APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITEWATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT; HEREFORD NATURAL RESOURCE CONSERVATION DISTRICT; ARIZONA ASSOCIATION OF CONSERVATION DISTRICTS; CALIFORNIANS FOR POPULATION STABILIZATION; SCIENTISTS AND ENVIRONMENTALISTS FOR POPULATION STABILIZATION; NEW MEXICO CATTLEGROWERS' ASSOCIATION; GLEN COLTON; RALPH POPE,

Plaintiffs-Appellants,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellees.

No. 20-55777

D.C. No.
3:16-cv-02583-
L-BLM

OPINION

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted May 11, 2021
Pasadena, California

Filed July 19, 2021

Before: Jay S. Bybee and Daniel A. Bress, Circuit Judges, and Kathleen Cardone,[*] District Judge.

Opinion by Judge Bybee

SUMMARY[**]

Environmental Law / Immigration / Standing

The panel affirmed the district court's judgment in favor of the Secretary of the Department of Homeland Security in an action brought by plaintiff organizations and individuals alleging that the Secretary violated the National Environmental Policy Act ("NEPA") by failing to consider the environmental impacts of various immigration programs and

[*] The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

immigration-related policies.

Plaintiffs identify themselves as environmentalists, environmental groups, natural resource conservation groups, and cattle ranchers from Arizona, New Mexico, Colorado, and California. Count I of the First Amended Complaint challenged DHS's 2015 Instruction Manual, which implements NEPA and Council of Environmental Quality ("CEQ") regulations. Count II asserted that DHS implemented eight programs that failed to comply with NEPA. Count III alleged that DHS's Categorical Exclusion A3 ("CATEX A3") was arbitrary and capricious in violation of the Administrative Procedure Act. Count IV challenged DHS's application of CATEX A3 to four DHS actions as contrary to NEPA and the APA. Count V challenged environmental assessments ("EA") and findings of no significant impact ("FONSI") issued by DHS in August 2014.

Concerning Count I, the panel held that the Manual did not constitute "final agency action" subject to review under § 704 of the APA. Applying the two-part test in *Bennett v. Spear*, 520 U.S. 154 (1977), the panel held that the Manual did not meet the "consummation" first prong because it did not make any "decision," rather it merely established the procedures for ensuring DHS's compliance with NEPA. The panel held further that plaintiffs could not satisfy the "legal effect" second prong of the test because the Manual did not impose new legal requirements or alter the legal regime to which DHS was subject. The panel concluded that the district court properly dismissed

Count I.

Concerning Count II, wherein the plaintiffs alleged that DHS implemented seven programs in violation of NEPA, the panel agreed with the district court that none of these programs were reviewable because they were not discrete agency actions. Specifically, as to the seven non-Deferred Action for Childhood Arrivals ("DACA") programs, the panel held that *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), squarely foreclosed plaintiffs' request for judicial review, where plaintiffs' challenge to the seven programs was indistinguishable from the broad programmatic attack at issue in *National Wildlife*.

Concerning Count II (plaintiffs' challenge to DACA) and III-V (plaintiffs' facial challenge to CATEX A3), the panel considered whether plaintiffs lacked Article III standing. Plaintiffs could claim only procedural injury, and they alleged that compliance with NEPA was required and preparation of an environmental impact statement might have affected DHS's decisions. To satisfy the injury-in-fact element for a procedural injury, the plaintiffs had to show that the procedures were designed to protect some threatened concrete interest that was the basis of their standing, and the reasonable probability of the challenged action's threat to plaintiffs' concrete interest.

Plaintiffs alleged they had standing to challenge DACA because, by allowing individuals who entered the country illegally to remain with federal approval,

DACA both added "more settled population" when it was implemented in 2012 and now enticed future unlawful entry. The panel rejected both theories. As to the enticement theory, the panel held that plaintiffs alleged no facts supporting their allegations that DACA caused illegal immigration. As to the "more settled population" theory, the panel held there was no redressability, and thus no standing, where DHS retained sole discretion over how to prioritize future removal proceedings.

Concerning Count III and plaintiffs' facial challenge to CATEX A3, the panel held that plaintiffs made no attempt to tie CATEX A3 to any particular action by DHS, and this was insufficient to create Article III standing. Concerning Count IV, plaintiffs alleged that DHS's application of CATEX A3 to the DSO Rule, the STEM Rule, the AC21 Rule, and International Entrepreneur Rules was improper because these rules contributed to immigration-induced population growth. The panel held that plaintiffs failed to show injury-in-fact or causation where they offered no evidence showing that population growth was a predictable effect of the DSO and STEM Rules. Similarly, the panel held that plaintiffs failed to show injury-in-fact or causation between the AC21 Rule and population growth where any increase in immigration that may result from the AC21 Rule would be a product of independent, third-party decisionmaking not fairly traceable to the AC21 Rule itself. The panel held that plaintiffs failed to show injury-in-fact or causation concerning their challenge to the International Entrepreneur Rule

where they did not show that aliens admitted under the Rule permanently stayed in the United States because of the Rule. Finally, plaintiffs alleged they had standing to challenge all four rules because CEQ regulations required agencies to consider cumulative impacts on the environment. The panel held that any "cumulative effect" analysis required by NEPA did not bear on whether plaintiffs had standing to challenge the rules.

Concerning Count V, the panel held that plaintiffs also lacked Article III standing to challenge the sufficiency of the EAs and FONSIs issued in relation to President Obama's Response to the Influx of Unaccompanied Alien Children Across the Southwest border.

COUNSEL

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Counsel, United States Department of Homeland Security, Washington, D.C.; for Defendants-Appellants.

OPINION

BYBEE, Circuit Judge:

Plaintiffs are organizations and individuals who seek to reduce immigration into the United States because it causes population growth, which in turn, they claim, has a detrimental effect on the environment. Plaintiffs allege that the Secretary of the Department of Homeland Security (the Secretary or DHS) violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331–4370m-12, by failing to consider the environmental impacts of various immigration programs and immigration-related policies. The district court dismissed two of Plaintiffs' claims and granted summary judgment in favor of the Secretary on the remaining claims. We affirm.

I. BACKGROUND

We begin with a brief overview of NEPA and its corresponding regulations before turning to the facts of this case.

A. *NEPA*

Congress enacted NEPA in recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment,

particularly the profound influences of population growth," and other enumerated factors. 42 U.S.C. § 4331(a). NEPA requires all federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a "detailed statement" known as an "environmental impact statement" (EIS). *Id.* § 4332(2)(C). The EIS should address "the environmental impact of the proposed action"; "any adverse environmental effects which cannot be avoided"; "alternatives to the proposed action"; "the relationship between local short-term uses of man's environment and the maintenance and enhancement of longterm productivity"; and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action." *Id.* § 4332(2)(C)(i)–(v). "Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted). Even where an agency determines that there will be "adverse environmental effects of the proposed action," the agency may still "decid[e] that other values outweigh the environmental costs." *Id.* (citations omitted). The purpose of NEPA is "to insure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citing *Nat Res. Def. Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

NEPA established in the Executive Office of the President a Council on Environmental Quality (CEQ) to promulgate regulations to implement NEPA. 42 U.S.C. § 4342. Under CEQ regulations, an agency must first assess the appropriate level of NEPA review. If it is clear that an EIS must be prepared, the agency should proceed with the EIS. 40 C.F.R. § 1501.4(a)(1) (2017).[1] Otherwise, the agency may prepare an "environmental assessment" (EA)—which is a "concise public document," *id.* § 1508.9(a)—to determine whether a proposed action requires an EIS, *id.* §§ 1501.4, 1508.9. If, after preparing an EA, the agency determines that an EIS is not required, the agency then may issue a "[f]inding of no significant impact" (FONSI). *Id.* §§ 1501.4(e), 1508.13; *see also Metcalf v. Daley*, 214 F.3d 1136, 1142 (9th Cir. 2000). The regulations also permit an agency to determine in advance that "a category of actions [will] not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. These categories of actions are often referred to as CATEXs. Federal agencies must "adopt procedures to supplement [NEPA] regulations," *id.* § 1507.3(a), and "integrate the NEPA process with other

[1] Unless otherwise noted, we will refer to the 2017 version of the CEQ regulations, which were in effect when Plaintiffs filed their complaint. The regulations have since been revised substantially. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

planning at the earliest possible time," *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (citation omitted).

B. *Proceedings*

Plaintiffs identify themselves as environmentalists, environmental groups, natural resource conservation groups, and cattle ranchers from Arizona, New Mexico, Colorado, and California.[2] The gravamen of Plaintiffs' complaint is that "[t]he primary factor driving U.S. population growth is international migration"—the entry of "approximately 35 million foreign nationals"—and that such growth has caused "enormous impacts" to the human environment, such as urban sprawl, loss of biodiversity, and increasing CO2 emissions. Plaintiffs complain that, despite the impact of immigration on the human environment, "DHS has failed to initiate *any* NEPA review" for "its programs regulating the entry and settlement of foreign nationals [in the United States]"; instead, DHS has "simply ignore[d] the impacts that foreign nationals themselves have on the human environment."

The First Amended Complaint (FAC) contains five counts. Count I challenges DHS's 2015 Instruction Manual (the Manual), which implements NEPA and

[2] The First Amended Complaint also included "Floridians for Population Stabilization" as an organizational Plaintiff. Plaintiffs have advised us that this organization is now defunct and not part of this appeal.

CEQ regulations. The FAC alleges that the Manual failed to require DHS to comply with NEPA and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Count II asserts that DHS implements eight "programs" for which it failed to comply with NEPA: (1) employment-based immigration; (2) family-based immigration; (3) long-term nonimmigrant visas; (4) parole; (5) Temporary Protected Status (TPS); (6) refugees; (7) asylum; and (8) Deferred Action for Childhood Arrivals (DACA). In Count III, Plaintiffs allege that DHS's Categorical Exclusion A3 (CATEX A3) is arbitrary and capricious, in violation of the APA. CATEX A3 applies to the "[p]romulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents" that are "strictly administrative or procedural"; "implement, without substantive change, statutory or regulatory requirements . . . procedures, manuals, and other guidance documents"; or "interpret or amend an existing regulation without changing its environmental effect." CATEX A3 is published in the appendix of the Manual.

In Count IV, Plaintiffs challenge DHS's application of CATEX A3 to four DHS actions as contrary to NEPA and arbitrary and capricious under the APA:

1. Adjustments to Limitations on

Designated School Official Assignment and Study by F-2 and M-2 Nonimmigrants (DSO Rule), 80 Fed. Reg. 23680 (Apr. 29, 2015), which amended DHS's Student and Exchange Visitor Program by allowing for (1) more designated school officials to oversee the program; and (2) spouses and children of visiting students to take classes on a parttime basis. *Id.* at 23,681–82.

2. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students (STEM Rule), 81 Fed. Reg. 13,040 (Mar. 11, 2016), which allows nonimmigrant students with degrees in STEM fields from U.S. universities to apply for a 24-month visa extension (replacing the previously available 17-month extension). *Id.* at 13,041. It also strengthens DHS's oversight of the program. *Id.* at 13,041–42.

3. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High- Skilled Nonimmigrant Workers (AC21 Rule), 81 Fed. Reg. 82,398 (Nov. 18, 2016), which aims to improve "the ability of U.S. employers to hire and retain high-skilled workers" with employment-based visas,

and to increase the ability of visa-holding workers to change positions or employers. *Id.* at 82,398.

4. International Entrepreneur Rule, 82 Fed. Reg. 5,238 (Jan. 17, 2017), which establishes criteria for DHS to use its discretionary parole authority to grant temporary parole to "entrepreneurs of start-up entities" with significant potential for rapid growth and job creation. *Id.* at 5,238.

Finally, in Count V, Plaintiffs challenge EAs and FONSIs issued by DHS in August 2014. On June 2, 2014, President Barack Obama issued a memorandum entitled "Response to the Influx of Unaccompanied Alien Children Across the Southwest Border," in which he directed the Secretary to address a dramatic increase in children and families crossing our border with Mexico. DHS responded with a proposal to expand infrastructure for temporary detention space, transportation, and medical care for the children and families crossing the southwest border. DHS prepared a programmatic EA under NEPA and ultimately issued a FONSI for the infrastructure proposal. DHS subsequently prepared a supplemental EA and issued a FONSI for a project to construct additional housing in Dilley, Texas. Plaintiffs allege that DHS failed to take a "hard look" at the environmental impacts of this action, in violation of NEPA, CEQ regulations, and the APA.

After Plaintiffs filed their FAC, the Secretary moved to dismiss Counts I and II. The district court granted the motion in full under Rule 12(b)(6) of the Federal Rules of Civil Procedure, finding neither count reviewable under the APA. The parties subsequently filed cross-motions for summary judgment on Counts III–V, and the district court granted summary judgment in favor of DHS on the grounds that Plaintiffs lacked Article III standing to bring this action. Plaintiffs timely appealed.

II. SCOPE AND STANDARD OF REVIEW

The scope of our review is determined by the judicial review provisions of the APA, 5 U.S.C. §§ 701–706. Under the APA, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter." 5 U.S.C. § 703. Where "no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer." *Id.* NEPA does not contain a "special statutory review" provision, so Plaintiffs properly filed their suit against the Secretary and DHS under the general review provisions of the APA. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005). In order to seek judicial review under the APA, the plaintiff or petitioner must have suffered a

"legal wrong" or been "adversely affected or aggrieved" by a "final agency action." 5 U.S.C. §§ 702, 704. Under § 706 of the APA, as a reviewing court, we will "hold unlawful and set aside agency action, findings, and conclusions" when they are found to be, among other criteria, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The standard of review is our ordinary rule regarding review of determinations by a district court at the motion to dismiss and summary judgment stages. We review dismissals under Rules 12(b)(1) and 12(b)(6) de novo.[3] *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). Likewise, we review a district court's grant of summary judgment and its determination on the issue of standing de novo. *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012); *see Nat'l Wildlife Fed'n*, 497 U.S. at 884–85.

III. DISCUSSION

We will address the district court's dismissal of Counts I and II separately, and then address the court's grant of summary judgment on Counts III–V together.

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[3] The Secretary argues that the district court incorrectly dismissed Count I under Rule 12(b)(6), rather than under Rule 12(b)(1). But as the Secretary acknowledges, this issue is immaterial to this appeal because we review dismissals under both Rule 12(b)(1) and Rule 12(b)(6) de novo.

A. *Count I*

Plaintiffs allege in Count I that the Manual is arbitrary and capricious because it fails "to incorporate NEPA compliance" and violates CEQ regulations. The threshold question for the district court was whether the Manual constituted "final agency action" subject to our review under § 704 of the APA. We agree with the district court that it does not.

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court established a two-part test for determining whether an agency action is final. The action must: (1) "mark the consummation of the agency's decisionmaking process [and] must not be of a merely tentative or interlocutory nature"; and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *See id.* at 177–78 (citations and internal quotation marks omitted). "In determining whether an agency's action is final, we look to whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance with the terms is expected." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (cleaned up). Our focus is "on the practical and legal effects of the agency action," with the understanding that the "finality element must be interpreted in a pragmatic and flexible manner." *Id.* (citations omitted).

1. Consummation.

In holding that the Manual does not meet *Bennett*'s first prong, the district court relied on our decision in *Oregon Natural Desert Ass'n v. United States Forest Service*, 465 F.3d 977 (9th Cir. 2006). In that case, we considered whether the Forest Service's issuance of annual operating instructions (AOIs) to permittees who graze livestock on national forest land constituted final agency action. *Id.* at 983. The Forest Service manages livestock grazing in national forests via land management directives known as Allotment Management Plans (AMPs), and it generally issues grazing permits for ten-year periods. *Id.* at 980. The Forest Service also issues AOIs to permit holders annually. *Id.* The AOIs convey the "more long-term directives [contained in the AMP and permits] into instructions to the permitee for annual operations." *Id.* Indeed, "the AOI is the only substantive document in the annual application process, [and] it functions to do more than make minor adjustments in the grazing permit . . . ; pragmatically, it functions to start the grazing season." *Id.* at 985. Because the AOI "is the only instrument that instructs the permit holder how [AMPs, grazing permits, and forest plans] will affect his grazing operations during the upcoming season," we reasoned that an AOI "is the Forest Service's 'last word' before the permit holders begin grazing their livestock." *Id.* We concluded that AOIs were final agency actions subject to judicial review under the APA. *Id.* at 990.

The district court here determined that, unlike an AOI, the Manual "does not make any decision." Rather, "[i]t establishes the procedures for ensuring

DHS's compliance with NEPA." We agree with the district court. Although in *Oregon Natural Desert Ass'n*, an AOI represented the culmination of the Forest Service's decisionmaking process each grazing season, the Manual facilitates the *beginning* of the NEPA review process for proposed DHS actions. And although an agency's decision not to prepare an EIS is subject to judicial review, *see San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 640–55 (9th Cir. 2014), the Manual is not itself a decision that any particular DHS action requires or does not require an EIS. Any guidance that could be attributed to the Manual would be subsumed in any final rule issued by DHS on a particular matter. *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling . . . is subject to review on the review of the final agency action.").

Pointing to *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 405 (9th Cir. 2019), Plaintiffs respond that "a rule that lays out mandatory criteria for how an agency will conduct its subsequent project-specific assessments is also a final action subject to APA review." But Plaintiffs' reliance on that case is misplaced. In *Safer Chemicals*, EPA adopted a "Risk Evaluation Rule" under the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601–2697. *Id.* at 405. The TSCA has a special judicial review provision, 15 U.S.C. § 2618, authorizing petitions for review of a rule promulgated under the Act. *Id.* § 2618(a)(1)(A). We held, nevertheless, that the preamble to the rule was "not reviewable as final agency action" because it reserved discretion to EPA and thus was "not the sort

of language that indicates an agency has intended to bind itself." *Safer Chemicals*, 943 F.3d at 418. By contrast, another section of the rule that was actually "part of the rule itself" was not "too speculative to evaluate" because it asserted EPA's discretion to exclude certain matters and because the petitioners claimed that the "TSCA forecloses the Agency from asserting such discretion." *Id.*

The Manual, like the preamble to the rule at issue in *Safer Chemicals*, is not a final agency decision subject to review under the APA. The Manual describes how DHS will implement NEPA, but it does not prescribe any action in any particular matter. The Manual states that "NEPA applies to the majority of DHS actions." It acknowledges that there may be "[e]xamples of situations in which NEPA is not triggered," but that such examples are "very few." In accordance with CEQ regulations, the Manual provides for categorical exclusions (CATEXs) from NEPA to "enable DHS to avoid unnecessary efforts, paperwork, and delays and concentrate on those proposed actions having real potential for environmental impact," but it does not prescribe any decisions regarding NEPA review of proposed actions—including whether a CATEX applies to a proposed project. *Cf. Fairbanks N. Star Borough v. U.S. Army Corps. of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008) (Army Corps of Engineers' jurisdictional determination represented "the agency's 'last word' on whether it view[ed] the property as a wetland subject to regulation under the [Clean Water Act (CWA)]" because "[n]o further agency decisionmaking on that

issue c[ould] be expected"). The Manual is careful to advise that DHS "Components[4] may otherwise decide to prepare an EA for any action at any time." This is not the stuff of final agency decisionmaking. The Manual contains very general instructions and has not bound DHS to any particular decision. It is a manual for preparing to make NEPA-related decisions, not the "'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178.

2. Legal Effect

It is equally clear that Plaintiffs cannot satisfy the second prong of the "final agency action" test. If "consummation" addresses itself to "*final* agency action," *Bennett's* second prong addresses itself to "final agency *action*," which is an act "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation and internal quotation marks omitted); *see also* 5 U.S.C. § 551(13) (defining "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). Agency actions "impose an obligation, deny a right, or fix *some* legal relationship as a consummation of the administrative process." *Or. Nat. Desert Ass'n*, 465 F.3d at 987 (citation omitted).

Plaintiffs do not claim the Manual imposes any

[4] Per the Manual, "Components" refer to "any organization which reports directly to the Office of the Secretary of DHS when approved as such by the Secretary."

obligation upon them. Rather, Plaintiffs argue that the Manual's mandatory language establishes "a binding set of legal obligations upon DHS." This argument is too thin to satisfy *Bennett*'s second prong. Plaintiffs' focus on the Manual's use of language like "must" and "requirement" ignores that NEPA, not the Manual, is the source of any binding legal obligations to which DHS is subject. *Cf. Fairbanks*, 543 F.3d at 594 ("At bottom, [plaintiff] has an obligation to comply with the CWA . . . . [plaintiff]'s legal obligations arise directly and solely from the CWA."). The Manual does not augment or diminish DHS's NEPA obligations; it simply facilitates DHS's fulfillment of those obligations. Indeed, Plaintiffs point to no provision in the Manual for which DHS's noncompliance might result in a consequence beyond those contained in NEPA.

Moreover, that the Manual integrates "the NEPA process with review and compliance requirements" found in other federal laws and regulations does not mean the Manual announces *new* substantive rules that alter the legal regime to which DHS is subject. In a proper action against DHS for failure to comply with NEPA, DHS would face liability for noncompliance with NEPA or other federal laws, not for its noncompliance with the Manual. *See Fairbanks*, 543 F.3d at 594; *see also e.g.*, *Home Builders Ass'n of Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 616–19 (7th Cir. 2003) (evaluating an interagency coordination agreement (ICA) under *Bennett*'s second prong and finding the ICA did not "add[] new 'conflicting requirements'"

where it referenced substantive requirements that are "a pervasive feature of the regulatory landscape, not something that the ICA created"). Because the Manual does not impose new legal requirements or alter the legal regime to which DHS is subject, the district court correctly concluded that the Manual fails *Bennett*'s second prong and properly dismissed Count I.

B. *Count II*

In Count II, Plaintiffs allege that DHS implements eight "programs" in violation of NEPA. The FAC identifies the following "programs":

> 1) Employment-based immigration authorized by Immigration and Nationality Act (INA) § 203(b);
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> 2) Family-based immigration, authorized by INA § 203(a) and INA § 201(b);
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> 3) Long-term nonimmigrant visas, authorized by INA § 214;
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> 4) Parole, authorized by INA § 212(d)(5)(A);
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> 5) Temporary Protective Status, authorized by INA § 244;
>
> 6) Refugees, authorized by INA § 207;
>
> 7) Asylum, authorized by INA § 208; and

8) Deferred Action for Childhood Arrivals ("DACA"), authorized by executive order.

The FAC does not cite any regulations, rules, orders, public notices, or policy statements that authorize or enforce these "programs"; they are identified only generically and, with the exception of DACA, not by name.[5] To be sure, in Appendix C to an affidavit attached to the FAC as Exhibit 3, the affiant listed 81 DHS regulations and five policy memoranda that implement these programs. Many of the regulations—certainly those dating from the 1980s and 1990s—are well outside the six-year statute of limitations for actions under the APA. *See* 28 U.S.C. § 2401(a); *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049 (9th Cir. 2016). In their briefing, Plaintiffs concede that the regulations cited are outside the statute of limitations, but aver that the "litany" they presented was merely illustrative of their claim that "DHS had *never* undertaken the environmental assessments required by NEPA." The district court determined that none of these "programs" are reviewable because they are not discrete agency actions. We agree.

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[5] In its briefing on appeal, DHS separates the first seven "programs" from the 2012 DACA Memorandum. DHS does not challenge Plaintiffs' claim that DACA is a discrete agency action; DHS instead asserts that Plaintiffs lack standing to challenge DACA. Accordingly, we will focus only on the first seven programs in this section and discuss DACA in the next section.

It is axiomatic that Plaintiffs must identify an "agency action" to obtain review under the APA. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004). An agency action is "circumscribed" and "discrete," such as "a rule, order, license, sanction [or] relief." *Id.* at 62 (citing 5 U.S.C. § 551(13)). A plaintiff or petitioner "must direct its attack against some *particular* 'agency action' that causes it harm." *Nat'l Wildlife Fed'n*, 497 U.S. at 891 (emphasis added). This limitation on judicial review precludes "broad programmatic attack[s]," whether couched as a challenge to an agency's action or "failure to act." *See S. Utah Wilderness All.*, 542 U.S. at 64–65.[6]

The Supreme Court's decision in *National Wildlife* squarely forecloses Plaintiffs' request for judicial review of these seven "programs." In that case, the National Wildlife Federation brought a challenge to what it called the Bureau of Land Management (BLM)'s "land withdrawal review program," including a claim that BLM had violated NEPA. 497 U.S. at 879.

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[6] Plaintiffs attempt to avoid the requirement of identifying a discrete agency action by arguing that they "simply seek to compel DHS to perform the environmental assessments mandated by NEPA." But in *Southern Utah Wilderness Alliance*, the Court made clear that a plaintiff cannot obtain judicial review by simply recasting his or her challenge "in terms of 'agency action unlawfully withheld' under § 706(1), rather than agency action 'not in accordance with law' under §706(2)." 542 U.S. at 64–65 (observing that the plaintiffs in *National Wildlife* "would have fared no better" had they sought to compel agency action under § 706(1) because "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.").

That "program" consisted of hundreds, and perhaps thousands, of actions, such as public land status determinations, that BLM undertook pursuant to the directives of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1787. *Id.* at 877; *see also id.* at 890 (referring to the district court's finding that the "program" extended to "1250 or so individual classification terminations and withdrawal revocations"). The Court held that the "so-called 'land withdrawal review program'" was "not an 'agency action' within the meaning of § 702" because it did "not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." *Id.* at 890. What the National Wildlife Federation called a "program" was "no more an identifiable 'agency action' . . . than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id.*

The Court's opinion was couched in terms of APA review, but its concerns sounded in separation of powers as well. The Court did not disparage the National Wildlife Federation's claims that "violation of the law is rampant within this [land use] program." *Id.* at 891. Rather, the Court's focus was that such systemic challenges, seeking "*wholesale* improvement . . . by court decree," were properly matters that should be pursued in the "offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made." *Id.* As relevant here, Article III of the Constitution limits the "judicial Power" of the federal courts to "cases . . . arising under

. . . the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party." U.S. Const. art. III, § 2, cl. 1. Consistent with the cases or controversies requirement, the APA does not give federal courts general supervisory authority over executive agencies, but only over cases in which "[a] person [has] suffer[ed] legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action." 5 U.S.C. § 702; *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) ("The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts."). The Court recognized in *National Wildlife* that this "case-by-case approach . . . is understandably frustrating" to those seeking "across-the board" relief. 497 U.S. at 894. But in the absence of express congressional authorization, and subject to Article III constraints, "more sweeping actions are for the other branches." *Id.*

We cannot see how Plaintiff's challenge to the seven "programs" is in any way distinguishable from the broad programmatic attack at issue in *National Wildlife*. As in *National Wildlife*, the challenged "programs" merely refer to continuing operations of DHS in regulating various types of immigration. *Id.* at 891. That Plaintiffs attach a list of eighty plus actions taken by DHS over the past 40 years to implement these "programs" only weakens their case. Plaintiffs cannot obtain review of *all* of DHS's individual actions pertaining to, say, "employment-based immigration" in

one fell swoop by simply labeling them a "program."[7] Plaintiffs either must identify a particular action by DHS that they wish to challenge under the APA, or they must pursue their remedies before the agency or in Congress. They may think that the third branch is more convenient or accessible, but the APA—consistent with Article III—will not permit such forays outside the "traditional, . . . normal[] mode of operation of the courts," which remains limited to "controvers[ies] . . . reduced to more manageable proportions." *Id.* at 891, 894.

C. *Counts II (DACA) and III–V*

The district court granted summary judgment in favor of DHS on Counts III–V on the grounds that Plaintiffs lack Article III standing. Additionally, as we have discussed, DHS now argues that Plaintiffs also lack standing to challenge the portion of Count II relating to DACA. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("[T]he jurisdictional

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[7] This is not to say that, for example, an "employment-based immigration program" does not exist in the sense that an individual rule or regulation might "apply[] some particular measure across the board" to an alien's ability to enter the country based on his or her employment status. *Nat'l Wildlife Fed'n*, 497 U.S. at 890 n.2. But as the Court explained in *National Wildlife*, challenging such a specific rule or regulation (that is otherwise final) is "quite different from permitting a generic challenge to all aspects of the '. . . program.'" *Id.* Stated otherwise, challenging a *particular* rule with broad application is a far cry from attempting to challenge *all* rules relating to one subject matter in the aggregate. The latter is not sufficient for review under the APA.

issue of standing can be raised at any time . . . ."). Plaintiffs' theory was (and remains) that they have standing because DHS administers immigration laws and programs that result in population growth, and population growth, in turn, has a negative impact on the environment in which Plaintiffs claim an interest. Plaintiffs appeal the district court's holding in its entirety.

Article III's standing requirements are well-established. Plaintiffs must show that (1) they "have suffered an injury in fact" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up).[8] The doctrine of standing has its origins in separation of powers, *see Allen v. Wright*, 468 U.S. 737, 750 (1984)[9], and "confines the federal courts to a properly judicial role," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Because "NEPA itself does not mandate particular results, but simply prescribes the necessary

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[8] The parties dispute whether one of the organizational Plaintiffs, Californians for Population Stabilization (CAPS), has standing to sue in its own right. In light of our resolution of this case, we do not address this issue.

[9] *Abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 (2014).

process" by which an agency considers the impact of its proposed action on the environment, *Methow Valley Citizens Council*, 490 U.S. at 350, Plaintiffs can only claim procedural injury. That is, Plaintiffs cannot argue (and they do not) that had DHS complied with NEPA, DHS would have enforced the immigration laws differently. Rather, Plaintiffs allege only that compliance with NEPA was required and preparation of an EIS might have affected DHS's decisions. This adds a layer to our analysis. "[P]rocedural injuries frequently suffice for standing in the NEPA context. . . . [But] [a] free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact." *Ashley Creek*, 420 F.3d at 938.

To satisfy the injury-in-fact element for a procedural claim, Plaintiffs must (1) "show that the procedures in question are designed to protect some threatened concrete interest of [Plaintiffs] that is the ultimate basis of [their] standing"; and (2) "establish the reasonable probability of the challenged action's threat to [their] concrete interest." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003) (cleaned up). We have "described [the] concrete interest test as requiring a geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Id.* at 971 (citation and internal quotation marks omitted) (alteration in original). As to the reasonable probability showing, "[e]nvironmental plaintiffs seeking to enforce a procedural requirement . . . can establish standing without meeting all the normal

standards for immediacy." *Id.* at 972 (cleaned up).

"Once a plaintiff has established an injury in fact under NEPA the causation and redressability requirements are relaxed." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (citation omitted). This is so because environmental plaintiffs cannot show that compliance with NEPA would have changed the agency's decisions—the agency may decide that "other values outweigh the environmental costs," *Methow Valley Citizens Council*, 490 U.S. at 350—only that the agency had to consider the environmental calculus in its decision. But environmental plaintiffs must make some showing of how the agency's failure to account for environmental consequences affects them, even if the environmental effects might not be realized "for many years." *Defs. of Wildlife*, 504 U.S. at 572 n.7. The environmental plaintiff also must be able to show that if the agency agreed that environmental harms flowed from its decision, that the agency was capable of redressing those harms.

Where, as here, an "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed" to demonstrate causation and redressability. *Id.* at 562. In that case, the plaintiffs must "adduce facts showing that [the choices of independent actors not before the courts] have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* In such circumstances, involving independent actors, the Court has cautioned

that "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* (citation and internal quotation marks omitted). And, as we saw in the prior section, "a plaintiff [asserting a procedural harm] raising only a generally available grievance about government . . . and seeking relief that no more directly and tangibly benefits him than it does the public at large[,] does not state an Article III case or controversy." *Id.* at 573–74.

With these principles in mind, we are prepared to consider Plaintiffs' standing to bring their remaining claims.

1. Count II (DACA)

In June 2012, then-DHS Secretary Janet Napolitano issued a memorandum outlining a policy to defer removal proceedings for two years (subject to renewal) for individuals who came to the United States as children, met certain eligibility criteria, and cleared a background check. This deferred action policy became known as Deferred Action for Childhood Arrivals or DACA. Plaintiffs argue that they have standing to challenge DACA because, by allowing individuals who entered the country illegally to remain with federal approval, DACA both added "more settled population" when it was implemented in 2012 and now entices future unlawful entry. Neither theory holds water.[10]

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[10] Although we decide this issue on the failure of causation, we note that DHS does not contest that Plaintiffs have met the

Turning first to Plaintiffs' enticement theory, we note that the D.C. Circuit has rejected a similar theory of standing in the context of a challenge to DACA. In *Arpaio v. Obama*, 797 F.3d 11, 18 (D.C. Cir. 2015), former Maricopa County Sheriff Joseph Arpaio sued to enjoin DACA and a second deferred action policy for parents of U.S. citizens and lawful permanent residents ("Deferred Action for Parents of Americans," or DAPA). *Id.* at 17–18. As relevant here, Sheriff Arpaio argued that he had standing because "deferred action will act as a magnet drawing more undocumented aliens than would otherwise come across the Mexican border into Maricopa County, where they will commit crimes" that he would then need to police. *Id.* at 14. The court held that Sheriff Arpaio could not establish causation because his theory of standing rested on the assumption that aliens outside of the United States would learn of DACA and DAPA, mistakenly believe they might benefit from such policies in the future, and then, relying on their own conjectures, enter the United States unlawfully. *Id.* at 19–20. The court reasoned that "[e]ven if the causal links in that attenuated chain were adequately alleged . . . . the law. . . does not confer standing to complain of harms by third parties the plaintiff expects will act in unreasonable reliance

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injury-in-fact requirement—that is, whether environmental degradation follows from overpopulation. However, because Plaintiffs have plainly not established causation, we need not address the injury-in-fact element with respect to Plaintiffs' DACA challenge. Nor do we reach, for any of Plaintiffs' claims, the question of redressability.

on current governmental policies that concededly cannot benefit those third parties." *Id.* at 20. Moreover, as the court pointed out, Arpaio's claimed injury (increased law enforcement expenses) not only depended on future entrants' mistaken understanding and unlawful entry, but on the supposition that those entrants would commit crimes in Maricopa County. *Id.* None of the consequences predicted by Sheriff Arpaio resulted from anyone actually subject to DACA or DAPA, but from "unrelated third parties." *Id.* The court affirmed the district court's dismissal of Sheriff Arpaio's complaint for lack of Article III standing. *Id.* at 25.

As in *Arpaio*, Plaintiffs' standing theory hinges on the unreasonable response of third parties to DACA made through allegations that lack sufficient factual support. The 2012 DACA Memorandum only applies to children who have been in the United States for the previous five years. Yet Plaintiffs ask us to assume that aliens outside the United States who are, by definition, *ineligible* for DACA relief would learn about the policy; mistakenly believe it applicable to them or that they might obtain similar relief from a future administration; come to the United States based on their misconceptions; and permanently settle near Plaintiffs, thereby increasing the population and straining environmental resources. The attenuation in this chain of reasoning, unsupported by well-pleaded facts, is worthy of Rube Goldberg. Even were we to assume "that inaccurate knowledge of DACA could have provided some encouragement to those who crossed the southern border, the Supreme Court's

precedent requires more than illogic or unadorned speculation before a court may draw the inference [Plaintiffs] seek[]." *Id.* at 21 (citation and quotation marks omitted). Plaintiffs alleged no facts supporting their allegations that DACA caused illegal immigration and was not merely one of the "myriad economic, social, and political realities" that might influence an alien's decision to "risk[] life and limb" to come to the United States. *Id.*

In an effort to distinguish their allegations from those in *Arpaio*, Plaintiffs rely on an affidavit from their expert, Jessica Vaughan, in which she claims that, as of 2014, DACA and "other discretionary actions by DHS have had the effect of significantly increasing the number of illegal border crossings, which has resulted in significant environmental impacts." But Vaughan does not detail any facts linking the alleged influx in immigration to DACA. To the contrary, she attributes the dramatic influx of "unaccompanied minors and families . . . that began around 2012 and continues today" to "policy changes that occurred in 2008 (the Trafficking Victims Protection and Reauthorization Act) and 2009 (Credible Fear Parole)." Plaintiffs' reliance on an unreleased Border Patrol intelligence report from 2014 that purportedly "reveals that 95% [of migrants interviewed] stated that their 'main reason' for coming was because they had heard they would receive . . . permission to stay," similarly lacks any specific reference to DACA sufficient to confer standing. Although we must accept Plaintiffs' factual allegations as true at the pleading stage, Plaintiffs have failed to

allege even the barest of connections between DACA and an increase in immigration.

Plaintiffs also attempt to distinguish *Arpaio* by pointing out that Sheriff Arpaio did not allege NEPA violations. That is true, but irrelevant. The D.C. Circuit rejected Sheriff Arpaio's claim with the understanding that he would be "entitled to proceed based on a lenient assessment of his alleged concrete injury [] because his complaint includes a claim of procedural injury." *Arpaio*, 797 F.3d at 21. Although causation and redressability requirements are relaxed when a plaintiff has established injury in fact under NEPA, the causation requirement remains implicated "where the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant." *Citizens for Better Forestry*, 341 F.3d at 975 (citations omitted). Stated otherwise, as in *Arpaio*, a claim of procedural injury does not relieve Plaintiffs of their burden—even if relaxed—to demonstrate causation and redressability. *See Wash. Envt'l Council v. Bellon*, 732 F.3d 1131, 1144 (9th Cir. 2013) (refusing to infer a causal connection simply because the plaintiffs sought "to enforce a specific regulatory obligation"). Here, Plaintiffs' speculation "lengthens the causal chain beyond the reach of NEPA." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983).

Nor can Plaintiffs establish standing on their alternative theory that DACA's enactment added "more settled population" in 2012 by temporarily reducing the number of aliens in the United States

who might have otherwise been removed. Under government policy, the children eligible for DACA are already "low priority cases" for removal; thus, Plaintiffs can only speculate that changes to DACA (that might flow from a NEPA analysis) would actually result in the removal of DACA beneficiaries, thereby reducing the U.S. population. Even without a declared DACA policy, DHS retains sole discretion over how to prioritize future removal proceedings. "There is no redressability, and thus no standing, where (as is the case here) any prospective benefits depend on an . . . actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict." *Glanton ex rel. ALCOA Prescrip. Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (citation and quotation marks omitted).

2. Count III

In Count III, Plaintiffs bring a facial challenge to CATEX A3. As we discussed in Part I, CEQ regulations permit agencies to establish categories of actions that "do not individually or cumulatively have a significant effect on the human environment" and, accordingly, do not require an EA or an EIS. 40 C.F.R. § 1508.4. Consistent with CEQ's regulations, DHS has published a list of categorical exemptions in an appendix in its Manual. CATEX A3 exempts from EIS and EA requirements the:

> Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders,

> directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature:
>
> (a) Those of a strictly administrative or procedural nature;
>
> (b) Those that implement, without substantive change, statutory or regulatory requirements;
>
> (c) Those that implement, without substantive change, procedures, manuals, and other guidance documents;
>
> (d) Those that interpret or amend an existing regulation without changing its environmental effect;
>
> (e) Technical guidance on safety and security matters; or
>
> (f) Guidance for the preparation of security plans.

We are hard-pressed to see how this categorical exemption injures Plaintiffs. The Supreme Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), is on point. In that case, conservation groups challenged amendments to the U.S. Forest Service's manual that categorically excluded certain Forest Service projects from the requirement to file an EIS or EA. *Id.* at 490–91. The plaintiffs settled a

portion of the suit but continued to challenge "the regulation in the abstract." *Id.* at 494. Because the plaintiffs "identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members," the Court held the plaintiffs lacked standing. *Id.* at 495. In so holding, the Court emphasized that a procedural injury alone does not constitute an injury in fact. *Id.* at 496. We too have explained that "[a] concrete and particular project must be connected to the procedural loss." *Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010).

Plaintiffs make no attempt in Count III to tie CATEX A3 to any particular action by DHS. They assert, as the Court put it, "a procedural right *in vacuo*," and that is "insufficient to create Article III standing." *Earth Island Inst.*, 555 U.S. at 496.

3. Count IV

In Count IV, trying to avoid their errors in Count III, Plaintiffs argue that DHS's application of CATEX A3 to the DSO, STEM, AC21, and International Entrepreneur Rules was improper because these rules all "contribute to immigration-induced population growth."

We begin with the DSO and STEM rules, which, as we explained in Part I, pertain to opportunities for foreign students. Neither rule authorizes permanent immigration; nevertheless, Plaintiffs insist that the two rules lead to permanent population growth by

encouraging additional foreign students to come to the United States. Their claim suffers from some of the same convoluted reasoning as their DACA claim, and unlike the DACA claim, the district court ruled against Plaintiffs on summary judgment. Once a case has proceeded to that stage, Plaintiffs "can no longer rest on . . . 'mere allegations,' but must set forth by affidavit or other evidence 'specific facts.'" *Defs. of Wildlife*, 504 U.S. at 562 (quoting Fed. R. Civ. P. 56(e)).

Plaintiffs offer no evidence to support their theory. Instead, their expert, Vaughan, simply opines that large numbers of nonimmigrant visa holders settle permanently in the United States without identifying how many—or whether *any*—of those aliens obtained visas under the DSO and STEM Rules. Plaintiffs request that we take judicial notice of "the fact that a large number of the schools participating in the Student and Exchange Visitor Program . . . are in California." But, even if true, this fact is irrelevant, as Plaintiffs have not shown a reasonable probability that the DSO and STEM rules cause population growth *anywhere* in a manner that affects Plaintiffs' interests. Plaintiffs' conjecture does not establish their injury in fact.

Plaintiffs also cannot establish causation. Where causation "depends on the unfettered choices made by independent actors not before the courts," Plaintiffs bear the burden to "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit

redressability of injury." *Defs. of Wildlife*, 504 U.S. at 562 (citations omitted). Not only do Plaintiffs fail to offer any evidence showing that aliens holding visas under the DSO or STEM rules decide to settle permanently in the United States—via the legal process or by overstaying their visa—but Plaintiffs also fail to show that these aliens would do so *because* of the challenged rules. As with the DACA claim, any number of variables might influence an alien's independent decision to resettle. *See Arpaio*, 797 F.3d at 21. Plaintiffs provide no evidence to the contrary.

Plaintiffs insist that they have met their burden because they need only show that permanent population growth is a "predictable effect" of the STEM and DSO rules. But the degree of predictability matters, and Plaintiffs have not come forward with any relevant evidence. In *Department of Commerce v. New York*, 139 S. Ct. 2551, 2563–64 (2019), eighteen states brought suit to enjoin the use of a citizenship question on the 2020 census. They alleged that the question would discourage noncitizens from responding to the census and that the resulting population count would affect, among other things, their representation in Congress and receipt of federal funds. *Id.* at 2565. The government contended that any harm resulted from the independent decisions of third parties, who would, mistakenly, believe they might be prosecuted if they answered truthfully about their non-citizen status. *Id.* at 2565–66. The Court, unanimously, held that the plaintiffs had satisfied "their burden of showing that third parties will likely react in predictable ways to the citizenship question."

Id. at 2566. Plaintiffs had presented evidence at trial that these groups "historically responded to the census at lower rates than other groups." *Id.* The Court held that the district court "did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question." *Id.* The Court explained that the plaintiffs' theory of standing did not "rest on mere speculation about the decisions of third parties; it relie[d] instead on the predictable effect of Government action on the decisions of third parties." *Id.*

The Court has since shed further light on what a plaintiff must do to meet his burden to show "that third parties will likely react in predictable ways." *California v. Texas*, No. 19-840, slip. op. at 11–14 (U.S. June 17, 2021) (citing *Dep't of Commerce*, 139 S.Ct. at 2566). In that case, eighteen states and two individuals sought to enjoin the minimum essential coverage requirement of the Patient Protection and Affordable Care Act. *Id.* slip op. at 1. As amended by Congress in 2019, the Act set all penalties for those who failed to meet its minimum coverage requirements to zero. *Id.* slip op. at 2–3. The state plaintiffs claimed the challenged provision harmed them by leading more individuals to enroll in state-operated or state-sponsored insurance programs. *Id.* slip op. at 10. But the Court found the state plaintiffs' proffered evidence did not establish such a causal connection—only four of their twenty-one affidavits attributed added state costs to the minimum essential coverage requirement, and all of the affidavits referred "to that provision as

it existed *before Congress removed the penalty*." *Id.* slip op. at 12. Nor was the Court persuaded by the state plaintiffs' reliance on a "predictive sentence" in a 2017 Congressional Budget Office Report that did not "adequately trace the necessary connection between the provision without a penalty and new enrollment in [state programs]." *Id.* slip op. at 13–14.

Like the state plaintiffs in *California v. Texas*, Plaintiffs have offered no evidence showing that population growth is a predictable effect of the DSO and STEM rules. Vaughan's affidavit provides only general population increase numbers; her report does not separate the F-1, F-2, and M-2 visas (the subject of the DSO and STEM rules) from all the other nonimmigrant visas, and she cannot draw any line connecting the DSO and STEM rules to population increase. Try as they may, Plaintiffs cannot rely on their ipse dixit to establish standing.

We turn next to the AC21 Rule, which "largely conforms DHS regulations to longstanding DHS policies and practices" aimed at providing "greater flexibility and job portability to certain nonimmigrant workers, particularly those who have been sponsored for [legal permanent resident] status." DHS intended the rule to "better enable U.S. employers to employ and retain high-skilled workers who are beneficiaries of employment-based immigrant visa (Form I-140) petitions." Seizing on DHS's use of the word "retain," Plaintiffs argue that this rule threatens the environment by encouraging immigration growth. The problem with Plaintiffs' claim is that, as the district

court noted, the AC21 Rule generally only applies to immigrants who *already hold* EB-1, EB-2, or EB-3 visas—that is, aliens who have been present in the United States for a number of years. Absent a concrete link between the AC21 Rule and population growth, then, Plaintiffs cannot show injury in fact. Nor can Plaintiffs establish causation. As with DACA, the DSO Rule, and the STEM Rule, any increase in immigration that may result from the AC21 Rule would be a product of independent, third-party decisionmaking and not fairly traceable to the AC21 Rule itself.

Finally, we address Plaintiffs' standing to challenge the International Entrepreneur Rule. This rule is explicitly designed to encourage aliens to come to the United States; however, it only provides for entry on a temporary basis. Plaintiffs assert that this particular rule results in population growth. This evidence might be difficult to come by given that, in explaining its decision not to conduct NEPA review, DHS stated that "[f]ewer than 3,000 individuals, an insignificant number in the context of the population of the United States, are projected to receive parole through this program." International Entrepreneur Rule, 82 Fed. Reg. 5,238, 5,284 (Jan. 17, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274a). Furthermore, Plaintiffs have failed to show that any aliens granted parole under this rule settle, either temporarily or permanently, near Plaintiffs in numbers that materially contribute to population growth. *See Ashley Creek*, 420 F.3d at 938. Finally, even assuming injury in fact, Plaintiffs cannot establish causation. As with the other challenged rules, Plaintiffs have not shown

that aliens admitted under the International Entrepreneur Rule permanently stay in the United States because of the rule.

In a last-ditch effort, Plaintiffs argue that they have standing to challenge all four rules because former CEQ regulations required agencies to consider cumulative impacts on the environment. *See* 40 C.F.R. § 1508.7 (repealed Sept. 14, 2020). Plaintiffs claim that the challenged rules have a "significant cumulative effect on the human environment" and it was therefore "improper" for DHS to exempt these rules from NEPA review. But any "cumulative effect" analysis required by NEPA does not bear on whether Plaintiffs have standing to challenge these rules. We may not find standing based on the Plaintiffs' cumulative speculation about their injuries in fact.

4. Count V

Finally, Plaintiffs challenge the sufficiency of the EAs and FONSIs issued in relation to President Obama's Response to the Influx of Unaccompanied Alien Children Across the Southwest Border. Recall that DHS prepared a programmatic EA for the UAC Response and a supplemental EA (pursuant to the UAC Response) before constructing a facility near Dilley, Texas to house temporarily up to 2,400 women and children detainees. DHS ultimately issued a FONSI in both instances.

At the outset, given that both the UAC Response and the Texas facility were *responses* to an

influx in immigration, Plaintiffs face an uphill battle to show that these two actions *cause* illegal immigration. Plaintiffs' experts do not attribute an increase in illegal immigration to the UAC Response or the Texas facility. For example, Vaughan's citation of a 2014 *Washington Times* newspaper article attributing a surge in illegal immigration to U.S. policy does not satisfy Plaintiffs' burden, as the article does not support a claim that infrastructure improvements are a reason that migrants enter the United States. Nor is Vaughan's general observation that "real or even perceived change[s] to enforcement policies . . . can significantly affect the number of people attempting to cross the border illegally" sufficient. Plaintiffs must connect a "concrete and particular project" to the "procedural loss" to establish standing. *See Wilderness Soc'y.*, 622 F.3d at 1260.

To the extent Plaintiffs challenge the FONSI related to the Texas facility, Plaintiffs also lack a geographic nexus to do so. Several individual Plaintiffs and members of Plaintiff organizations provided declarations describing the environmental damage along the southwest border in Arizona and New Mexico. That none of the declarants actually live in Texas underscores their lack of standing. In *Ashley Creek*, we found no geographic nexus where the plaintiff challenged the BLM's EIS for a proposed mining project that was 250 miles from plaintiffs' phosphate reserves. 420 F.3d at 938–39. We rejected the plaintiff's theory, under which "any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS." *Id.*

at 939. Yet that is precisely the theory Plaintiffs advance here—under Plaintiffs' framework, *anyone* living near Texas would have standing to challenge the EA and FONSI prepared for the Dilley facility. That is beyond the scope contemplated by Article III. *See Defs. of Wildlife*, 504 U.S. at 572 n.7.

Finally, causation also presents a problem for Plaintiffs. As with the DACA policy, we know of no evidence in the record indicating that either the UAC Response or the building of the Dilley facility entices aliens to come to the United States. Plaintiffs' enticement theory is even less compelling in this context because, unlike DACA, neither action offers non-citizens an opportunity to remain in the United States. If an alien were granted relief *after* his or her stay in the Texas (or another) facility, that would be the result of a separate DHS action, having nothing to do with these policies. And if an alien decides to settle illegally, such a decision would be attributable to "the myriad" considerations beyond the UAC Response or the Dilley housing facility. *Arpaio*, 797 F.3d at 21.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs cannot challenge DHS's actions under NEPA or the APA. The judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE WHITEWATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT et al.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY et al.,
Defendants.

Case No.: 16cv2583-L-BLM

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pending before the Court in this administrative review action are cross-motions for summary judgment. (Docs no. 70, 71.) The motions are fully briefed. They were taken under submission without oral argument pursuant to Civil Local Rule 7.1.d. For the reasons stated below, Plaintiffs' motion is denied, and Defendants' motion is granted.

I. BACKGROUND

Plaintiffs are environmentalists, environmental groups, natural resource conservation groups and cattle ranchers from the southwestern region of the United States. They allege that Defendants, the United States Department of Homeland Security and its Secretary[1] (collectively, "DHS"), violated the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA"), and corresponding regulations. They seek to set aside DHS actions they deem noncompliant. Because NEPA itself does not provide for judicial review, Plaintiffs are proceeding under Administrative Procedure Act, 5 U.S.C. § 101 *et seq.*

NEPA requires federal agencies to identify environmental impacts of proposed actions, consider alternatives or mitigating measures capable of lessening the impact on the environment, and prepare a report detailing these considerations. *See* 42 U.S.C. § 4332. It was passed in part due to the recognition of "the profound influences of population growth" on the environment. *Id.* § 4331(a). NEPA established the Council on Environmental Quality ("CEQ"), which promulgates regulations guiding agency compliance. *Id.* The CEQ regulations provide that an agency's environmental report may take the form of an Environmental Assessment ("EA"), Environmental Impact Statement ("EIS"), or a Finding of No Significant Impact ("FONSI"). *See* 40 C.F.R. §§ 1508.9, 1508.11, 1508.13.

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[1] The current Secretary is Chad Wolf.

NEPA is a "primarily procedural" statute, and "agency action taken without observance of the procedure required by law will be set aside." *Metcalf v. Daley,* 214 F.3d 1135, 1141 (9th Cir. 2000).[2] To implement NEPA, Congress prescribed, and the CEQ regulations require, that federal agencies integrate the "NEPA process" in their planning and decision making. *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979); *see* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1.

DHS policies and NEPA compliance procedures are contained in the DHS Instruction Manual on Implementation of the National Environmental Policy Act ("Manual") and Directive 023-01, Implementation of the National Environmental Policy Act ("Directive"). (Doc. nos. 71-3 through 71-9 ("DHS App'x") at DIR00309.) The Manual supplements the CEQ regulations as provided in 40 C.F.R. § 1507.3. (*See id.*)

CEQ regulations permit a "categorical exclusion" for those agency actions

> which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an

[2] Unless otherwise noted, internal quotation marks, citations, and footnotes are omitted throughout.

> environmental impact statement is required.

40 C.F.R. § 1508.4. Pursuant to this provision, the DHS Manual provides for several categorical exclusions. (*See* DHS App'x at DIR00330.)

Plaintiffs seek to vacate DHS Categorical Exclusion A3 ("CATEX A3") which applies to the following DHS administrative and regulatory activities:

> Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature:
>
> (a) Those of strictly administrative and procedural nature;
>
> (b) Those that implement, without substantive change, statutory or regulatory requirements;
>
> (c) Those that implement, without substantive change, procedures, manuals, and other guidance documents;
>
> (d) Those that interpret or amend an existing regulation without changing its environmental impact[.]

(*See* DHS App'x at DIR00355.) Plaintiffs also seek to vacate application of CATEX A3 to certain amendments of existing regulations:

(1) The April 2015 Adjustments to Limitations on Designated School Official Assignment and Study by F-1 and M-2 Nonimmigrants ("DSO Rule") amended the Student and Exchange Visitor Program by allowing for a greater number of designated school officials to oversee the program, and by allowing the spouses and children of visiting students to take classes, as long as they are not taking a full course load. (DHS App'x at DSO00009-18 and DSO00271-329 (80 Fed. Reg, 23680 *et seq.* (Apr. 29, 2015)).)

(2) The March 2016 rule entitled Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and CapGap Relief for All Eligible F-1 Students ("STEM Rule"), allowed nonimmigrant students with degrees in STEM fields (science, technology, engineering or mathematics) from United States universities to participate in training opportunities for an additional 24 months and strengthened the reporting requirements to help DHS track students in the program. (DHS App'x at STEM00055-137, STEM005298 (81 Fed.

Reg, 13040 *et seq*. (Mar. 11, 2016)).)

(3) November 2018 rule entitled Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers ("AC21 Rule") amended regulations regarding several existing employment-based visa programs to enable U.S. employers to employ highly skilled workers with employment-based visas and increase the ability of visa-holding workers to change positions or employers. (DHS App'x at AC0124-236 (81 Fed. Reg, 82398 *et seq*. (Nov. 18, 2016)).)

(4) The January 2017 rule established criteria for the use of DHS discretionary authority on a case-by-case basis to temporarily parole into the United States individual entrepreneurs of startup businesses with significant potential for growth and job creation ("International Entrepreneur Rule"). (DHS App'x at IER00041-93 (82 Fed. Reg, 5238 *et seq*. (Jan. 17, 2017)).)

CEQ regulations also permit that an agency's environmental report take the form of a FONSI. To comply, the agency is required to

> briefly present[] the reasons why an action, not otherwise excluded (§ 1508.4),

> will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.13. Plaintiffs seek to vacate the FONSI issued in relation to the June 2, 2014 Response to the Influx of Unaccompanied Alien Children Across the Southwest Border ("UAC Response"). The program entailed an infrastructure expansion for temporary detention, transportation and medical care of children and families crossing the border. DHS prepared an EA which defined the parameters for when a more detailed NEPA analysis for site-specific proposals would be required. Accordingly, in August 2014, DHS prepared a supplemental EA before construction of a housing facility for up to 2,400 women and children near Dilley, Texas, and issued a FONSI. (DHS App'x at UAC00534-58, UAC00568-71, and UAC00775-948.)

DHS had previously moved to dismiss Counts I and II of Plaintiffs' operative amended complaint (doc. no. 44 ("FAC")). Count I alleged that the DHS Manual violated NEPA because it did not require immigration

program compliance. (*Id.* at 71.)[3] Count II alleged that DHS violated NEPA by failing to engage in NEPA review with respect to seven immigration statutes pertaining to employment-based immigration, family-based immigration, long-term nonimmigrant visas, parole, Temporary Protected Status, refugees, and asylum, and because it did not initiate NEPA compliance with regard to the immigration non-enforcement policy known as Deferred Action for Childhood Arrivals. (*Id.* at 73.) The motion to dismiss Counts I and II was granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (*See* doc. no. 55.)

At issue on the pending cross-motions for summary judgment are Plaintiffs' remaining Counts III through V, alleging that on its face CATEX A3 is not sufficiently defined to comply with NEPA, that the application of CATEX A3 to the DSO, STEM, AC21 and International Entrepreneur Rules violated NEPA, and that the EA which led to the UAC Response FONSI was inadequate under NEPA. (FAC at 74-80.)

Plaintiffs move for summary judgment on Counts III through V. DHS crossmoves for summary judgment based on lack of Article III standing, or in the alternative, on the merits of Counts III through V.

II. DISCUSSION

Federal Rule of Civil Procedure 56 empowers

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[3] Unless otherwise noted, page citations in this Order refer to those generated by the court's CM/ECF system.

the court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment or adjudication of issues is appropriate if depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c)(1).

The burden on the party moving for summary judgment depends on whether it bears the burden of proof at trial.

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

See C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). If the nonmoving party would bear the burden at trial, the moving party can meet the burden on summary judgment by pointing out the absence of evidence with respect to any one element of

the opposing party's claim or defense. *See Celotex*, 477 U.S. at 325.

> When the moving party has carried its burden . . ., its opponent must do more than simply show that there is some metaphysical doubt as to the material facts[, but] must come forward with specific facts showing that there is a genuine dispute for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (internal quotation marks, citations and footnote omitted). The nonmoving party can make its showing by "citing to particular parts of materials in the record . . .; or [¶] showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. Proc. 56(c)(1).

> [W]here the nonmoving party will bear the burden of proof at trial, [it must] go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial" on all matters as to which it has the burden of

proof.

Celotex, 477 U.S. at 324 (internal quotation marks omitted).

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita Electric Indus. Co., Ltd.*, 475 U.S. at 587. "The district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995)).

The filing of cross-motions for summary judgment "does not necessarily mean there are no

disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other." *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir. 1975). Furthermore, "each motion must be considered on its own merits," and the court must consider evidence submitted in support of and in opposition to both motions before ruling on each one. *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

DHS argues this action should be dismissed for lack of standing under Article III of the Constitution. A federal court "may not decide a cause of action before resolving whether the court has Article III jurisdiction." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 n.6 (9th Cir. 2002). Standing is a requirement of Article III jurisdiction. *See id.* at 1056 n.6. Accordingly, the Court first turns to Plaintiffs' standing.

"[T]he party asserting federal jurisdiction . . . has the burden of establishing it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). Furthermore, "[e]ach element of standing must be supported with the manner and degree of evidence required at the successive stages of the litigation." *Maya v. Centex Corp.,* 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)) (ellipsis omitted). Accordingly, Plaintiffs as the parties who commenced this action in federal court, have the burden of establishing Article III standing with the type of evidence required at summary judgment.

Article III standing "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis in original). When, as here, a plaintiff seeks injunctive relief, the plaintiff "must show that he is under threat of suffering injury in fact that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* He or she must do so with regard to each type of relief sought. *Id.*

To meet the injury-in-fact requirement, Plaintiffs claim they suffered a procedural injury. (Doc. no. 75-1 ("Pls.' Reply") at 15, 16.) In this context, a plaintiff need not meet "all the normal standards for redressability and immediacy," which are otherwise required to establish standing. *Lujan,* 504 U.S. at 572 n.7. However, the plaintiff's burden is heavier in other respects:

> deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal

> standards for redressability and immediacy.

Summers, 555 U.S. at 496. For a cognizable injury in fact on the procedural-injury theory a plaintiff must establish that the government agency violated certain procedural rules which are "designed to protect" the plaintiff's "concrete interests" and that it is "reasonably probable" that the challenged agency action will threaten those concrete interests. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 741 F.3d 961, 969-70 (9th Cir. 2003).

If a plaintiff has established an injury in fact for violation of a procedural rule under NEPA, "the causation and redressability requirements are relaxed." *Citizens for Better Forestry*, 341 F.3d at 975. Nevertheless, to meet the causation requirement, a plaintiff must show that his or her "injury is dependent upon the agency's policy" rather than "result[ing from] independent incentive governing a third party's decisionmaking process." *Id*; *see also id.* at 973 n.8. When, as here, the plaintiff's

> asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or

> more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.

Lujan, 504 U.S. at 562; *see also Summers*, 555 U.S. at 493.

DHS argues that Plaintiffs cannot meet their burden to show injury in fact and causation. In their complaint, Plaintiffs request a finding that CATEX A3 violates NEPA, and seek to set aside its application to the DSO, STEM, AC21 and International Entrepreneur Rules, as well as the FONSI relative to the UAC Response. (FAC at 7482.) Their theory of standing is that DHS is charged with enforcing and administering immigration laws, immigration drives population growth, which has a negative effect on the environment. Plaintiffs claim an interest in the quality of their environment. (*See* doc. no. 70-1 ("Pls' Mot.") at 8.)

Plaintiffs point to the affidavits filed in support of their amended complaint. (*See* Pls.' Reply at 16, 19.) They filed expert reports prepared by Jessica Vaughan, Director for Policy Studies for the Center for Immigration Studies (Pls.' Ex. 3 ("Vaughan Rept.")), Steven A. Camarota, Ph.D., Director of Research, Center for Immigration Studies (Pls.' Ex. 4 ("Camarota Rept.")), and Philip Cafaro, Ph.D. (Pls.' Ex. 5 ("Cafaro Rept."). (Doc. nos. 44-4 through 44-6, respectively.) The reports support Plaintiffs' contention that immigration causes an increase in population and that population growth has a negative effect on the environment. In addition, Plaintiffs filed affidavits of Plaintiff association members and individual Plaintiffs, which reference population growth and resulting impact on the environment in the areas where they reside or enjoy visiting. They attribute the growth to immigration. (Pls.' Reply at 16 (citing doc. nos. 44-9 through 4415 (Lamm, Rosenberg, Willey, Oberlink, Schneider, Hurlbert and Colton Decl., respectively), 19 (citing doc. nos. 44-7, 44-8, and 44-16 through 19 (F. Davis, P. Davis, Cowan, Ladd, Oliver and Pope Decl.).)

A. Count III -- Challenge to CATEX A3

NEPA regulations allow for exclusions from environmental assessment and environmental impact statement requirements for actions the agency finds do not have a significant effect on the environment. *See* 40 C.F.R. § 1508.4. Accordingly, CATEX A3 excludes promulgation of rules, issuance of rulings, and development of policies and other guidance documents that are "strictly administrative and procedural

nature," that "implement, without substantive change," statutory, regulatory or procedural requirements, or "interpret or amend an existing regulation without changing its environmental impact[.]" (*See* DHS App'x at DIR00355.)

Plaintiffs argue that had DHS not promulgated CATEX A3 and had issued environmental assessments prior to all of their actions falling under CATEX A3, the public reaction to such disclosure may have altered immigration policies and slowed population growth and environmental damage. (*See* Pls.' Reply at 19-20; doc. nos. 44-9 through 44-15.)

Assuming solely for the purposes of this analysis, and without so finding, that Plaintiffs established a procedural injury, this alone is not sufficient for standing. "[P]rocedural injury, standing on its own, cannot serve as in injury-in-fact. A concrete and particular project must be connected to the procedural loss." *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010 (citing *Summers*, 555 U.S. at 496-97).

CATEX A3 is not a concrete and particular project. On its face, CATEX A3 has no effect on the environment, because it applies only to "strictly administrative and procedural" documents, implementation of other provisions "without substantive change," and interpretation or amendment of existing regulations "without changing their environmental impact." (*See* DHS App'x at DIR00355.) None of Plaintiffs' evidence supports a reasonable

inference that CATEX A3 causes an increase in immigration.

Plaintiffs have not shown with reasonable probability that CATEX A3 on its face threatens their interest in the environment or that their claimed environmental injury is dependent on CATEX A3. Because Plaintiffs have not raised a genuine issue of material fact as to the injury-in-fact and causation requirements, they lack Article III standing on Count III.

B. Count IV – Challenge to the Application of CATEX A3 to DHS Actions

The DSO, STEM, AC21 and International Entrepreneur Rules amend existing immigration regulations. They refer to CATEX A3 for exclusion from the EA or EIS requirements. (*See* DHS App'x at DIR00355 (CATEX A3 subsect. (d).) Plaintiffs argue that had EA and EIS been prepared for each of the rules, they would have been changed to reduce their effect on population growth. (*See* Pls.' Reply at 19-20; doc. nos. 44-9 through 44-15.)

To support standing, Plaintiffs must show it is "reasonably probable" that the rules they challenge will threaten their interests. None of the expert reports or Plaintiff declarations does that.

Declarations of Plaintiff association members and individual Plaintiffs attribute environmental damage to an increase in population, which they

attribute to immigration in general, or alternatively, to illegal immigration across the southwest border. The Camarota Report provides past and projected population growth numbers attributable to immigration in general. The Cafaro Report links environmental damage to population growth from immigration in general. The Vaughan Report provides past population increase numbers attributable to broad immigration programs. (Vaughan Rept. at 29-34.) The report, however, does not show that any increase is attributable to the DHS rules under challenge in the complaint.

The Vaughan Report includes a discussion of eight DHS programs, including employment-based immigration, the nonimmigrant visa program, and the parole program. Although it alludes to the DSO, STEM, AC21 and International Entrepreneur Rules (Vaughan Rept. at 15 (F-1 and M-2 visas), 18 (DSO and STEM Rules), 11-12 (EB-1, EB2 and EB-3 visas only and *not* referencing AC21 Rule), 22 (referencing International Entrepreneur Rule)), it does not address them apart from the broad immigration programs in which they are included—The Nonimmigrant Visa Program (*id.* at 14-19), Employment Based Immigration Program (*id.* at 11-12), and Parole Program (*id.* at 19-22).

The AC21 Rule is a case in point. It amends the existing employment visa program authorized by Congress (*see* DHS App'x at AC00153; Vaughan Rept. at 11) and applies to immigrants who already hold EB-1, EB-2 or EB-3 visas (*see* DHS App'x at AC00219).

It is therefore not reasonably probable that it will result in an increased immigration.

Drawing all reasonable inferences in Plaintiffs' favor, as the Court must on considering Defendants' summary judgment motion, *see Matsushita Electric Indus. Co., Ltd.*, 475 U.S. at 586-87, Plaintiffs' evidence does not support a finding that it is reasonably probable that the DHS rules at issue will threaten to damage their interest in the environment. Plaintiffs therefore lack Article III standing as to Count IV.

Alternatively, Plaintiffs lack standing because any increase in population which may result from the challenged rules would be due to independent third-party decision making rather than the rules themselves. To establish causation for purposes of procedural injury, Plaintiffs must show that their "injury is dependent upon the agency's policy" rather than "result[ing from] independent incentive governing a third party's decisionmaking process." *See Citizens for Better Forestry*, 741 F.3d at 969-70, 975; *see also id.* at 973 n.8.

This is often difficult when, as here, the alleged injury arises from government regulation of someone other than the plaintiff him- or herself. *See Summers*, 555 U.S. at 493. In such cases, causation "ordinarily hinge[s] on the response of the regulated . . . third party to the government action . . .." *Lujan*, 504 U.S. at 562. Causation then "depends on the unfettered choices made by independent actors not before the

courts and whose exercise of . . . discretion the courts cannot presume either to control or to predict . . .." *Id.*

So it is here with regard to the DSO and STEM Rules, which apply to student visas. As acknowledged in the Vaughan Report, these rules are included in the "The Nonimmigrant Visa Program." (Vaughan Rept. at 14-15, 18.) Vaughan asserts that "large numbers of these nonimmigrants in fact settle permanently in the United States." (*Id.* at 15; *see also id.* at 14.) In this regard, permanent settlement depends on the independent choices of the visa holders, who are not before the Court. The visa holders individually decide whether to leave the United States after the expiration of their student visas, lawfully become permanent residents, or unlawfully overstay their visas. These decisions are made outside the DSO and STEM Rules. Furthermore, Vaughan's assertion is unsupported, as the population increase numbers provided in the report for the Nonimmigrant Visa Program do not segregate the F-1 and M-2 visas, which are the subject of the DSO and STEM Rules, from all the visas issued under the program. (*See* Vaughan Rept. at 15 (referencing E, H-1B and L visas, but not F-1 and M-2 visas), 30-31 (Tables 1 and 2 do *not* include F-1 and M-2 visas in the "Long Term Non Immigrant Visa Category").)

The same is true with regard to the International Entrepreneur Rule. By its own terms, the rule provides entry into the United States on a *temporary* basis. (DHS App'x at IER00041; *see also* Vaughan Rept. at 20 ("The alien paroled into the

country is therefore temporarily 'lawfully present.'").) Unlike with other parole programs, Vaughan does not contend that the International Entrepreneur Rule leads to permanent residency. (*See* Vaughan Rept. at 20-22.) Accordingly, as with student visas, to the extent persons admitted under the International Entrepreneur Rule remain in the United States on a longterm basis, it is the product of their independent decision making rather than the rule under challenge. The Vaughan Report provides no evidence to the contrary. (*See id.* at 30, 32 (Tables 1, 3 provide no information for the number of international entrepreneurs).)

Based on the foregoing, and drawing all reasonable inferences in Plaintiffs' favor, they have not established the causation element of standing with respect to the DSO, STEM and International Entrepreneur Rules. Accordingly, Plaintiffs lack Article III standing on this alternative ground as well.

C. Count V – Challenge to the UAC Response FONSI

Finally, Plaintiffs challenge the sufficiency of the EA prepared in support of the FONSI related to the UAC Response. DHS prepared an EA relative to the UAC Response, as well as a supplemental EA for the decision pursuant to the UAC Response to construct a housing facility near Dilley, Texas for up to 2,400 illegal border crossers. (DHS App'x at UAC00769, UAC00773 *et seq.*) In both instances, DHS issued a FONSI. Plaintiffs have not provided sufficient

evidence to show it is reasonably probable that this DHS action will increase illegal crossings, as the action was taken *in response* to the illegal crossings already in progress. Plaintiffs have provided no evidence that the UAC will foster additional illegal border crossings.

Plaintiffs argue the Court should focus on the environmental effect of the "border crisis itself," rather than on the UAC Response they challenge in their complaint. (Pls.' Reply at 21.) This argument is unavailing, because Plaintiffs must tie the asserted procedural violation to a "concrete and particular" DHS action. *See Wilderness Soc.*, 622 F.3d at 1260. The declarations of individual Plaintiffs and members of Plaintiff associations describe the environmental damage caused by illegal border crossers in along the southwest border in Arizona and New Mexico (*see* doc. nos. 44-7, 44-8, 44-16, 44-17, 44-19), however, the damage is attributed to illegal crossings in general, including drug trafficking, rather than to the UAC Response in particular.

Furthermore, to the extent Plaintiffs' challenge is directed at the FONSI relative to the facility in Texas, no Plaintiffs or Plaintiff association members who filed declarations reside in Texas. (*See* doc. nos. 44-7, 44-8, 44-16, 44-17, 44-19.) To meet their burden with regard to injury in fact on a procedural injury theory, Plaintiffs must show that their "concrete interest" lies in the relevant geographic area. *See Summers*, 555 U.S. at 499 ("to establish standing plaintiffs must show that they use the area affected by

the challenged activity and not an area roughly in the vicinity of a project site"). Plaintiffs have not done so.

Finally, to the extent Plaintiffs suggest their interest will be injured because the illegal crossers will settle in the United States after leaving the Texas facility (*see* Pls.' Reply at 21), the argument is unavailing because it fails to establish the requisite causation. If the illegal crosses are granted entry into the United States, this is the result of a separate DHS action. If the crossers settle in the United States illegally after their release from the facility, this is the result of their independent decision making. In either case, the result is independent of the UAC Response. *See Citizens for Better Forestry*, 341 F.3d at 973 n.8, 975; *Summers*, 555 U.S. at 493; *Lujan*, 504 U.S. at 562.

Based on the foregoing, Plaintiffs have not presented sufficient evidence to raise a genuine issue of material fact with respect to injury-in-fact and causation requirements of Article III standing. Accordingly, they lack standing with respect to Count V.

III. CONCLUSION

Defendants' motion for summary judgment is granted based on lack of Article III standing. Plaintiffs' Counts III through V are dismissed for lack of subject matter jurisdiction and the action is dismissed in its entirety. Plaintiffs' motion for summary judgment is denied as moot.

IT IS SO ORDERED.

Dated: June 1, 2020

/s/
Hon. M. James Lorenz
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WHITEWATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT, *et al.*,
Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary of Homeland Security, *et al.*,
Defendants.

Case No.: 3:16-cv-02583-L-BLM

ORDER GRANTING DEFENDANT'S PARTIAL MOTION TO DISMISS

Pending before the Court in this administrative review action is Defendants' motion to dismiss two of the five causes of action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs filed an opposition, and Defendants replied. This matter is submitted on the briefs without oral argument. For the reasons stated below, Defendants' partial motion to dismiss is GRANTED.

I. BACKGROUND

Plaintiffs, various groups based in Arizona, California, New Mexico, and Florida, an informal organization of scientists and two individuals filed this action to oppose immigration and address environmental issues arising from immigration. (*See* First Amended Complaint ("FAC") at 15-40.) They allege that Defendants Kirstjen Nielsen, Secretary of Homeland Security, and the United States Department of Homeland Security (collectively "DHS") violated the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq*. ("NEPA"), and corresponding regulations. NEPA requires federal agencies to identify environmental impacts of proposed actions, consider alternatives or mitigating measures capable of lessening the impact on the environment, and prepare a report detailing these considerations. *See* 42 U.S.C. § 4332. NEPA established the Council on Environmental Quality ("CEQ"), which promulgates regulations guiding agency compliance with NEPA's mandates. *Id*. CEQ regulations provide that an agency's environmental report may take the form of an Environmental Assessment ("EA"), Environmental Impact Statement ("EIS"), or a Finding of No Significant Impact. *See* 40 C.F.R. §§ 1508.9, 1508.11, 1508.13. Plaintiffs allege that immigration is a major cause of population growth with a significant impact on the environment. They claim that the DHS is required to subject all proceedings having to do with immigration to a NEPA analysis, and its failure to do so harmed Plaintiffs by degrading the environment. (FAC at 42.)

NEPA itself does not provide for judicial review. Plaintiffs therefore brought suit pursuant to the Administrative Procedure Act, 5 U.S.C. § 101 *et. seq*. ("APA"), which provides for judicial review of certain agency actions. Specifically, they bring suit under 5 U.S.C. § 706(2)(A), which provides that a reviewing court must "hold unlawful and set aside agency actions, findings, and conclusions" which it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"

DHS moves to dismiss Count I and Count II of the first amended complaint. Count I alleges that the DHS Instruction Manual on the implementation of NEPA procedures ("Manual") violates NEPA because it does not require that immigration programs comply with it. (FAC at 71.) Count II alleges that the DHS violated NEPA by failing to engage in NEPA review with respect to actions pursuant to seven immigration statutes pertaining to employment based immigration, family based immigration, long term nonimmigrant visas, parole, Temporary Protected Status, refugees, and asylum, and because the DHS did not initiate NEPA compliance with regard to the immigration non-enforcement policy known as Deferred Action for Childhood Arrivals ("DACA"). (*Id*. at 73.)

II. DISCUSSION

DHS moves to dismiss Count I for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and Count II for failure to state a claim under Rule 12(b)(6). However, Rule 12(b)(6) applies to this

motion as to both counts. Although Defendants characterize the lack of finality of the Instruction Manual challenged in Count I as a jurisdictional issue, "the fact that an agency decision is not final under the APA is not a defect in subject matter jurisdiction." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 830 (9th Cir. 2002), abrogated on other grounds by *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, (2008), *as recognized in Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). The motion is therefore considered under Rule 12(b)(6) as to both counts.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *See N. Star Int'l v. Ariz. Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). The Court may dismiss a complaint as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). The Court must assume the truth of all factual allegations in the complaint and "construe them in the light most favorable to [the nonmoving party]." *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and quotation marks omitted). Instead, the allegations "must be enough to raise a right to relief above the speculative level." *Id.*

Unless "agency action is committed to agency discretion by law, the APA allows for judicial review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §§ 701(a)(2), 702. Not every agency action is subject to judicial review. When, as here, the underlying statute does not provide adequate remedy in court, a "final agency action" is reviewable. *Id.* § 704. The scope of judicial review is limited to "compel[ling] agency action unlawfully withheld or unreasonably delayed; and [¶] hold[ing] unlawful and set[ting] aside" certain kinds of agency actions, findings, and conclusions. *Id.* § 706.

A. Count I

Plaintiffs argue that the Manual is subject to judicial review as final agency action under 5 U.S.C. 704, which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). The parties disagree whether the Manual represents final agency action. A two-part test determines whether an agency action is final under the APA: "[f]irst, the action must mark the consummation of the agency's decisionmaking process . . . [a]nd second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). The focus is "on the practical and legal effects of the agency action." *Or. Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982

(9th Cir. 2006). "It is the effect of the action and not its label that must be considered." *Id.* at 985 (internal quotation marks and citation omitted).

An agency action qualifies as the "consummation of the agency's decisionmaking process" when it represents the agency's "last word in the matter" in the sense that "an action is final and is ripe for judicial review," as opposed to "merely tentative or interlocutory in nature." *Id.* at 984 (internal quotation marks and citations omitted). For example, the Forest Service annual operating instructions issued to the holders of cattle-grazing permits satisfied prong one of *Bennett* because they set "the parameters for the upcoming grazing season and . . . impose[d] legal consequences on the [grazing] permit holder." *Id.* at 983; *see also id.* at 986. The grazing permits by themselves were not enough. *See id.* at 985. As provided in the permits, the holders were subject to terms and conditions, including the Forest Plan and federal environmental requirements. *Id.* The annual operating instructions instructed the permit holders how those standards affected their individual grazing operations that season, including the start date of grazing in the area and how much grazing particular pastures in a given allotment can sustain that season. *Id.* at 984, 985. Although the Forest Service had issued permits, the annual operating instructions consummated its decisionmaking process regarding the extent, limitation and other restrictions on the permit holders' rights under the permit. *Id.* at 986.

By contrast, the Manual does not represent the DHS' final decision regarding NEPA review. It establishes the procedures for ensuring DHS' compliance with NEPA. *See* 79 Fed. Reg. 70,538, 70,538 (Nov. 26, 2014). The Manual informs agency employees of what to consider in evaluating a program under NEPA, provides guidance on which DHS actions NEPA applies to, and sets forth procedures for NEPA's implementation. (FAC Ex. 2 at 20, 40, 37.) It does not make any decision. It is a "decision-making tool" to be used "prior to making decisions." (*Id.* at 19.) The Manual therefore does not meet the first prong of Bennett. For this reason alone, the Manual is not "final agency action," and Count I is dismissed on this ground.

Alternatively, Count I is dismissed because it also does not meet the second prong of *Bennett*. An agency action meets the second prong "if the action is one by which rights or obligations have been determined, or from which legal consequences will flow." *Or. Natural Desert Assoc.*, 465 F.3d at 986 (quoting *Bennett*, 520 U.S. at 178). There are "several avenues" for meeting this element, including when administrative actions "impose an obligation, deny a right, or fix some legal relationship as a consummation of administrative process," or have "a direct and immediate effect on the day-to-day business of the subject party" or have "the status of law or comparable legal force, and whether immediate compliance with its terms is expected." *Id.* at 986-87 (internal quotation marks, ellipses and citations omitted.) In *Bennett* an agency opinion regarding the impact of a proposed

reservoir project on endangered fish met this element because, although it did not conclusively determine how the project would be carried out, it altered the legal regime by authorizing the agency to take endangered species only if it complied with conditions set forth in the opinion. *Bennett*, 520 U.S. at 178. In *Oregon Natural Desert Association* the annual operating instructions met this element because they were binding on the permit-holders: if the permit-holders did not comply with the terms of the annual operating instructions, the agency could restrict their permits. 465 F.3d at 987.

Here, the Manual does not impose any obligations or consequences on the DHS that are not already imposed by NEPA itself, but only provides a procedural framework for compliance without imposing consequences for violating the Manual's guidelines. (*See generally* FAC Ex. 2.) Any legal consequences are set forth in NEPA, provided that failure to follow the Manual's provisions also violated NEPA. Accordingly, the Manual does not meet the second requirement of *Bennett's* "final agency action" definition.

Alternatively, Plaintiffs contend that the Manual qualifies as a rule under 5 U.S.C. § 551(4). Section 551(13), which defines "agency action" includes "agency rule" as an example of agency action; however, it does not define "final agency action." The definition of "final agency action" is set forth in *Bennett*. For the reasons stated above, the Manual does not meet the definition of final agency action. The APA therefore

does not provide for judicial review. Defendants' motion to dismiss Count I is granted.

B. Count II

In Count II, Plaintiffs seek judicial review of seven immigration statutes pertaining to employment based immigration, family based immigration, long term nonimmigrant visas, parole, Temporary Protected Status, refugees, and asylum, and DACA, an immigration non-enforcement policy of the DHS. Plaintiffs seeks review under 5 U.S.C. § 706(2)(A), which allows review of final agency action which is "found to be [¶] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and 5 U.S.C § 706(1), which may apply to "compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs proceed on the theory that the seven statutes and the non-enforcement policy are subject to judicial review because they are "programs" requiring "programmatic environmental analysis," such as PEIS under 40 C.F.R. § 1508.18(b)(3). (*See* FAC at 73.)

As with Court I, only a "final agency action" is subject to judicial review and remedy. *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 882 (1990); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004); 5 U.S.C. §§ 702, 704, 706. To state a claim, Plaintiffs must show that they are challenging an "agency action." *See Lujan*, 497 U.S. at 882, 890-91. In addition to being "final," the action must be "circumscribed," "discrete," or "particular." *Norton*, 542 U.S. at 62;

Lujan, 497 U.S. at 891. This limitation "precludes . . . broad programmatic attack[s.]" *Norton*, 542 U.S. at 64. Plaintiffs "cannot seek *wholesale* improvement of [a government] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891(emphasis in original). These limitations are the same, whether APA review is sought under 5 U.S.C. § 706(2)(A) or § 706(1). *Norton*, 542 U.S. at 64-65.

What Plaintiffs propose here is broad programmatic review of DHS actions under seven immigration statutes and a non-enforcement policy relative to its NEPA obligations. This is precisely the type of APA review that was rejected in *Lujan* as not constituting the requisite "final agency action." *See* 497 F.3d at 890-94. Plaintiffs target whole categories of DHS actions, each of which includes many regulations and policy memoranda. (FAC Ex. 3 at 109-26; Opp'n at 19-21.) Although Plaintiffs identified regulations within these categories, as in *Lujan*, they are still challenging the continuing and evolving operations of the DHS. Further, the claim that DHS failed to engage in NEPA review arises from an alleged "general deficiency in compliance," similar to the challenges found lacking in *Lujan* and *Norton*.

Plaintiffs do not seek review of an "agency action" because they seek review of entire operations which are "continuing (and thus constantly changing)." *Lujan*, 497 U.S. at 890 & n.2. Much less are these DHS operations final in terms of being ripe for judicial

review. "[T]he flaws in the entire 'program'-consisting principally of the many individual actions . . . and presumably actions yet to be taken as well-cannot be laid before the courts for wholesale correction under the APA[.]" *Id.* at 892-93. Judicial review under the APA is limited to "final agency action," which typically requires "case-by-case approach." *Id.* at 894. The "sweeping actions" Plaintiffs desire "are for the other branches." *Id.* Accordingly, DHS operations under seven immigration statutes and DACA are not reviewable under the APA.

Alternatively, Plaintiffs maintain that the seven immigration statutes and DACA are "programs" under 40 C.F.R. § 1508.18(b)(3), which requires the DHS to prepare a PEIS. However, the decision whether a set of agency actions is a "program" for which NEPA analysis is required is left to the agency's discretion. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). A court cannot order an agency under the APA to perform a discretionary act. *Norton*, 542 U.S. at 63-64. A court can only compel a legally required, non-discretionary act. *Id.* Judicial review of DHS' determination not to conduct a PEIS is therefore not appropriate. Defendant's motion is therefore granted at to Court II.

C. Leave to Amend

Finally, the Court considers whether Plaintiffs should be granted leave to amend Counts I and II. *See Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016). Rule 15 advises leave to amend shall be freely given

when justice so requires. Fed. R. Civ. P. 15(a)(2). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and citation omitted).

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. – the leave sought should, as the rules require, be freely given.

Foman v. Davis, 371 U.S. 178, 182 (1962). Dismissal without leave to amend is not appropriate unless it is clear the complaint cannot be saved by amendment. *See id.* Because amendment of Claims I and II would be futile, leave to amend is denied.

III. CONCLUSION

Defendant's motion for partial dismissal is granted. Counts I and II are dismissed without leave to amend.

IT IS SO ORDERED.

Dated: September 30, 2018

/s/
Hon. M. James Lorenz
United States District Judge

APPENDIX C

Excerpts from Defendant's Memo of Points and Authorities for Cross Motion for Summary Judgment, Filed May 24, 2019

* * *

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(9th Cir. 1996) (holding challenge to categorical exclusion barred by statute of limitations).

B. CATEX A3 is Not Arbitrary or Capricious

Should the Court conclude that Plaintiffs' facial challenge to CATEX 3 is justiciable, the record demonstrates the category was properly developed consistent with the applicable law and following CEQ and DHS procedures.

In order to establish a Categorical Exclusion, the CEQ requires that an agency: (1) publish the proposed category in the Federal Register, (2) provide an opportunity for public comment on the proposal, and (3) submit the proposed CE to CEQ for review and approval. 40 C.F.R § 1507.3(a). Here DHS properly followed the CEQ regulations when it established CATEX A3.

The proposed Categorical Exclusion was published in the Federal Register for public comment

in 2004. 69 Fed. Reg. 33,043. The category was approved by the CEQ in March 2006. *See* Letter from Connaughton to Chertoff (March 23, 2006). DHS published its NEPA regulations in final form in April 2006. 71 Fed. Reg. 16790 (Apr. 4, 2006). In 2014 DHS published draft revised NEPA regulations, which retained CATEX A3, for public comment. *See* DIR00001. These regulations were approved by CEQ, DIR00291, and published in final from in November 2014. DIR00288.

As demonstrated below, Plaintiffs' critiques of CATEX A3 – that it is improperly broad, didn't comply with NEPA scoping requirements, and violates DHS's own NEPA procedures – are all unavailing.

1. CATEX A3 is Properly Defined

Plaintiffs first contend that CATEX A3 is contrary to CEQ regulations requiring that Categorical Exclusions include "[s]pecific criteria for and identification of those typical classes of action" which normally do not require preparation of an EIS or an EA. Pl. Br. at 9; *see also* 40 C.F.R. § 1507.3(b)(2)(iii).

* * *

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environment.'" Pl. Br. at 11. This argument is a strawman. CATEX A3 establishes a general category for types of rules and interpretations that do not have significant environmental effects. The category itself is not related to immigration, and it can be used by any

DHS component for any qualifying rule. *See* DIR00309 (noting procedures apply to all components of DHS). Nowhere does DHS assert that the category is intended to encompass all immigration related activities; DHS will determine and conduct the appropriate level of NEPA analysis for its actions at the time they are proposed.[9] *See* DIR00293 (noting NEPA procedures apply to DHS "programs, projects, and other activities"). Because CATEX A3 does not purport to cover "all of DHS'[s] immigration-related actions," Pl. Br. at 11, there was no need for DHS to establish a record that any and all immigration-related actions have no potential to impact the environment.

Contrary to Plaintiffs' assertions, CATEX A3 is well-supported by the record. DHS's 2006 NEPA procedures, including CATEX A3, where developed over a year-long process by a panel of experts. *See* 69 Fed. Reg. 33,043. In particular, the panel developed CATEX A3 through comparison to long-standing categories used by multiple other agencies, a process explicitly recommended by the CEQ. *See* Admin. R. for Categorical Exclusions;[10] 71 Fed. Reg. 16,790, 16791 (Apr. 4, 2006) ("The CATEXs were developed on the

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[9] For example, in this case, DHS prepared a programmatic EA and Supplemental EA to analyze the environmental effects of adding infrastructure to address the 26 influx of children and families along the southwestern border.

[10] https :/ /www.dhs.gov/sites/ default/files/publications/Mgmt NEPA AdminRecdetai 28 ledCATEXsupport 0.pdf