No. 21-1839

United States Court of Appeals
for the
Fourth Circuit

WILD VIRGINIA, ET AL.,

Plaintiffs-Appellants,

– v. –

COUNCIL ON ENVIRONMENTAL QUALITY, ET AL.,

Defendants-Appellees,

AMERICAN FARM BUREAU FEDERATION, ET AL.,

Intervenors-Defendants-Appellees,

On appeal from the
United States District Court for the Western District of Virginia
Case No. 3:20-cv-0045-JPJ-PMS

ANSWERING BRIEF FOR INTERVENORS-APPELLEES THE AMERICAN FARM BUREAU FEDERATION, THE AMERICAN PETROLEUM INSTITUTE, THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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CORPORATE DISCLOSURE STATEMENT

Intervenor-defendants-appellees before this Court are the American Farm Bureau Federation, the American Petroleum Institute, the American Road & Transportation Builders Association, and the Chamber of Commerce of the United States of America. Each is a membership-based trade association. None issues stock or has any parent corporation. None is pursuing the claims of any particular member in a representative capacity, or aware of any publicly-traded member company whose stock or equity value could be affected substantially by the outcome of the proceeding, or aware of any other publicly-traded company that otherwise has a direct financial interest in the outcome of the litigation.

/s/ *Michael B. Kimberly*

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INTRODUCTION

The National Environmental Policy Act (NEPA) was enacted to ensure that federal agencies learn about and consider the environmental impacts of their decisions when those decisions have the potential to significantly affect the environment. The Council on Environmental Quality (CEQ)—established by NEPA to supervise the statute's implementation by federal agencies—promulgated its original regulations implementing the statute in 1978. Prior to the rulemaking at issue here, those regulations had become stale, scarcely having been touched in 42 years. Their definitions of key terms were, to put it charitably, out of step with contemporary methods of statutory interpretation; indeed, some were flatly inconsistent with intervening Supreme Court decisions construing NEPA.

Equally bad, the 1978 regulations had become a tool to obstruct rather than inform. Groups opposed to the use and development of land and natural resources had learned to exploit the regulations' vague and overinclusive definitions, bringing endless lawsuits. These in turn encouraged boundless bureaucratic analyses designed solely to stave off further legal challenges rather than to inform agency decisionmaking. The result has been grossly drawn-out, impractical, and costly environmental reviews—many lasting longer than a decade.

Simply put, the 1978 regulations were no longer serving NEPA's purpose. CEQ thus set out in 2018 to update and streamline its outmoded NEPA regulations. It took and responded to two rounds of comments from the public, held

public hearings and consultations, and carefully considered the interests of stakeholders and its duties under the statutory text and judicial precedent. Its efforts culminated in a final regulation (the 2020 Rule or Rule) that took effect on September 14, 2020.

Appellants here (plaintiffs below) preferred the old regulations and thus challenged the Rule. But like many NEPA reviews themselves, their filings were long on words and short on relevant substance. Their 10-count complaint comprised more than 650 paragraphs, spanning over 180 pages. It was followed by a 108-page motion for a preliminary injunction, to which appellants attached 60 exhibits totaling more than 600 additional pages. Yet appellants failed in all those pages to demonstrate a single practical or concrete injury that they will suffer as a result of the 2020 Rule; they offered only vague worries about possible future events, reflecting unsupported speculation.

The district court was right to dismiss the complaint for lack of standing and ripeness. An APA plaintiff, like any other, must come forward with evidence of at least an imminent injury arising from the challenged action. That standard is easily met when the challenged rule affirmatively requires or forbids the plaintiff to do something. But neither NEPA nor the Rule requires appellants to do, or proscribes them from doing, a single thing. All appellants offer instead is surmise concerning the effects of the Rule's implementation on later NEPA reviews, together with "informational injury." Article III demands more.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court was correct to dismiss for lack of standing in light of the speculative and generalized nature of appellants' alleged injuries.

2. Whether the district court was correct to dismiss for lack of ripeness in light of appellants' failure to identify a pending agency action that will directly affect the concrete interests of appellants or their members.

STATEMENT OF FACTS

A. Statutory and regulatory background

Congress enacted NEPA to "create and maintain conditions under which man and nature can exist in productive harmony," while "fulfill[ing] the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. 4331(a). At the core of this effort is a requirement that, for all "major Federal actions significantly affecting the quality of the human environment," federal agencies prepare "a detailed statement" on "the environmental impact of the proposed action," including alternatives and adverse environmental effects. 42 U.S.C. 4332(2)(C).

"NEPA itself does not mandate particular results, but simply prescribes the necessary process" that agencies must follow when they propose major federal actions that may impact the environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained

by NEPA from deciding that other values outweigh the environmental costs." *Id.* Nor does NEPA regulate the primary conduct of private parties, as do other environmental laws like the Clean Water Act, the Clean Air Act, or the Endangered Species Act. *See Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). As a procedural statute, it has a direct impact only on the agencies undertaking the NEPA reviews and the entities applying for the federal action under review, such as permit approvals or the like.

NEPA is silent concerning the details of how environmental reviews are to be undertaken. Congress thus established CEQ to oversee federal agencies' compliance with the statute. 42 U.S.C. 4342, 4344. In 1977, President Carter issued Executive Order 11,991, directing CEQ "to make the [NEPA] process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives." 42 Fed. Reg. 26,967, 26,967 (May 24, 1977). It also directed federal agencies to "comply with the regulations issued by [CEQ]." *Id.* at 26,968.

B. The 1978 regulations

In 1978, CEQ promulgated the regulations that first established the overarching structure for NEPA reviews, which remains in effect to this day.

1. As a starting point, NEPA calls for review of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).

In addition to establishing a broad framework for those reviews, the 1978 regulations defined the key terms within that phrase.

"Federal actions" are those potentially subject to federal control and responsibility, including "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. 1508.18(a) (2018). Issuances of federal permits for private development projects or approvals of projects involving federal lands or funds typically are "Federal" actions.

The 1978 regulations defined the word "major" to mean any federal action that is determined to "significantly" affect the environment. 40 C.F.R. 1508.18 (2018). That is, under the 1978 regulations the word "[m]ajor reinforces but does not have a meaning independent of" the concept of an action "significantly" affecting the environment. *Id.*

The 1978 regulations defined "effects" and "impacts" to include "aesthetic, historic, cultural, economic, social, or health" effects, "whether direct, indirect, or cumulative." 40 C.F.R. 1508.8(b) (2018). "Indirect effects" were any effects that were "reasonably foreseeable" (*id.* 1508.8) regardless of directness, and "[c]umulative impact" was defined to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of" who undertakes them (*id.* 1508.7).

Under both the 1978 regulations and the 2020 Rule, the significance of a project's impact depends on the determined "scope" of the project. The 1978 regulations thus provided for a "scoping" process "for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action," but called for the scoping process to begin only after significant analyses had already been undertaken. 40 C.F.R. 1501.7 (2018). The 1978 regulations directed agencies to consider within the scope of every review the environmental effect of "connected" actions that are (1) automatically triggered by the action under review, (2) prerequisites to the action under review, or (3) "interdependent parts of a larger action and depend on the larger action for their justification." *Id.* 1508.25(a)(1).

2. NEPA's review process itself comprises three stages. First, an agency must consider whether the federal action is of the type that can have a significant environmental impact. On that front, CEQ has determined that several kinds of federal actions *categorically* have no significant environmental impacts. 40 C.F.R. 1508.4 (2018); 40 C.F.R. 1501.4 (2020). Individual agencies may identify additional "categorical exclusions." 40 C.F.R. 1507.3 (2018); 40 C.F.R. 1501.4(a) (2020). For projects not covered by a categorical exclusion, the agency must conduct an environmental assessment (EA) to determine whether the anticipated environmental impacts will be "significant." 40 C.F.R. 1508.9 (2018); 40 C.F.R. 1501.5(a) (2020). An EA includes a written description of the environmental

impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

If the agency concludes in the EA that a proposed action will *not* have a significant impact on the environment, it issues a so-called "finding of no significant impact" and need not prepare a more thorough environmental impact statement (EIS). 40 C.F.R. 1501.4(e), 1508.13 (2018); 40 C.F.R. 1501.6(a) (2020). The agency must briefly explain why it determined that the project will not have a significant impact. *Id.*

If, on the other hand, an agency determines in an EA that the impacts of a "major federal action[]" *will* or *may* be "significant[]," it must prepare an EIS. 42 U.S.C. 4332(2)(C); 40 C.F.R. 1501.4(e) (2018); 40 C.F.R. 1502.3 (2020). To prepare an EIS, the agency must publish a notice of intent in the Federal Register, which tips off a 45-day public comment period. 40 C.F.R. 1508.22 (2018); 40 C.F.R. 1501.9(d) (2020). The agency must then prepare a statement detailing how the project will affect the environment, addressing comments from the public, and listing alternatives to the proposed action and explaining why they were not taken. *See* 40 C.F.R. 1502.14-.16, 1502.19 (2018); 40 C.F.R. 1502.10-17 (2020). The agency must take additional public comment on the draft EIS. 40 C.F.R. 1503.1 (2018); 40 C.F.R. 1502.9(b) (2020). After this second comment period concludes, there is a waiting period before the issuance of a final Record of Decision (ROD). 40 C.F.R. 1505.2 (2018); 40 C.F.R. 1505.2 (2020). This basic structure for NEPA

reviews remains in place under the new Rule.

3. The 1978 regulations' broadly inclusive definitions and the statute's strict procedural requirements created the perfect conditions for confusion and abuse. The breadth of the definitions (especially "effects" and "impacts") meant that NEPA reviews required sprawling analyses, creating significant litigation risks that threatened the viability of development projects requiring federal approval. Displeased advocacy groups regularly filed lawsuits alleging noncompliance with vaguely defined statutory terms, holding up the process in courts and often necessitating agencies starting from scratch. These risks were exacerbated by yet further uncertainties introduced by inconsistent judicial interpretations of NEPA's key terms and requirements. The net result was delays often so extreme as to make projects economically infeasible and a strong disincentive for developers to seek federal funding in the first place.

Agencies in turn sought to mitigate the increased litigation risk by devoting more and more resources to their NEPA processes to make them less susceptible to legal challenges. When CEQ's regulations were first promulgated more than 40 years ago, they stated that EISs normally should be less than 150 pages, with a maximum length of 300 pages for proposals of "unusual scope or complexity." 40 C.F.R. 1502.7 (2018). Today, compliance with those limits is aspirational at best. In the years leading up to the 2020 Rule, the average length for a final EIS had grown to over 650 pages, and a quarter of all EISs exceeded 750 pages; appendices

added an additional 1,000 pages on average. *See* 85 Fed. Reg. 43,305, 43,305 (July 16, 2020); Length of Environmental Impact Statements (2013-2018) at 3 (AR 1135) (JA___). Similarly, CEQ originally stated that the completion of an EIS should take no longer than one year; in reality, the average time now approaches five years. *Id.*; *accord* GAO, *National Environmental Policy Act*, GAO-14-370, at 14 (April 2014), perma.cc/9UTJ-3C4N; *see, e.g.*, *Friends of Capital Crescent Trail v. U.S. Army Corps of Engineers*, 453 F. Supp. 3d 804, 809-810 (D. Md. 2020) (discussing the 14-year NEPA review process for Maryland and D.C.'s Purple-Line project). Such excessive documentation and delays were not conducive to meaningful public engagement.

More fundamentally, agencies undertaking NEPA reviews had, in recent years, gathered and analyzed boundless amounts of data and evidence concerning distantly indirect effects for use in analyses that have often been irrelevant to their decisionmaking processes—all to minimize the risk that a court would later find the record insufficient. Along the way, regulated entities were required to produce redundant documents to multiple agencies participating in a largely uncoordinated process while their projects languished. But this vast over-inclusion and repetition was not, in fact, reducing the risk of litigation, which persisted in the face of unclear and inconsistent regulatory and judicial interpretations of terms. *See, e.g.*, *Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1066 (D.C. Cir. 2017) (district court had declared an agency's NEPA decision issued after *ten years* of in-

vestigation to be insufficient).

The exponential growth of resources, both federal and private, committed to NEPA reviews can be traced directly to the 1978 regulation's definitions. Prior to the 2020 Rule, the overbroad definitions of effects and impacts, in particular, had invited the unproductive commitment of private and public resources to deciding how to categorize effects (as either direct, indirect, or cumulative), given the different standards that applied to each category. *See* 85 Fed. Reg. at 43,343. This practice led to rigidly compartmentalized analyses, rather than substantive evaluations of effects as a whole. *Id.*

C. CEQ's new 2020 Rule

Recognizing the unsustainability of runaway NEPA reviews, CEQ published an advanced notice of proposed rulemaking on June 20, 2018 (83 Fed. Reg. 28,591) and a notice of proposed rulemaking on January 10, 2020 (85 Fed. Reg. 1,684), proposing to "modernize and clarify the CEQ regulations" and "to facilitate more efficient, effective, and timely NEPA reviews" by "simplifying regulatory requirements, codifying certain guidance and case law relevant to these proposed regulations, revising the regulations to reflect current technologies and agency practices, [and] eliminating obsolete provisions." *See* 85 Fed. Reg. at 1,685. CEQ received roughly 8,000 unique comments on the notice alone.

CEQ published the final Rule on July 16, 2020, and it became effective September 14, 2020. The Rule clarifies and simplifies the agency's regulations in nu-

merous respects and brings the definitions of key terms and concepts into line with intervening judicial precedent. The key provisions of the 2020 Rule include:

Clarifying when NEPA review is required. Despite NEPA's requirement that agencies review "major federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)), CEQ's 1978 regulations explicitly rendered the word "major" superfluous. The 2020 Rule restores independent meaning to the word "major" by clarifying that it refers to the "type of action, including the role of the Federal agency and its control over any environmental impacts," rather than to the extent of the environmental impacts of a project (which is addressed by the word "significant"). *See* 85 Fed. Reg. at 43,345. Under the 2020 Rule, in order to qualify as a major federal action, the activity under review must be "subject to Federal control and responsibility." *Id.* at 43,375 (new 40 C.F.R. 508.1(q)). Thus, for example, the Rule clarifies that NEPA does not apply to "[l]oans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance," such as "farm ownership and operating loan guarantees by the [USDA] Farm Service Agency" or "business loan guarantees by the Small Business Administration." *Id.*

Clarifying which environmental "effects" must be considered. Under the 1978 regulations, the process for identifying an action's effects was highly complex. Those regulations directed agencies to analyze all "direct, indirect, or cumulative"

impacts. 40 C.F.R. 1508.8 (2018) (parenthetical omitted). Under this approach, agencies spent considerable effort just classifying potential environmental effects according to the direct-indirect-cumulative trichotomy and analyzing potential effects whose causal connection to the proposed action would be remote at best.

The 2020 Rule replaces this framework with simple proximate cause, which has long been required by the Supreme Court. The Rule thus defines "effects" as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." 85 Fed. Reg. at 43,375 (new 40 C.F.R. 1508.1(g)). Drawing word-for-word from *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Rule clarifies that "[a] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA" and that "[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action." 85 Fed. Reg. at 43,375.

The Rule also clarifies how agencies are to determine when effects are "significant" within the meaning of NEPA. It removes a provision of the 1978 regulations that required consideration of whether the effects of a project would be "highly controversial." 40 C.F.R. 1508.27(b)(4) (2018). This provision had become, in effect, a heckler's veto allowing opponents of a project to prevent an agency from issuing a finding of no significant impact. But as the 2020 Rule

explains, "the extent to which effects may be controversial is subjective and is not dispositive of effects' significance." 85 Fed. Reg. at 43,323.

Defining the range of reasonable alternatives. An EIS must analyze "alternatives to the proposed action" (42 U.S.C. 4332(2)(C)(iii)), which the 1978 regulations interpreted to mean "*all* reasonable alternatives" (40 C.F.R. 1502.14 (2018) (emphasis added)). CEQ guidance, however, had long advised that agencies do not need to analyze every conceivable reasonable alternative, and that "[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

The 2020 Rule clarifies this standard by specifying that an agency must analyze only "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." 85 Fed. Reg. at 43,376 (new 40 C.F.R. 1508.1(z)). The Rule also clarifies that an agency need not consider alternatives that are outside the agency's jurisdiction and thus beyond its power to implement, except when considering these alternatives is "necessary for the agency's decision-making process." *Id.* at 43,330.

Setting length and scheduling guidelines for reviews. Finally, the 2020 Rule sets default page and time limits for EISs and EAs to encourage agencies to prepare

and finalize these documents expeditiously and to present them in a format helpful to agency decisionmakers. The 1978 regulations state that EISs should "normally" be no longer than 150 pages, or 300 pages in the case of proposals of unusual scope or complexity (40 C.F.R. 1502.7 (2018)); the 2020 Rule makes this aspirational page limit a default requirement that can be exceeded only with a senior agency official's approval (85 Fed. Reg. at 43,364 (new 40 C.F.R. 1502.7)). The Rule also sets a default page limit of 75 pages for EAs. *Id.* at 43,360 (new 40 C.F.R. 1501.5(f)). And with respect to timing, the Rule directs agencies to complete EAs within one year and EISs within two years—again allowing these time limits to be exceeded with a senior agency official's approval. *Id.* at 43,362-43,363 (new 40 C.F.R. 1501.10).

D. Litigation below and further developments

Appellants, a group of seventeen environmental organizations, filed this action in July 2020, alleging that the 2020 Rule violates the APA. Dkt. 1. Weeks after filing their complaint, plaintiffs moved for a preliminary injunction. Dkt. 30. CEQ and the intervenor-defendants cross-moved to dismiss. Dkts. 52, 56.[1] The district court denied both preliminary relief and the motions to dismiss. Dkt. 92.

[1] The district court granted leave to intervene as defendants to a group of nine national trade associations. Dkt. 72. Four have joined in defense of this appeal: the American Farm Bureau Federation, the American Petroleum Institute, the American Road & Transportation Builders Association, and the Chamber of Commerce of the United States of America.

Following completion of the briefing on cross-motions for summary judgment, the district court dismissed for lack of jurisdiction. Dkt. 155, at 1 (JA__). The court held that the claims were not ripe because they were more appropriately brought in as-applied challenges once the 2020 Rule's new standards were actually applied. *Id.* at 21-29 (JA__-__). The court also found that appellants lacked standing to bring this facial challenge, because their purported injuries were too speculative and remote, untethered from their concrete interests. *Id.* at 29-41 (JA__-__).

While this appeal was pending, CEQ announced that it was "engaged in a comprehensive review of the 2020 NEPA Regulations to ensure that they provide for sound and efficient environmental review of Federal actions." 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021); *see* CEQ Br. 8-10.

SUMMARY OF THE ARGUMENT

Because Appellants cannot demonstrate standing to bring a facial challenge, and because their claims are not yet ripe for judicial review, the district court was correct to dismiss for want of jurisdiction.

A. 1. Standing, including organizational and associational standing, is a highly fact-specific inquiry. Here, appellants rely on generalized concerns about potential future environmental harm that may or may not occur. Appellants' allegations of environmental injury fall distantly short of the mark to establish standing. Moreover, unlike a typical APA case, this case involves a procedural rule im-

plementing a procedural statute without demonstrable consequences for appellants or their members, even further underscoring their failure to establish standing. NEPA does not dictate substantive outcomes. Nor does the 2020 Rule govern appellants' primary conduct. In such circumstances, appellants' purported harms require the Court to guess whether, when, and how the 2020 Rule will be applied by independent decisionmakers, and then guess again as to how that hypothetical application will affect the environment. Such speculative harms, lying at the end of a "highly attenuated chain of possibilities," do not support Article III standing. *South Carolina v. United States*, 912 F.3d 720, 727 (4th Cir. 2019).

2. Nor can appellants demonstrate standing through their allegations of informational harms. This case does not involve information to which appellants are statutorily entitled, as might be the case under the Freedom of Information Act. Instead, appellants allege that the 2020 Rule harms them because the government will no longer create the information that it would like. Even if that sort of theory were cognizable, appellants cannot meet the requirements of informational standing without identifying an actual instance in which they were (or imminently will be) denied information. Allegations that the 2020 Rule denies or diminishes appellants' opportunities to participate in notice and comment proceedings, or that the rule harms their organizational missions, are likewise insufficient.

B. Appellants' claims are unripe for similar reasons. In the context of a purely procedural regulation like the 2020 Rule—one that does not require appel-

lants to do or refrain from doing anything—ripeness requires an actual or imminent application that causes or threatens harm. Until then, appellants' claims are impermissibly speculative and the harms are too attenuated to permit review. And a dismissal on ripeness grounds here will not leave appellants without an opportunity for review—they still can bring traditional challenges to NEPA reviews in which the 2020 Rule is applied in a concrete manner.

ARGUMENT

"[F]ew, if any, precepts are more fundamental than that 'federal courts are courts of limited jurisdiction,' constrained to exercise only the authority . . . conferred by Article III of the Constitution." *B.R. v. F.C.S.B.*, 17 F.4th 485, 492 (4th Cir. 2021) (quoting *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998)). Article III's limit on federal-court jurisdiction finds expression in several doctrines, two of which compelled dismissal of appellants' complaint below. First, it requires that plaintiffs demonstrate standing with a concrete, imminent, non-speculative injury in fact. *Id.* Second, it requires a plaintiff's claim to be "ripe" for determination—meaning that the "controversy is presented in 'clean-cut and concrete form.'" *Miller v. Brown*, 462 F.3d 312, 318-19 (4th Cir. 2006) (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947)).

The district court held that appellants here failed to meet both requirements. That decision should be affirmed.

I. APPELLANTS LACK STANDING TO CHALLENGE THE 2020 RULE

"The standing doctrine is an indispensable expression" of Article III's limitation of the jurisdiction of federal courts to "Cases" and "Controversies." *Frank Krasner Enterprises v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005). Appellants thus "bear[] the burden of establishing standing to assert each of [their] claims." *South Carolina*, 912 F.3d at 726.

For each claim, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *South Carolina*, 912 F.3d at 726 (quoting *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180-81 (2000)). In particular, standing requires a "realistic danger of sustaining a direct injury." *Id.* (quoting *Peterson v. National Telecommunications & Information Administration*, 478 F.3d 626, 632 (4th Cir. 2007)). "While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute an injury-in-fact." *Id.* (cleaned up) (quoting *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017)). Indeed, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and . . . '*possible* future injury' [is] not sufficient." *Clapper v. Amnesty International USA*, 568 U.S. 298, 409 (2013) (quoting *Whitmore v. Ar-*

kansas, 495 U.S. 149, 158 (1990)). "The requirement that an alleged injury be palpable and imminent ensures that the injury 'is not too speculative for Article III purposes.'" *South Carolina*, 912 F.3d at 726 (quoting *Beck*, 848 F.3d at 271).

None of appellants' various theories of injury amounts to "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

A. Appellants have not shown environmental injury

Appellants first assert (Opening Br. 24) that they have standing because the 2020 Rule "substantially heighten[s] the risk of harm to the places and resources [they] care about." That assertion is unsupported and insupportable.

1. The 2020 Rule "neither require[s] nor forbid[s] any action on the part of [appellants]." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). Instead, both NEPA and the 2020 Rule merely prescribe the manner in which federal agencies must consider environmental effects of their projects. *See* 42 U.S.C. 4223(2)(C); 85 Fed. Reg. at 43,406. In a situation like this, appellants "can demonstrate standing only if application of the regulations by the Government will affect *them*," directly. *Summers*, 555 U.S. at 494.

Appellants attempt but fail to meet this requirement because they rely on generalized concerns rather than specific harm. They cite Andrew Young's concern about the effect of the 2020 Rule on the Greenbrier Southeast project in West Virginia. Opening Br. 25 (citing Yong Decl. ¶¶ 14-17, ECF 30-16). But, as the relevant

agency has recently made clear, its finding of no significant impact was based on "environmental analysis . . . conducted according to the . . . 1978 regulations." Monongahela National Forest, *Greenbrier Southeast Project: Draft Decision Notice and Finding of No Significant Impact*, U.S. Department of Agriculture 6 (Nov. 2021), perma.cc/NEA3-XYR7. This is not a case where the 2020 Rule did make or even could have made a difference.

Elizabeth Kolsteny (Opening Br. 25) similarly expresses only a general concern that the 2020 Rule will mean less environmentally friendly decisionmaking, without identifying any specific projects that could be affected. Appellants cite only Ms. Kolsteny's reference to a project in which an agency determined under the 1978 regulations that an EIS was not required and a project in which a court has already ordered the agency to prepare an EIS. Kolsteny Decl. ¶¶ 14-17, ECF 30-41 (JA___). And the declarations cited in appellants' statement (Opening Br. 10-11), concerning "robust consideration of alternatives" and agencies' anticipated refusal "to gather relevant information," resulting in "poorer decisions," are equally speculative and generalized—they rely on unsubstantiated worry, but nothing more.

At best, the cited declarations "relate[] to past injury rather than imminent future injury," and they are "not tied to application of the challenged regulations." *Summers*, 555 U.S. 495. Such claims cannot support standing in a facial challenge such as this. *Id.* Nowhere do appellants point to any actual, pending federal ac-

tions, the outcomes of which would change under the 2020 Rule. It bears emphasis that appellants are thus in a very different position than a company with development plans requiring NEPA review seeking to challenge the 2020 Rule because of its direct impact on the company's operations. Although NEPA does not directly regulate such a company, the company nonetheless could establish standing in a facial APA challenge by showing that changes to a CEQ regulation will create concrete additional costs or project delays. *E.g.*, *Town of Stratford v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002). In such a case, the 2020 Rule *itself* would adversely affect the company. *Summers*, 555 U.S. at 494.

CEQ advocates for a narrower rule, asserting that a "a plaintiff must demonstrate that a particular project will impede his or her specific and concrete interests" exclusively "by showing that a project is about to happen in a way that harms the plaintiff's interests." CEQ Br. 31 (quotation marks omitted). From there, it reasons that—because NEPA does not regulate private conduct or provide specially for pre-enforcement review—all prospective plaintiffs must wait for agencies to apply CEQ's regulations to specific projects before challenging the regulations. CEQ Br. 14-15.

That theory has traction with respect to appellants' asserted environmental harm. But it does not speak to cases in which a project developer would be harmed by an agency's application of a CEQ regulation itself, irrespective of the outcome of a particular NEPA review or underlying agency decision. Such a case may arise,

for example, when a project developer alleges that a NEPA regulation will harm it by making the NEPA review process itself more burdensome, costly, or time-consuming. There, the plaintiff would not "have to await the consummation of threatened injury to obtain preventive relief." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (quoting *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979)). Instead, review would be available so long as the plaintiff could show "some concrete action applying the regulation to the claimant's situation in a fashion that . . . threatens to harm him" in a concrete and identifiable way. *Lujan*, 497 U.S. at 891; *see, e.g.*, *Town of Stratford*, 285 F.3d at 88 (holding that a town demonstrated an injury in fact in a NEPA challenge because "its developmental prospects were clearly impaired"). The Court need not opine on these other scenarios; but in light of these differences, it should be cautious not to prejudge the standing question outside of the limited factual circumstances presented here.

2. Appellants' remaining arguments in support of asserted environmental harms are unavailing. Their asserted harms "lie[] at the end of a 'highly attenuated chain of possibilities.'" *South Carolina*, 912 F.3d at 727 (quoting *Clapper*, 568 U.S. at 410). As we have noted, NEPA is a procedural statute that does not dictate substantive outcomes. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The 2020 Rule clarifies the proper scope of NEPA reviews, facilitates coordination for reviews involving more than one agency, and identifies pre-

sumptive page and time limits for reviews. None of that has any direct effect *on the environment*. To say otherwise is to speculate that in some unknown future federal action, an unknown agency will make an unknown choice about a project that it would otherwise not have made if it only had considered some unknown datum that it failed to consider because of the changes in the 2020 Rule. That is precisely the kind of "attenuated chain" of possibilities that this Court and the Supreme Court have held, time and again, cannot support standing.

The D.C. Circuit's decision in *National Wildlife Federation v. Hodel*, 839 F.2d 694 (1988) is inapposite for just that reason. There, the court considered regulations addressing the *substantive* "minimum national environmental standards" under the Surface Mining Control and Reclamation Act of 1977. *Id.* at 706. The regulations in *Hodel* thus directly altered the range of options available to agencies by authorizing them to take less environmentally protective options. That is unlike the 2020 Rule, which simply alters the process for NEPA reviews, which do not constrain or dictate substantive outcomes.

At bottom, appellants' theory of standing would require the Court to guess as to what federal projects will be proposed, how agencies will apply the 2020 Rule to those projects (compared with how those agencies would have applied the 1978 regulations to those projects), and how any difference in procedure would affect the substantive outcome of agency decisionmaking. Theories of standing like this,

"requir[ing] guesswork as to how independent decisionmakers will exercise their judgment," are insufficient for Article III. *Clapper*, 568 U.S. 413.

B. Informational injuries do not confer standing

Unable to rely on a concrete or imminent environmental harm, appellants turn to "informational injury," where they fare no better. A plaintiff suffers an informational injury when (1) "he is denied access to information required to be disclosed by statute;" (2) "and he 'suffers by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.'" *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 345-346 (4th Cir. 2017) (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Appellants' alleged informational injuries are every bit as generalized and speculative as their environmental harm theory, so they cannot meet this standard either.

1. For starters, this case is not about a past denial of information; appellants have not "sought and [been] denied access to" information that any agency was required by statute to disclose. *Doe v. Public Citizen*, 749 F.3d 246, 264 (4th Cir. 2014). Rather, their informational injury argument turns on their worry that unidentified agencies will withhold unidentified information at unidentified times in the future. Again, that sort of speculation is not sufficient to satisfy Article III's standing requirement under any theory. *See Beck*, 848 F.3d at 274.

2. In addition, appellants do not (and cannot) argue that NEPA creates a legal obligation for the government to generate and provide the information they

prefer and fear will be excluded. *See* Opening Br. 28-29. To be sure, one of NEPA's purposes is to ensure "that [an] agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process" (*Baltimore Gas*, 462 U.S. at 97), which "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision" (*Robertson*, 490 U.S. at 349). But any informational benefits to the public are only incidental to NEPA's primary mandate for informed decisionmaking; they do not satisfy the first part of the informational injury test.

It bears emphasis on this score that appellants' claim is not that agencies conducting NEPA reviews will not disclose information to which appellants are entitled, but instead that agencies will not create or commission information appellants would like to receive based on their own purposes and missions. The problem is that such an injury "exists day in and day out, whenever federal agencies are not creating information a member of the public would like to have." *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991). "If such injury alone were sufficient, a prospective plaintiff could bestow standing upon itself in every case." *Id.* That is not the law. "If one of NEPA's purposes is to provide information to the public, any member of the public—anywhere—would seem to be entitled to receive it." *Id.* But the Supreme Court has refused to recognize informational standing when the asserted informational injury is

"generalized" and "plainly undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)). That is this case.

3. Beyond that, the purpose of information-disclosure under NEPA is to foster public participation in the statute's notice-and-comment processes. *E.g.*, 40 C.F.R. 1503.1, 1503.4, 1508.22; *accord Robertson*, 490 U.S. at 349. Appellants contend that the 2020 Rule will harm them by reducing the amount of information that agencies generate—but that is only relevant because it will supposedly hamper their ability to participate in agency oversight and decisionmaking. Opening Br. 29-31. It is well established, however, that "mere inability to comment effectively or fully, in and of itself, does not establish an actual injury." *International Brotherhood of Teamsters v. TSA*, 429 F.3d 1130, 1135 (D.C. Cir. 2005) (quoting *United States v. AVX Corp.*, 962 F.2d 108, 119 (1st Cir. 1992)). Instead, "to establish standing based on [their] inability to comment," appellants must show that "at least one of [their] members is 'suffering immediate or threatened injury as a result of the challenged action.'" *Id.* In other words, appellants would have to identify a pending federal action that threatens them or their members because of the 2020 Rule—which, again, they have failed to do.

4. Finally, appellants assert that they have "begun to shift organizational resources to address the Rule's curtailment of access to information." Opening Br. 32. But they "cannot manufacture standing" by spending money to guard against

hypothetical reductions in available information. *Clapper*, 568 U.S. at 402.

At bottom, informational injury is a poor fit for appellants' claims. Courts have been hesitant to allow standing in NEPA cases "solely on the basis of 'informational injury.'" *Foundation on Economic Trends*, 943 F.2d at 84. That hesitation is doubly warranted here, where appellants' claim is not denial of information in *this* rulemaking, but rather worry about hypothetical informational injuries in *future* NEPA reviews, caused not by a failure to disclose but by a failure to create information to begin with. That is not the stuff of Article III injury.

II. APPELLANTS' CHALLENGES TO THE 2020 RULE ARE NOT RIPE

For reasons that substantially overlap with those demonstrating their lack of standing, appellants' claims are not ripe, either. *See South Carolina*, 912 F.3d at 730 (noting that "in practice there is an obvious overlap between" standing and ripeness). The question of ripeness "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission*, 461 U.S. 190, 201 (1983) (quoting *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

Not all final agency actions are immediately ripe for review. In *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162 (1967), for example, the Court considered a challenge to regulations formally published by an agency after notice and comment. Despite that the claims challenged "final agency action" and presented

"the type of legal issue that courts have occasionally dealt with without requiring a specific attempt at enforcement," the Court held that the factors "which support the appropriateness of judicial resolution are . . . outweighed by other considerations." *Id.* at 162-63. Specifically, the claims in *Toilet Goods* would have required the Court to speculate about "whether or when" the rule would be applied—the regulation there stated that the "the Commissioner may under certain circumstances order inspection of certain facilities and data." *Id.* at 163. But as a matter of prospective review, the Court could "have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." *Id.* Uncertainty about the regulation's application meant that "judicial appraisal . . . [was] likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." *Id.* at 164; *accord South Carolina*, 912 F.3d at 730-31 (holding that "future uncertainties" surrounding injuries at the end of a "highly attenuated chain of possibilities" rendered claims unripe).

Similarly, in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998), the Supreme Court considered challenges to a Forest Service plan that set a ceiling on how much logging could occur without "itself authoriz[ing] the cutting of any trees." *Id.* at 729 (citation omitted). The Court concluded that because several additional procedural steps were required before logging could occur, the conservation groups had "ample opportunity later to bring [their] legal challenge at a time

where harm is more imminent and more certain." *Id.* at 734. The remoteness and contingency of the harms in *Ohio Forestry* "threaten[ed] the kind of abstract disagreements over administrative policies that the ripeness doctrine seeks to avoid." *Id.* at 736.

These concerns illustrate why a regulation that does not require "the plaintiff to adjust his conduct immediately" is not typically ripe "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, 497 U.S. at 891. Thus, the remoteness of appellants' asserted injuries counsels against ripeness and in favor of dismissal. *See South Carolina*, 912 F.3d at 731.

Moreover, given that appellants' asserted injuries cannot occur until the 2020 Rule is applied, appellants will not endure any injury in the meantime. Despite their concern about the "momentum" of the "bureaucratic steamroller" (*Jersey Heights Neighborhood Association v. Glendening*, 174 F.3d 180, 188 (4th Cir. 1999)), courts have had no trouble ordering agencies to comply with NEPA even though the bureaucratic process is underway. *See, e.g.*, *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d 596 (2012) (holding that an agency violated NEPA); *National Audubon Society v. Department of the Navy*, 422 F.3d 174, 181 (2005) (holding "that the Navy's EIS was deficient and thus . . . that the Navy must complete a Supplemental EIS (SEIS) to address its

shortcomings"). Nor does a lack of ripeness here foreclose any chance of review of appellants' asserted harms. Should any of their speculative, hypothetical concerns actually come to pass, they will have a meaningful opportunity to present those concerns in the context of an actual, extant NEPA review in which an agency applies the Rule to agency action.

Appellants thus satisfy neither of the prongs of the ripeness analysis, and the district court was correct to dismiss the complaint.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel for intervenors certifies that this brief:

(i) complies with the type-volume limitation of the Court's November 15, 2021 order because it contains 7,123 words (which, combined with the government's brief, makes for a total of 19,972 words), including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Century Supra in 14 points.

Dated: January 25, 2022 /s/ *Michael B. Kimberly*