id.* Plaintiffs have identified contracts from these refineries in their amended complaint that are included in the record, [Doc. 56, ¶¶54-55], and Defendants do not

[16] *See* Exs. 22 and 23 to Plaintiffs' Motion for Summary Judgment. AR at 10221 and 10251.
[17] LMI Report. AR at 81-82.

deny that the record indicates that the fuels obtained with these contracts likely contains COSRC derived fuels. Therefore, there is no genuine issue that DLA is contracting for COSRC fuels. There is also no issue that the contracts identified in the Amended Complaint, and indeed none of the contracts DLA has entered into since the enactment of § 526, contain the required greenhouse gas specification.[18] *See* [Doc. 56, ¶¶ 56-57]; [Doc. 60, ¶¶ 56-57]; [Doc. 61, ¶¶ 56-57].

Based on these undisputed facts, Plaintiffs are entitled to judgment as a matter of law, because § 526 applies to the fuel contracts at issue in this case, yet the contracts fail to contain the required greenhouse gas specification.

1. Based on the Plain Language of the Statute, the Fuel Contracts at Issue are Contracts for the Procurement of Tar Sands Fuel.

The contracts at issue are "contracts for the procurement of tar sands fuel" within the plain meaning of § 526. In interpreting a statute, courts "first and foremost strive to implement congressional intent by examining the plain language of the statute." *United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010) (quotations omitted); *United States v. Bell,* 5 F.3d 64, 68 (4th Cir. 1993) (a statue is given its plain meaning "absent ambiguity or a clearly expressed legislative intent to the contrary"). To determine a statute's plain meaning, a court will look at the words' "ordinary meaning at the time of a statute's enactment." *Stephens ex rel. R.E. v. Astrue,* 565 F.3d 131 (4th Cir. 2009) (quotations omitted).

The ordinary meaning of the phrase "contract for procurement" compels the application of § 526 to the contacts at issue here. "There can be little doubt that the word procurement is

[18] Defendants attack the First Amended Complaint for stating only that the contracts are "likely to contain" tar sands, as if Plaintiffs are merely speculating. Deft. Memo at 20-21. However, Defendants' own report concludes that these contracts are from the refineries that process tar sands fuel, and that the fuel procured from these facilities contains up to 27% tar sands-derived fuel. Defendants' practice of deliberately failing to analyze the contents of the fuel, and failing to include the required greenhouse gas specification so as to avoid compliance with § 526 is the reason why Plaintiffs cannot state with specificity how much tar sands fuel is included within each contract.

widely understood, by lawyers and laymen alike, to denote the process by which the government pays money or confers other benefits in order to obtain goods and services from the private sector." *Rapides Reg'l Med. Ctr. v. Sec'y, Dept. of Veterans' Affairs*, 974 F.2d 565, 573-74 (5th Cir. 1992).

In the contracts entered into under Federal Defendants' fuel purchasing program, DLA pays money to private sector fuel suppliers to purchase tar sands derived fuel. DLA is undisputedly aware that they are purchasing tar sands fuel because, contrary to Defendants' assertions, *the fuel specifications expressly require tar sands fuel.* For example, the military specification for jet fuel JP-8 requires that "the feedstock from which the fuel is refined *shall be* derived from petroleum, tar sands, oil shale, or mixtures thereof."[19] Tar sands-derived fuel is one of only three fuel sources that are allowed under the contract specifications, meaning that all other sources are prohibited.[20] Defendants concede, as they must, that the procurement contracts specifically and affirmatively *permit* tar sands-derived fuel. [Doc. 90, at 10-11]. They claim, however, that DLA is not intending to purchase tar sands fuel. The logic of their argument seems to be that if an agency requires that a fuel *shall be* derived from one of only three sources, it is not intending to buy any specific type of fuel; rather, it is leaving the door open to any possible fuel source. However, expressly listing a tar sands fuel for inclusion in a contract results in a contract for the procurement of tar sands fuel.

Furthermore, Defendants' own LMI Report concludes that tar sands encompass up to 27% of the fuel procured under the contracts.[21] There can be little doubt that the DLA contracts are, in fact, "contract[s] for the procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources…" 42 U.S.C. § 17142.

[19] AR 10221 (emphasis added).
[20] *Id.*
[21] LMI Report. AR at 81-82.

2. The Court Cannot Consider Rep. Waxman's Letters to Interpret Section 526.

As Plaintiffs anticipated, Federal Defendants' primary merits argument was that the Court should rely upon "subsequent legislative history" in the form of letters from one Congressman to interpret Section 526 of EISA. The Supreme Court has repeatedly rejected the use of this type of *post-hoc* statements by a bill's sponsor in interpreting a statute. In *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396 (2010), the Court examined the scope of the False Claims Act, which barred *qui tam* recovery actions based on the public disclosure of allegations or transactions in "a congressional, administrative, or Government Accounting Office [GAO] report, hearing, audit, or investigation." *Id.* at 1411. The question before the Court was whether the term "administrative" was intended to include state and local administrative sources in addition to federal sources. Respondents attempted to rely on a post-enactment letter written by the sponsors of the provision declaring that they "did intend, and any fair reading of the statute will confirm, that the disclosure bar must be in a federal civil, criminal, or administrative hearing. Disclosure in a state proceeding of any kind should not be a bar to a subsequent qui tam suit." *Id*. at 1408-09. The Court, however, rejected the use of the letter, making it clear that such letters are not considered legislative history and offer "scant or no value" in interpreting a statue, and ultimately concluded that the provision did apply to state and local administrative hearings. *Id*. at 1409-11.

Similarly, in *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980), the Court refused to consider *post hoc* statements by a provision's author to discern the provision's meaning. Section 6(b)(1) of the Consumer Product Safety Act (CPSA) required the Consumer Product Safety Commission (Commission) to provide notice-and-comment opportunity to a manufacturer before publically disclosing product information pursuant to its

information-gathering authority. The Commission decided to release product information pursuant to a FOIA request without following the CPSA procedures, reasoning that the CPSA procedures applied only when the Commission affirmatively sought to release information but not when it responded to a FOIA request. In deciding whether Section 6(b)(1) applied to FOIA requests, the Court refused to consider a statement made by the primary author of the Act during testimony before the an Oversight Subcommittee as well as a joint statement by a Conference Committee, both made after passage of the CPSA. The Court held that neither statement could be used to interpret the provision:

> [O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history. We do not think that either Representative Moss' isolated remark or the *post hoc* statement of the Conference Committee with respect to § 6(b) is entitled to much weight here.

Consumer Prod. Safety Comm'n, 447 U.S. at 118 (1980) (*citing Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)).

Similarly here, Rep. Waxman's post-hoc statements are in the form of letters written after § 526 became law. They are the view of one member of Congress, and they were made outside of any congressional proceeding. These letters are not legislative history, and have no value in interpreting congressional intent of § 526. Therefore, the court should not consider the Waxman letters as they relate to Count One.

3. Defendants' Interpretation of Section 526 is Illogical, Runs Counter to Canons of Statutory Interpretation, and Would Produce Absurd Results.

Federal and Intervenor Defendants' interpretation of § 526 would read an exemption into the plain language of § 526 that would exempt DOD for bulk fuel contracts that purchase generally available fuel partially composed of tar sands fuel, but do not specifically require tar sands fuel in the language of the contract (only in the contract specifications). However, as set forth in Plaintiffs' opening brief, their interpretation ignores the fact that Congress explicitly

carved out this very exemption for the National Aeronautics and Space Administration (NASA) but did not do so for DOD or any other federal agency. If Defendants are correct in their interpretation of Section 526, the NASA exemption would have been unnecessary and meaningless. The Court should not adopt an interpretation that would render a portion of a statute superfluous.

(a) Congress Evidenced its Intent by Exempting NASA but not DOD.

It is telling that Federal Defendants' brief does not once mention the NASA exemption after Plaintiffs raised it, and Intervenors only briefly address it in a footnote. [Doc. 95, at 32 n.13]. That is because it is fatal to the interpretation of § 526 that they now advance.

The NASA exemption reads:

> Section 17142(a) [§ 526 of the EISA] of this title does not prohibit NASA from entering into a contract to purchase a generally available fuel that is not an alternative or synthetic fuel or predominantly produced from a nonconventional petroleum source, if –
>
> (1) the contract does not specifically require the contractor to provide an alternative or synthetic fuel or fuel from a nonconventional petroleum source;
>
> (2) the purpose of the contract is not to obtain an alternative or synthetic fuel or fuel from a nonconventional petroleum source; and
>
> (3) the contract does not provide incentives for a refinery upgrade or expansion to allow a refinery to use or increase its use of fuel from a nonconventional petroleum source.

42 U.S.C. § 17827.[22]

The express exemption for NASA is virtually identical to the implied one that Defendants propose for DOD. However, "where Congress includes particular language in one section of a

[22] The NASA exemption, originally passed as part of the "National Aeronautics and Space Administration Authorization Act of 2008," PL 110–422 (HR 6063) (Oct. 15, 2008), was not extended beyond December 2010. *See* P.L 111-314 (Dec. 18, 2010). The only logical reading of P.L 111-314 is that, by removing the NASA exemption, Congress determined that no federal agency should enjoy a bulk fuels exemption from § 526. It also does not change the fact that Congress knew how to create a bulk fuels exception and only did so for NASA.

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted); *United States v. Abdelshafi*, 592 F.3d 602, 608 (4th Cir. 2010) *cert. denied*, 131 S. Ct. 182 (U.S. 2010). Thus, the Court must presume that Congress acted intentionally when it amended the statute to include a bulk fuel exemption for NASA but excluded the same amendment for all other government agencies – including DOD.[23]

If the Court looks beyond the plain meaning of the statute for interpretation, the Court can look to the NASA amendment to the EISA, because a "statute should be construed to be consistent with subsequent statutory amendments." *United States v. Dauray*, 215 F.3d 257, 263 (2d Cir. 2000) (citing *Bowen v. Yuckert,* 482 U.S. 137, 149-51 (1987)). Construing § 526 with the NASA exemption amendment exempting NASA for bulk fuel purchases results in the inescapable conclusion that *only* NASA was exempted from the law, not DOD or any other federal agency.

It is well-settled that if Congress crafts an express exception for one thing in one part of a statute, its failure to do so elsewhere is intentional and another exception cannot be implied. In *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, discussed *supra*, the Court refused to infer an exception to a statute where Congress had set forth other express exceptions. Central to the Court's ruling was the fact that Congress had carved out a list of exemptions in Section 6(b)(2) of the CPSA, including an express incorporation of the FOIA exceptions, but did not include the exception that the Commission urged the Court to read into the statute. The Court explained:

[23] As noted in Plaintiffs' Memorandum in Support of Summary Judgment [Doc. 76], at the same time the NASA amended was being considered, some members of Congress were pushing for a similar exemption for DOD. However, no such exemption was enacted, further supporting the application of Section 526 to Defendants' contracts.

> If Congress had intended to exclude FOIA disclosures from § 6(b)(1) it could easily have done so explicitly in this section as it did with the other listed exceptions. That Congress was aware of the relationship between § 6 and the FOIA when it enacted the CPSA is evident in the fact that Congress in § 6(a)(1) specifically incorporated by reference the nine exemptions of the FOIA, 5 U.S.C. § 552(b). We are consequently reluctant to conclude that Congress' failure to include FOIA requests within the exceptions to § 6(b)(1) listed in § 6(b)(2) was unintentional.

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. at 109.

Similarly here, the NASA exemption demonstrates that Congress was aware of the federal government practice of procuring "generally-available fuel" partially comprised of alternative or synthetic fuel, and decided to carve an exception to allow NASA to continue this practice. If Congress had intended to enact an exemption from § 526 that applied to all government agencies as opposed to only NASA, it clearly could have done so. Congress did not, and the court cannot conclude that Congress' failure to include DOD or any other government agency within this exemption was unintentional. The court cannot imply an exception for DOD in this case.

Finally, Intervenors state that Plaintiffs' reliance on the NASA exemption is "curious given Plaintiffs' argument against use of subsequent legislative history." [Doc. 95 at 32 n.13]. However, the NASA exemption is not "legislative history;" it is legislation that was passed by both houses and became law. Thus it can be considered in the Court's interpretation of § 526. *See Dauray*, 215 F.3d at 263; *Russello,* 464 U.S. at 23.

By contrast, the Waxman letters federal and intervenor defendants rely on do not even rise to the level of "subsequent legislative history." They are statements made after the passage of § 526, outside of any legislative proceeding, by a single member of Congress. *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396, 1408-09 (2010)

(holding that a post-enactment interpretive letter was not considered legislative history and should not be considered by the court despite the fact that it was written by the bill's author).

(b) Defendants' Interpretation Would Render the NASA Exemption Meaningless.

Moreover, federal and intervenor defendants' interpretation cannot succeed because it would render the NASA exemption meaningless. Courts "cannot interpret a statute in a manner that would render some of its language meaningless; rather, [courts] must give effect to each portion of the statute…" *Etape v. Chertoff*, 497 F.3d 379, 384 (4th Cir. 2007); *Duncan v. Walker,* 533 U.S. 167, 174 (2001) (a court has a "duty to give effect, if possible, to every clause and word of a statute," and should be reluctant "to treat statutory terms as surplusage"); *Hibbs v. Winn,* 542 U.S. 88, 101 (2004) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (quotations omitted). Federal and intervenor defendants' interpretation of § 526— that it exempts *all* federal agencies' bulk fuel contracts that contain synthetic or alternative fuels—would render the NASA exemption absolutely meaningless and superfluous. This cannot be the result. If Congress had intended for a "generally available fuel purchase" exception to apply to all federal agencies, it would have been unnecessary to explicitly amend § 526 to carve such an exemption for NASA. The court has a duty to give effect to the NASA exemption, which requires a rejection of federal and intervenor defendant's interpretation.

In *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 244-45 (4th Cir. 2009) ("Shipbuilders"), the Court of Appeals reversed a District Court order that had rejected the U.S. Coast Guard's interpretation of a regulation that it administers in favor of an interpretation advanced by the Shipbuilders Council of America. The court reasoned that the Shipbuilders' interpretation "eviscerate[d]" another part of the regulations, while the Coast Guard's

"interpretive scheme [had] the great virtue of construing each provision of the regulation to have functional significance." *Id*. at 244-45. Following *Shipbuilders*, this court cannot accept Defendants' interpretation of § 526 without eviscerating the NASA exemption and rendering it superfluous. If the court gives effect to every clause and word of the statute, it must find that NASA is the only agency to which Congress granted a "generally-available fuel purchase" exemption.

(c) Defendants' Interpretation Would Produce Absurd Results.

Defendants' interpretation must also be rejected because it would produce absurd results. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citing *United States v. American Trucking Assns., Inc.*, 310 U.S. at 542-543); see also *In re Motley,* 150 B.R. 16, 18 (Bkrtcy. E.D. Va. 1992) (quotations omitted) (legislative enactments "should never be construed as establishing statutory schemes that are illogical, unjust, or capricious").

The interpretation urged by Defendants would lead to an absurd and illogical result that would frustrate the goals of the EISA and Section 526. It would allow any federal agency to avoid compliance with § 526 so long as its fuel contracts do not specifically name alternative or synthetic fuels or fuels from nonconventional petroleum sources as the type of fuel being procured. Under this approach, federal agencies would continue their business-as-usual fuel purchases without regard to § 526 and there would be no reduction in federal greenhouse gas emissions.

However, the plain language reading that Plaintiffs advance is consistent with the legislative purpose of § 526. The stated purpose of the EISA was to reduce the government's use of high-carbon fuels in favor of cleaner options. EISA's preamble states:

> [The purpose is to] move the United States toward greater energy independence and security, to increase the production of clean, renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes.

Preamble, Pub. L. 110-140 (Dec. 19, 2007) (codified at 42 U.S.C. §§ 17001, *et seq*.).

Moreover, § 526's purpose is further described in the "findings" of the Carbon Neutral Government Act (from which § 526 originated). The findings begin by stating that the harms associated with climate change are real and well-recognized; that the U.S. must be a leader in reducing our greenhouse gas emissions because our 5% of the worlds' population emit 20% of global GHG emissions; and that the US Government alone is responsible for 100,000,000 metric tons of CO2-equivalent emissions annually. H.R. 2635 (2007). It goes on to make the following findings:

> A reduction in greenhouse gas emissions by Federal agencies would slow the increase of global emissions and hence of global warming…
>
> Federal action would accelerate the pace of development and adoption of technologies that will be critical to addressing global warming in the United States and worldwide…
>
> A failure by any Federal agency to comply with the provisions of this Act requiring reductions in its greenhouse gas emissions would exacerbate the pace and extent of global warming and the harms caused by the agency beyond what would otherwise occur. Although the emissions increments involved could be relatively small, such a failure allowing incrementally greater emissions would injure all United States citizens…
>
> Improved management of Government operations, including acquisitions and procurement and operation of Government facilities, can maximize the use of existing energy efficiency and renewable energy technologies to reduce global

> warming pollution, while saving taxpayers' money, reducing our dependence on oil, enhancing national security, cleaning the air, and protecting pristine places from drilling and mining.

Id.

As these findings make clear, the intent and purpose of § 526 is to reduce the federal government's carbon footprint by prohibiting the purchase and use of high-carbon fuels. While Plaintiffs' plain language reading of the statute would advance these goals by reducing the federal governments' use of high-carbon tar sands fuel, Defendants' reading would reach the incongruous result of allowing all federal agencies to avoid compliance with §526 by writing vague contracts. Defendants' approach would not reduce greenhouse gas emissions. It would, at best, preserve the *status quo* contrary to the stated intent of the statute; but would more likely increase federal greenhouse gas emissions considering the use of tar sands fuel is expected to rise dramatically.

Defendants further claim that Plaintiffs "insist that any purchased fuel 'containing' fuel derived from COSRC is subject to § 526.'" [Doc. 90, at 29]. As Plaintiffs discussed in their original memorandum, there is no basis in the record for determining that there is a *de minimis* level of COSRC derived fuels. However, this case involves contracts containing far more than incidental amounts.[24] Some of the contested contracts are from refineries that produce on average as much as 27% tar sands fuel.[25] In fact, the percentages in the record are from 2006, and the LMI Report states that COSRC "will be an even larger fraction in the future;" that "more suppliers at more locations will be processing COSRC" in years to come; and that COSRC production is expected to expand so quickly that it may triple and represent 15 percent of U.S.

[24] Plaintiffs complaint encompasses those contracts that contain more than "incidental" amounts. Amended Complaint, at ¶ 55.

[25] LMI Report. AR at 81-82. The LMI Report finds that at least five fuel suppliers with whom DLA is contracting produce fuel comprised of at least 10%-20% COSRC, and one supplier supplies at least 27% COSRC. *Id.*

supply by 2020.[26] Thus, current contracts almost certainly contain much higher percentages of COSRC fuels than what is stated in the LMI Report.

Most importantly, Defendants' interpretation would not limit COSRC to only incidental amounts, as Defendants imply. Under their reading of § 526 all federal agencies could contract for the procurement of "commercially-available fuel" that contains *any* amount of COSRC derived fuels, even 100%, yet avoid § 526 compliance as long as the contracts did not specify any particular fuel source. Agencies could purchase tar sands fuel, coal-to-liquid fuel, synfuel, or any other specific high-carbon fuel in its contract specifications but feign ignorance in the actual contract language, thereby avoiding § 526 compliance. The absurd result would be that federal agencies could continue to purchase high-greenhouse gas fuels, and the government would not reduce its greenhouse gas emissions. Plaintiff's plain language reading of § 526 on the other hand is the only interpretation that furthers the statute's purpose of reducing greenhouse gas emissions.

(d) Defendants' Interpretation of § 526 is Not Entitled to Deference.

Moreover, Federal Defendants' interpretation of § 526 is not due *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference applies only to any reasonable agency interpretation of a statute by an agency that was authorized to administer the statute. *Chevron supra* at 843-44 ("[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation"). However, DLA did not receive "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

[26] LMI Report. AR at 84, 86.

In urging the court to adopt an interpretation of § 526 that would render the NASA exemption meaningless and allow all federal agencies to avoid compliance, Defendants argue, relying on *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that "[i]n any event, the DLA interpretation is reasonable and merits deference." [*See* Doc. 90, at 32]. However, *Skidmore* deference should not apply here, because rather than entrusting DLA to administer § 526, Congress created the provision to curtail DLA's actions. DOD should not be afforded deference in interpreting a statute in a way that allows it to avoid compliance with the law.

In addition, Defendants misstate the appropriate legal standard. *Skidmore* only allows courts to give limited deference to an agency interpretation "*only if and to the extent that it is persuasive*." *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009) (emphasis added) ("[T]he agency does not have unfettered interpretive license"); *Precon Dev. Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011) (quotations omitted) ("Under *Skidmore,* an agency's interpretation merits deference to the extent that the interpretation has the power to persuade"). *Skidmore* deference involves assessing the "thoroughness evident in [agency] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Cervantes v. Holder,* 597 F.3d 229, 233 (4th Cir. 2010) (*quoting Skidmore,* 323 U.S. at 140). The Court cannot simply accept any agency interpretation under *Skidmore,* as Defendants request.

4. Tar Sands Fuel is a Synthetic Fuel and/or a Fuel Produced From Nonconventional Petroleum Sources.

Defendants also appear to argue that COSRC is neither a "fuel produced from nonconventional petroleum sources" nor a "synthetic fuel" within the meaning of § 526, or that it is unclear. [Doc. at 23, 30-32]. This argument is unavailing, as it runs counter to Defendants'

own characterization of COSRC in the LMI Report, the Implementation Plan, the pleadings, and the wealth of information in the administrative record.

Tar sands fuel is nonconventional by definition. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. U. S.*, 444 U.S. 37, 42, 100 S. Ct. 311, 314, 62 L. Ed. 2d 199 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975)).

The ordinary, common meaning of the phrase "a fuel produced from nonconventional petroleum sources" is a fuel that is produced from a source that is something other than a conventional petroleum source. The Energy Information Agency glossary that Defendants cite defines conventional oil production as follows**:** "Crude oil… that is produced by a well drilled into a geologic formation in which the reservoir and fluid characteristics permit the oil …to readily flow to the wellbore."[27] Thus, a conventional petroleum source involves drilling into underground crude oil deposits and siphoning the liquid crude oil to the surface.

Tar sands development methods contrast sharply with conventional extraction methods. The tar sands are solid mixtures of bitumen, clay, sand, and other sediments and minerals that lay mainly under Alberta's boreal forests.[28] The bitumen comprises only 1% to 20% of the mixture, so after the forests are razed, vast amounts of earth must be mined.[29] Two tons of earth are required to produce one barrel of oil.[30] After the tar sands are extracted, they are added to a mixture of hot water and caustic soda, creating a slurry that is then agitated to allow the bitumen to rise to the surface where it is skimmed off.[31] After further treatment, the bitumen is

[27] http://www.eia.doe.gov/tools/glossary/. By contrast, the glossary defines unconventional oil as "oil… that is produced by means that do not meet the criteria for conventional production. *Id.*
[28] LMI Report. AR at 46.
[29] LMI Report. AR at 46-47.l
[30] *Id.*
[31] *Id.*

transported to an upgrading facility.[32] Raw bitumen is a complex hydrocarbon comprised of a long chain of molecules that must be broken down and reorganized.[33] Through the use of thermal conversion, distillation, catalytic conversion, and hydrotreating, the upgrading process removes some carbon molecules and adds hydrogen molecules to create a synthetic form of crude oil.[34] An alternative extraction method, called in situ extraction, involves converting the buried bitumen deposits to liquid form using various techniques before bringing it to the surface.[35] In short, defendants' attempt to portray tar sands fuel as a conventional fuel is easily rebutted by the complicated tar sands extraction and processing procedures described in the record. The tar sands are the very definition of a nonconventional petroleum source.

Moreover, as set forth in Plaintiffs' opening brief, Congress has explicitly included tar sands-derived fuel within the definition of both "synthetic fuel" and "nonconventional petroleum sources." *See* Defense Production Act of 1950, 50 U.S.C. App. § 2098 (repealed by Pub. Law 96-294 (June 30, 1980)); Internal Revenue Code, 26 U.S.C. § 45K(c)(1)(A). As pointed out in Defendants' brief, the Department of Energy's Energy Information Administration defines "nonconventional petroleum sources" as including "syncrude derived from the bitumen in oil sands…" [Doc. 90, at 30-31].[36]

The administrative record is replete with characterizations of tar sands fuel as a both a synthetic fuel and a nonconventional petroleum source. For example, Defendants' own LMI Report refers to COSRC as "synthetic crude oil" throughout the document. *See, e.g.*, LMI Report, at 4-2 ("the bitumen is then transported and eventually upgraded into synthetic crude oil."); LMI Report, at 4-3 ("The end product is synthetic crude oil, which is shipped by pipelines

[32] LMI Report. AR at 48-49.
[33] *Id.*
[34] *Id.*
[35] LMI Report. AR at 47.
[36] Citing http://tonto.eia.doe.gov/oiaf/aeo/otheranalysis/aeo_2006analysispapers/nlf.html

to refineries across North American to be refined further into jet fuels, gasoline, and other petroleum products"). Similarly, Federal Defendants' own Implementation Plan states that it "addresses petroleum because the petroleum produced from oil sands crude might be considered 'an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources' under § 526."[37] The entire premise of the LMI Report, and the Implementation Plan, is to determine how to comply with Section 526 in light of the fact that the "commercially-available fuel" procured by Defendants contains some percentage of tar sands fuel; but neither the LMI Report nor the Implementation Plan dispute that tar sands fuel in and of itself is a synthetic or nonconventional petroleum source.

The Implementation Plan also makes this distinction between conventional and nonconventional petroleum: "DoE categorizes heavy crudes and oil sands crudes as nonconventional because the extraction process for these crude require heat processes and are not typical of extracting liquid petroleum crude."[38] Similarly, the LMI Report compares COSRC to conventional oil, reinforcing the notion that COSRC is not conventional: "DESC is concerned that petroleum products derived from oil sands crude are estimated to have life-cycle emissions exceeding those of conventional oil."[39]

Finally, although Plaintiffs object to the use of Rep. Waxman's post-enactment interpretive letters regarding the meaning of § 526, if the court considers those letters, they plainly support Plaintiffs on this point. Rep. Waxman states that Section 526 "would clearly apply to … a fuel produced from a nonconventional petroleum source, such as fuel produced from tar sands."[40]

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[37] Implementation Plan. AR at 4.
[38] Implementation Plan. AR at 11.
[39] LMI Report. AR at 36.
[40] 3.17.08 Ltr Waxman to Bingaman. AR at 109. *See also* LMI Report. AR at 39.

5. It is Not Impossible for Defendants to Comply with Section 526.

Defendants make misleading statements in arguing that Federal Defendants could not comply with § 526 without jeopardizing national security. For example, Defendants falsely claim that "nearly all petroleum products in the United States might contain at least some amount of COSRC." [Doc. 90, at 24]. This statement is plainly contradicted by the record. The LMI Report states that there are currently 143 active refineries in the United States, totaling 17.5 million barrels per day (bpd).[41] However, only some refineries and their suppliers are capable of processing significant amounts of COSRC, and the LMI Report analyzes which those are.[42] The LMI Report estimates that between 4 and 19 of DLA's suppliers processed significant amounts of COSRC in 2006, and as many as 21 would likely be processing it within a few years.[43] Out of the 42 fuel suppliers analyzed in the LMI Report, 19 were NOT capable of processing any COSRC, and another 12 were processing less than one percent COSRC.[44] Thus, DLA knows that it can, and does currently, purchase non-COSRC fuel and knows which suppliers sell it.

Defendants also claim that "refiners and other suppliers *could not* and would not specify all fuel supplied would contain no COSRC" and "the only way to ensure that DLA procures fuel containing no COSRC is to withdraw from the commercial market or decline to serve the needs of its military and agency clients." [Doc. 90, at 24] [emphasis added]. Again, these exaggerated claims are simply not supported by the record; in fact, the record actually supports the opposite. The LMI Report states that if the ultimate standard is that procured fuel can only have incidental amounts of tar sands crude, "some suppliers might have to modify their operations in order to

[41] LMI Report. AR at 41.
[42] LMI Report. AR at 66-85.
[43] LMI Report. AR at 76.
[44] LMI Report. AR at 81-82.

comply."[45] The LMI Report further discusses potential outcomes of an injunction: "If [DLA] wished to avoid product from [suppliers processing significant amounts of COSRC], it could attempt to switch among suppliers so that those it continues to use do not process COSRC except in small quantities."[46] Again, the LMI Report shows that there are numerous non-COSRC suppliers in the U.S.[47]

"Another approach would be to contractually stipulate with refiners or other suppliers that no more than minimal amounts of COSRC could be utilized in products supplied to DESC."[48] This may be accomplished because refiners "may be able to easily schedule their runs such that non-COSCR crude is processed when they are producing products for the U.S. government while COSRC crude input is reserved for others." In fact, the LMI Report describes that there is a history of refiners supplying "boutique" fuels, which requires refiners to build extra tanks to isolate certain types of crude and then store that fuel separately according to the buyers' needs.[49] While § 526 compliance may require operational changes for suppliers. Defendants' unsupported claims that it would be impossible to comply with § 526 are flatly contradicted by its own LMI Report.

Defendants' claims that § 526 compliance would compromise the readiness of our armed forces is also contradicted by the Implementation Plan. The Plan contains exceptions to § 526 that are needed to meet DOD's operational requirements for fuel, such as small purchases, overseas and contingency purchases, emergencies or sole source situations."[50] These exceptions

[45] LMI Report. AR at 86.
[46] *Id.*
[47] LMI Report. AR at 81-82.
[48] LMI Repot. AR at 87.
[49] *Id.*
[50] Implementation Plan. AR at 4.

ensure that DOD could comply with § 526 while enjoying a degree of flexibility to ensure the preparation of our armed forces.[51]

If necessary, the Court could craft a remedy pursuant to its broad equitable powers that would satisfy the purpose and intent of EISA while keeping our military fully supplied with fuel. Regardless, the parties agree that the proper remedy would be a separate issue for the Court to consider at a later stage. *See* [Doc. 90, at 1 n.1]. At present, however, all that is before the Court is Defendants' claim of a blanket exemption for COSRC derived fuels, not the possibility of narrow exceptions. At this point, the court need only resolve the legal issue of whether Plaintiffs are entitled to summary judgment on this issue.

B. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON COUNT II BECAUSE THE IMPLEMENTATION PLAN VIOLATES THE APA.

As discussed in Plaintiffs' Memorandum in Support of Summary Judgment [Doc. 76], and not disputed by Defendants, the Implementation Plan is a rule as defined by 5 U.S.C. § 551(4), because it implements Section 526 as it pertains to all of Federal Defendants' mobility related fuel purchases.[52] In fact, the Plan is a substantive rule carrying the force of law, and thus should have been subjected to the notice and comment rulemaking procedures contained in the APA prior to being promulgated and relied upon by defendants. *See* 5 U.S.C. § 553(b) and (c). Moreover, contrary to Defendants' arguments, the Plan does not fit within any of the limited exceptions to the APA's notice and comment requirements, and because Defendants admittedly did not follow these requirements, the Plan, and any and all action take pursuant to it, should be set aside under 5 U.S.C. § 706(2)(A). Even if the Court finds that the Implementation Plan is

[51] Implementation Plan. AR at 16.

[52] A "rule" is broadly defined in the APA. *See* 5 U.S.C. § 551(4). In pertinent part, a rule is defined as "an agency statement of general or particular applicability and future effect *designed to implement* …law or policy…." *Id.* (emphasis added).

an interpretative rule or a policy statement, the DLA Energy was still required to publish the Plan in the *Federal Register* pursuant to the APA because it is of general applicability, and the fact that it was not published makes it unenforceable. Furthermore, the Plan is invalid because it violates Section 526, and as a result Federal Defendants' promulgation of and reliance on the Plan is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in violation of Section 526 and 5 U.S.C. § 706(2)(C).

1. The Implementation Plan Does Not Fit Within Any Of The Exceptions To The APA's Notice And Comment Rulemaking Procedures.

Defendants argue that the Implementation Plan is not subject to the APA's notice and comment rulemaking requirements because it fits within each of the exceptions to § 553's notice and comment requirements. See 5 U.S.C. § 553(b)(A); 5 U.S.C. § 553(a)(1); 5 U.S.C. § 553(a)(2). However, the Plan is not subject to any of these narrow exceptions, and defendants have not only completely disregarded the legislative intent governing these exceptions, but further seek to improperly extend these exceptions far beyond the legislative intent.

As a threshold matter, is important to note that Congress, given the important policy goals of maximum participation and full information, intended the exceptions to § 553's notice and comment requirements to be narrow ones. *United States v. Gould,* 568 F.3d 459, 477 (4th Cir. 2009); *see also American Hospital Association v. Bowen,* 834 F.2d 1037, 1044 (D.C. Cir. 1987). As a result:

> Courts have therefore looked askance at agencies' attempts to avoid the standard notice and comment procedures, holding that exceptions under § 553 must be *narrowly construed and only reluctantly countenanced* in order to assure than an agency's decisions will be informed and responsive.

United States v. Gould, supra at 478 (internal citations omitted) (emphasis added); *see also Alcaraz v. Block,* 746 F.2d 593, 612 (9th Cir. 1994) (holding that the exceptions to § 553 will be

narrowly construed and only reluctantly countenanced in order to maintain consistency with Congress' clear intent to ensure that these exceptions did not become "escape clauses" which agencies could utilize at their whim). Given that the essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies, these "[e]xemptions should be recognized only where the need for public participation is overcome by good cause to suspend it." *Batterton v. Marshall,* 648 F.2d 694, 704 (D.C. Cir. 1980). Stated differently, these exceptions should be construed as "an attempt to preserve agency flexibility in dealing with *limited situations where substantive rights are not at stake*." *American Hospital Association, supra* at 1045 (emphasis added).

The instant matter does not present such a limited situation, as there is no good cause to suspend the notice and comment requirements set out in § 553; moreover, the Implementation affects substantive rights. Therefore, for these reasons, as well as those discussed *infra*, the IIP does not fall within any of the exceptions to the notice and comment rulemaking procedures contained in 5 U.S.C. § 553, and thus should have been adopted pursuant to these procedures.

(a) The IIP is Not an Interpretative Rule or a General Statement of Policy Pursuant to 5 U.S.C. § 553(b)(A).

Defendants first contend that the Implementation Plan is merely an "interpretative rule" or "general statement of policy" pursuant to 5 U.S.C. § 553(b)(A) and thus exempt from § 553's notice and comment requirements. However, this argument fails because the Plan is a substantive rule which has the force of law. [53] Therefore, the Court should reject federal and intervenor defendants' argument in this regard.

[53] Substantive (or legislative) rules are ones which "grant rights, impose obligations, or produce other significant effects on public interests, or which effect a change in existing law or policy." *Tabb Lakes v. United States,* 715 F.Supp. 728, 729 (E.D. Va. 1988); *see also Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission,* 874

In contrast to a substantive rule, an interpretative rule is "merely a clarification or explanation of an existing statute or rule." *See, e.g., Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation,* 589 F.2d 658, 664 (D.C. Cir. 1978) ("*Guardian Federal*"). Furthermore, "[A]lthough the distinction between a substantive and interpretative rule is a gray area, courts generally differentiate cases '*in which the agency is adding substantive content of its own*.'" *Tabb Lakes, supra* at 728 (quoting *American Hospital Association, supra* at 1045) (emphasis added). Applying this principle to the case at hand, the Implementation Plan is not an interpretative rule, as it goes far beyond merely clarifying or explaining Section 526; in fact, its arbitrary conclusion that Section 526 does not cover purchases of mobility related fuels containing COSRC clearly adds substantive content to Section 526. Similarly, the Plan is not a general statement of policy. A general statement of policy "may not have a present effect." *Tabbs Lake, supra* at 729 (quoting *American Bus Association v. United States,* 627 F.2d 525, 529 (D.C. Cir. 1980)). The Plan has a clear present effect in that it excludes from Section 526 purchases of mobility related fuels containing COSRC, and thus is not a general statement of policy. Moreover, a court will look at "whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion." *Id.* In the instant matter, the arbitrary conclusion contained in the Plan that purchases of mobility related fuels containing COSRC are not covered by Section 526 has clearly foreclosed the discretion of agency decision-makers in this regard. Therefore, the Plan is not a general statement of policy. [54]

F.2d 205, 207 (4th Cir. 1989) (holding that substantive rules have the force of law, and create new law or impose new rights and duties).

[54] When distinguishing between substantive and nonlegislative rules, courts will generally differentiate cases "'in which the agency is adding substantive content of its own.'" *Tabb Lakes, supra* at 728 (quoting *American Hospital Association v. Bowen,* 834 F.2d 1037, 1045 (D.C. Cir. 1987)). Ultimately, "[I]f an agency acts as if a document is controlling in the field, if it treats the document in the same manner as it treats a legislative rule … then the agency's

Ultimately, defendants are attempting to characterize the Implementation in such a manner so as to justify their admitted noncompliance with the notice and comment procedures of the APA. Not surprisingly, courts have become increasingly concerned that agencies are using interpretative rules and policy statements to create binding rules without following procedures that are required for the development of binding rules. As the court stated in *Appalachian Power Company v. EPA, supra:*

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute …. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining *and often expanding* the commands ….Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Appalachian Power Company, supra at 1020 (emphasis added). Federal defendants have, through promulgation of and reliance on the Plan, made new law and changed existing law by adding substantive content to Section 526, without compliance with the APA's required notice and comment procedures.

(b) The Implementation Plan is Not Subject to the Military Function Exception to the APA's Notice and Comment Procedures Contained in 5 U.S.C. § 553(a)(1).

Defendants summarily contend, without any supporting legal authority, that because DLA Energy purchases mobility-related fuels for the Department of Defense, the Implementation Plan is exempted from the APA's notice and comment requirements pursuant to the military function exception contained in 5 U.S.C. § 553(a)(1). However, this contention misrepresents the full range of services provided by DLA Energy, as well as the broad scope of

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document is for all practical purposes" a binding, substantive rule. *Appalachian Power Company, supra* at 1021; *see also Batterton v. Marshall,* 648 F.2d 694, 702 (D.C. Cir. 1980) (holding that substantive rules "narrowly constrict the discretion of agency officials by largely determining the issue addressed"). In the instant matter, as evidenced by the contracts contained in the record, none of which contain the lifecycle greenhouse gas specification required by Section 526, federal defendants are clearly treating the IIP as a legislative rule that is controlling in the field.

the Implementation Plan. Moreover, the legislative history indicates that the military function exception should be narrowly construed. For these reasons, the Plan does not fall within the military function exception and should have been subjected to the APA's notice and comment rulemaking procedures.

5 U.S.C. § 553(a)(1) provides that the notice and comment rulemaking procedures contained in § 553(b) and (c) do not apply "to the extent there is involved a military of foreign affairs function of the United States." At the outset, it should be noted that there is a "dearth of authority" discussing the application of the military function exception, demonstrating that it has not been widely invoked. *Independent Guard Association of Nevada, Local No. 1 v. O'Leary,* 57 F.3d 766, 770 (9th Cir. 1995) (hereinafter "*O'Leary*"). Further, as discussed *supra,* Congress intended the exceptions to § 553 to be narrowly construed and the military function exception is no different. *See O'Leary, supra* at 769 (noting that "[C]ongress intended the military function exception to have a narrow scope").[55]

In support of their argument that the military function exception applies to the Implementation Plan, Defendants rely solely on the fact that DLA Energy procures mobility-related fuels for the U.S. military. However, this reliance is misplaced, as it misrepresents the full range of DLA Energy's services, as well as the broad scope of the Implementation Plan. As noted in the Plan:

> Through our core mission of energy support, [DLA Energy] provide[s] products and services that are essential to our Military and *Federal Civilian customers* ….[56] [emphasis added].
>
> [DLA Energy's] mission is to provide the Department of Defense (DoD) *and*

[55] In fact, the Administrative Conference of the United States recommended that Congress replace this categorical exemption for military or foreign affairs functions with a much narrower exemption. ACUS Recommendation 73-5, *Elimination of the "Military of Foreign Affairs Function" Exemption from APA Rulemaking Requirements,* 39 Fed. Reg. 4847 (1974).

[56] Implementation Plan, AR at 2.

> *other government agencies* with comprehensive energy solutions in the most effective and efficient manner possible. *Because DESC contracts for fuel and other types of energy on behalf of the federal government, [DLA-Energy] has taken the lead in developing this implementation plan.*[57] [emphasis added].

Thus, it is undisputed that DLA Energy supplies fuel to civilian government agencies and not just the Department of Defense. Because of this fact, DLA Energy took the lead in preparing the Plan. Therefore, because it covers civilian, as well as military, fuel purchases, the Implementation Plan does not fit within the military function exception and should have been adopted in accordance with the APA's notice and comment rulemaking provisions. *See O'Leary, supra* at 770 (holding that the exception should not be stretched to encompass civilian support services).

(c) Implementation Plan is Not Subject to the Contract Exception to the APA's Notice and Comment Procedures Contained in 5 U.S.C. § 553(a)(2).

Federal and intervenor defendants further argue, again without citation to any legal authority supporting such argument, that the Implementation Plan is exempted from the APA's notice and comment requirements pursuant to the public contracts exception set forth in 5 U.S.C. § 553(a)(2). However, this argument ignores the legislative history of the exception and seeks to impermissibly broaden the scope of the contract exception.

5 U.S.C. § 553(a)(2) provides that notice and comment rulemaking requirements of § 553 do not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." This exception has met "substantial criticism" and, like the other exceptions to § 553's notice and comment requirements, should be narrowly construed. *Vigil v. Andrus,* 667 F.2d 931, 937 (10th Cir. 1982). In fact, like the military function exception, the Administrative Conference of the United States has recommended that governmental agencies agree to follow rulemaking procedures even if the subject matter would fall within the

[57] Implementation Plan. AR at 3.

APA's exception for grants, benefits, and contracts. *See Rodway v. USDA,* 514 F.2d 809, 814 (D.C. Cir. 1975).

Defendants argue that because the Implementation Plan applies to contracts it is subject to the contract exception. This argument represents nothing more than an attempt to impermissibly broaden the scope of the contracts exception, and in so doing completely disregards the legislative intent of the scope of the exception. Plaintiffs are not challenging the failure of defendants to follow notice and comment requirements for *individual fuel purchases*; rather, they are challenging the failure of defendants to do so for the Implementation, which is an Implementation Plan for *all* of DLA Energy's mobility-related fuel purchases. As stated by one court:

> The practical necessity for the public contracts exception is apparent. It would be altogether unreasonable to require the various agencies of government to publish notice in the Federal Register and to hold hearings each and every time they entered into, rescinded, or cancelled a government contracts; the burden in time and expense would be extraordinary.

Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp., 506 F.2d 467, 469 (9th Cir. 1974). Therefore, federal and intervenor defendants seek to have this Court broaden the maligned contracts exception to the point where the exception would swallow the rule. The Implementation Plan is a broad implementation document which is intended to implement Section 526 for all of defendants' fuel purchases, not just one selected purchase. Moreover, this is simply not a "limited situation" where substantive rights are not at stake. The Plan affects the substantive rights of Plaintiffs and their members by formalizing Federal Defendants' policy of noncompliance with Section 526, leading to adverse environmental consequences. Similarly, the Plan affects the substantive rights of the government relating to how it purchases fuel, as well as the rights of those from who it purchases fuel. The Plan simply does not present a situation

where the need for public participation is overcome by good cause to suspend it, and thus does not fall within the narrow contracts exception to the public notice and comment requirements under § 553 of the APA.

2. Even If The Court Finds That The Implementation Plan Is An Interpretative Rule Or A General Statement Of Policy, Notice Should Still Have Been Published In The Federal Register Because The Plan Is Of General Applicability.

Should the Court find that the Implementation Plan is an interpretative rule or a general policy statement, Federal Defendants were still required to publish the Plan in the Federal Register, as it clearly is of general applicability. 5 U.S.C. § 552(a)(1)(D) provides:

> (1) Each agency shall separately state and concurrently publish in the Federal Register for the guidance of the public –
>
> > (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published….

Such interpretations or statements are within this publication requirement if they directly affect preexisting legal rights or obligations, or if they are of such a nature that knowledge of it is needed to keep outside interests informed of the agency's requirements with respect to any subject within its competency. *Appalachian Power Company v. Train,* 566 F.2d 451, 455 (4th Cir. 1977). Failure to comply with the publication requirement of § 552 renders the challenged interpretation or statement unenforceable for want of proper publication. *Id.* at 457.

The Plan applies to all of defendants' purchases of mobility-related fuels, including purchases of petroleum containing COSRC, and thus is clearly of general applicability. Moreover, the IIP directly affects preexisting legal rights and obligations in that it adds

substantive content to Section 526 and thus effects a change in existing law. As a result, it should have been published in the *Federal Register* pursuant to § 552(a)(1)(D); however, as admitted by federal defendants, it was not. [Doc. 61, ¶ 68]. Therefore, because federal defendants have failed to comply with the publication requirements of § 552(a)(1)(D), the Court should find that the IIP is unenforceable.

3. The Implementation Plan Is Invalid Under The APA Because It Violates Section 526.

Pursuant to 5 U.S.C. § 706(2), the reviewing court can also invalidate agency rules that are "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." As discussed *supra,* the Implementation Plan's arbitrary conclusion that purchases of mobility related fuels containing COSRC are not within the purview of Section 526 has improperly added substantive content to Section 526 which has effected a change in existing law and moreover has created new law. As a result, the IIP has resulted, and will continue to result, in violations of Section 526 by defendants. For this reason, Defendants' publication of and reliance on the Implementation Plan is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right in violation of Section 526 and 5 U.S.C. § 706(2)C.

C. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON COUNT THREE BECAUSE THE CONTRACTS AT ISSUE, AND THE IMPLEMENTATION PLAN ARE MAJOR FEDERAL ACTIONS SUBJECT TO NEPA COMPLIANCE.

Despite their arguments that the contracts at issue in this matter, as well as the Implementation Plan, are not subject to the requirements of NEPA because they do not constitute "major federal actions," federal Defendants have affirmatively represented to this Court that they intend to take the steps necessary to comply with NEPA in regards to DLA Energy's fuel purchasing program. [Doc. 90-1]. Based on Defendants' representation, Plaintiffs have entered into settlement negotiations with Federal Defendants regarding Count III of Plaintiffs'

Complaint.[58] However, these negotiations are not final at the time of filing of this Combined Response. Nevertheless, because Plaintiffs believe that these negotiations will result in a settlement of Count III of Plaintiffs' Amended Complaint, Plaintiffs, in the interest of judicial economy, incorporate by reference herein the arguments pertaining to NEPA contained in their Memorandum in Support of their Motion for Summary Judgment [Doc. 76, at 24-28] for purposes of this Combined Memorandum.

CONCLUSION

For all of the reasons set forth herein, defendants' dispositive motions, including but not limited to their motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) should be denied. Moreover, Plaintiffs are entitled to summary judgment as a matter of law.

Respectfully submitted, this 18th day of April, 2011.

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[58] Plaintiffs dispute Defendants' contentions that their prospective NEPA compliance moots Plaintiffs' NEPA claims.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 18, 2011, a copy of the foregoing Plaintiffs' Combined Memorandum in Opposition to Federal and Intervenor Defendants' Dispositive Motions and In Reply to Federal Intervenor Defendants' Oppositions to Plaintiffs' Motion for Summary Judgment was filed electronically. I understand that notice of this filing will be sent to the following filing users:

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