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VIA CM/ECF

August 12, 2021

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

RE: *Advanced Integrative Medical Science Institute v. U.S. Drug Enforcement Agency*, No. 21-70544 (9th Cir.)

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j) I write to inform the Court of two recent decisions regarding the meaning of final agency action.

First, in *Southern California Alliance of Publicly Owned Treatment Works v. U.S. EPA*, No. 19-15535 (9th Cir. Aug. 5, 2021), this Court held that guidance issued by EPA was not final agency action because it did not impose legal consequences. *Southern California* Op. 4. The Court explained that application of the test for final agency action must be "based on the concrete consequences an agency action has or does not have." *Id.* at 9 (quoting *California Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019)). While regulated entities could be subject to enforcement actions for violating permits issued under the Clean Water Act, the plaintiffs had failed to demonstrate that the guidance, "standing alone, will cause them to face anything." *Id.* at 12. Rather, "as a bare statement of the agency's opinion," that guidance could be "neither the subject of immediate compliance nor of defiance." *Id.* (quotation marks omitted).

Second, in *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, No. 20-55777 (9th Cir. July 19, 2021), this Court held that an instruction manual implementing the National Environmental Policy Act (NEPA) and related regulations

was not final agency action. The Court explained that the manual did not give rise to any legal consequences because NEPA was "the source of any binding legal obligations." *Whitewater* Op. 18. The manual did not "augment or diminish [any] NEPA obligations" and "[i]n 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." *Id.* at 19.

These cases support the government's arguments (Resp. 21-23) that the letter challenged in this litigation is not final agency action. The letter simply informed the petitioners of pre-existing law, and any consequences that the petitioners would face from dispensing or using psilocybin are imposed by that law, not the letter.

Sincerely,

s/ *Thomas Pulham*
Thomas Pulham
Attorney

cc: all counsel (via CM/ECF)

CERTIFICATE OF COMPLIANCE

I hereby certify that this letter complies with the word limit of Federal Rule of Appellate Procedure 28(j) because the body of the letter contains 338 words.

s/ *Thomas Pulham*
THOMAS PULHAM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED TREATMENT WORKS; CENTRAL VALLEY CLEAN WATER ASSOCIATION; BAY AREA CLEAN WATER AGENCIES, *Plaintiffs-Appellants*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; DEBORAH JORDAN, Acting Regional Administrator, United States Environmental Protection Agency, Region IX, *Defendants-Appellees.*	No. 19-15535 D.C. No. 2:16-cv-02960-MCE-DB OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted June 8, 2020
San Francisco, California

Filed August 5, 2021

Before: Eric D. Miller and Danielle J. Forrest,* Circuit Judges, and Patrick J. Schiltz,** District Judge.

Opinion by Judge Miller

SUMMARY***

Environmental Law

The panel affirmed the district court's dismissal of an action challenging nonbinding guidance that the Environmental Protection Agency issued to recommend a statistical method for assessing water toxicity.

Plaintiffs are trade associations whose members are California municipal agencies that operate wastewater treatment plants. They brought this action alleging that the EPA violated the Administrative Procedure Act ("APA") and the Clean Water Act in issuing the guidance at issue here, which explained how to use a new statistical method called the Test of Significant Toxicity ("TST").

As a threshold matter, the panel held that it could consider both of the district court's dismissal orders where the district court expressly stated in its second dismissal

* Formerly known as Danielle J. Hunsaker.

** The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota, 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.

order that it incorporated the first dismissal order "in its entirety."

The panel held that because the guidance at issue imposed no legal consequences, the APA did not permit this challenge where there was no final agency action. The panel rejected plaintiffs' argument that even if the guidance itself was not final, the EPA's later actions turned it into final agency action. The panel also rejected plaintiffs' contention that if they were unable to challenge the TST in district court, then their challenge could not be heard in any other forum.

COUNSEL

Melissa A. Thorme (argued) and Patrick F. Veasy, Downey Brand LLP, Sacramento, California, for Plaintiffs-Appellants.

John D. Gunter II (argued), Michael C. Gray, and Leslie M. Hill, Attorneys; Eric Grant, Deputy Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

OPINION

MILLER, Circuit Judge:

This case involves a challenge to nonbinding guidance that the Environmental Protection Agency issued to recommend a statistical method for assessing water toxicity. The Administrative Procedure Act allows a plaintiff to challenge only final agency action, and an agency's action is final only if it imposes legal consequences. Because the guidance at issue imposes no such consequences, we conclude that the APA does not permit this challenge, and we affirm the district court's judgment in favor of the agency.

The Clean Water Act prohibits "the discharge of any pollutant by any person" into the waters of the United States without a permit. 33 U.S.C. § 1311(a). Although the EPA may issue discharge permits, the Act also allows it to delegate permitting responsibility to the States. *Id.* § 1342(b). "If [permitting] authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving . . . discharge permits, albeit with continuing EPA oversight." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). State permitting programs must meet minimum requirements set by EPA regulations. 40 C.F.R. §§ 122.44, 123.25(a)(15). The EPA has transferred permitting authority to 47 States, including California. *NPDES State Program Authority*, EPA, https://www.epa.gov/npdes/npdes-state-program-authority (last visited July 28, 2021).

The EPA takes several measures to ensure that any discharge into public waters is safe and nontoxic. Its regulations entirely ban permitholders from discharging

certain pollutants and severely limit discharging others. *See, e.g.*, 40 C.F.R. §§ 129.100–129.105. And the regulations require States to establish similar limitations on the amounts of specific pollutants that permitholders can discharge. *Id.* § 131.11. But even if a discharge complies with the limits on individual pollutants, it might still be toxic because it contains a combination of pollutants, or because it contains substances that federal or state regulators have not yet found to be toxic. To address those possibilities, the EPA also requires certain permitholders to pass a test called a "whole effluent toxicity" (WET) test. *Id.* § 122.44(d)(1)(iv). A WET test measures the aggregate effect of a discharge on aquatic organisms such as minnows by exposing a test population of organisms to a discharge and counting how many die or become immobilized. *See* 60 Fed. Reg. 53,529, 53,532 (Oct. 16, 1995).

Because a WET test does not measure specific levels of pollutants but instead measures toxicity based on the response of aquatic organisms, the regulations must define what is considered toxic in a way that accounts for variations in how different populations of organisms may respond to identical samples. The 1995 regulations incorporated three manuals on WET testing—which in turn included several recommended statistical methods—and noted that any "changes" to the manuals "will be published in the Federal Register prior to their effective date for regulatory purposes." 60 Fed. Reg. at 53,532, 53,540. In 2002, the EPA updated the manuals but declined to "include[] . . . alternative statistical methods"; it noted, however, that the recommended statistical methods "are not the only possible methods of statistical analysis." 67 Fed. Reg. 69,952, 69,964 (Nov. 19, 2002).

The initial WET test regulations aimed to limit false positive results—results that incorrectly state that a sample is toxic—to no more than 5 percent. *See* 67 Fed. Reg. at 69,968. In June 2010, the EPA issued the guidance at issue here, explaining how to use a new statistical method called the Test of Significant Toxicity (TST). Among other things, the TST aims to limit false *negative* results—results that incorrectly state that a sample is nontoxic—by adopting a null hypothesis that a sample is toxic. In other words, the TST presumes that a sample is toxic absent statistically significant evidence to the contrary. The EPA explained that it believed adopting that null hypothesis increases the statistical power of the TST—the likelihood that it will correctly classify samples as toxic or nontoxic—compared to the methods authorized by the 1995 and 2002 regulations, which did not control for false negatives. The EPA has amended the relevant regulations governing WET tests several times since issuing the 2010 guidance, but it has never promulgated the TST as a formal rule. *See* 77 Fed. Reg. 29,758 (May 18, 2012); 80 Fed. Reg. 8,956 (Feb. 19, 2015); 82 Fed. Reg. 40,836 (Aug. 28, 2017).

Plaintiffs are trade associations whose members are California municipal agencies that operate wastewater treatment plants. In 2014, plaintiffs brought an action in the Eastern District of California to challenge the EPA's use of the TST. Plaintiffs alleged that the agency violated the APA and the Clean Water Act when it approved California's application to use the TST as an "alternative test procedure" for permits under 33 U.S.C. § 1314(h) and 40 C.F.R. §§ 136.3(a), 136.5. After the complaint was filed, the EPA withdrew its approval of California's alternative test procedure, and the district court dismissed the case as moot.

After unsuccessfully seeking reconsideration of the dismissal, plaintiffs sought to reopen the case to amend their complaint. Although most of the original complaint had focused on the alternative test procedure, some allegations related directly to the EPA's use of the TST and its issuance of the 2010 guidance, and plaintiffs sought to expand on those allegations in the amended complaint. In October 2016, the district court denied the motion, concluding that "[i]t makes no sense . . . to clumsily tack such a new claim to [plaintiffs'] original [alternative-test-procedure] challenge via a motion for reconsideration of a prior motion for reconsideration."

In December 2016, plaintiffs brought the action that is now before us. Plaintiffs alleged that the EPA had violated the APA by issuing the TST guidance without following notice-and-comment rulemaking procedures, and that the EPA had violated its own regulations by requiring and using the TST in discharge permits. The district court dismissed the complaint, in relevant part, on the ground that it was barred by the APA's six-year statute of limitations. *See* 28 U.S.C. § 2401(a). The court reasoned that plaintiffs "fundamentally take procedural issue with the EPA's failure to formally promulgate the 2010 TST Guidance pursuant to notice-and-comment requirements," so the limitations period expired in June 2016, six years after the guidance was adopted. The court stated that because it had determined that plaintiffs' challenge was untimely, it did not need to "address whether the 2010 TST Guidance . . . constitutes a final agency action."

Plaintiffs amended their complaint to allege that the EPA's actions were ultra vires and in violation of the Clean Water Act. The district court determined that "[a]dding this label . . . does nothing to change the substance of [p]laintiffs'

allegations," so it again dismissed the complaint, this time with prejudice, in a three-page order that "incorporated" its prior order "in its entirety." Plaintiffs timely appealed from that order.

As a threshold matter, the EPA suggests that we should ignore plaintiffs' challenges to the district court's first dismissal order because plaintiffs named only the second dismissal order in their notice of appeal. The first dismissal order was not an appealable final judgment because the district court had allowed leave to amend; only the second order was a final judgment. *See Disabled Rts. Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004). But we have held that "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984). And here, the district court expressly stated that its second dismissal order "incorporated" the first order "in its entirety." We may therefore consider plaintiffs' arguments relating to both orders.

Although plaintiffs advance a variety of different legal theories, all of them challenge what plaintiffs describe as the EPA's "requirement, use, allowance, and promotion" of the 2010 guidance, which "created and recommended use of statistical and other toxicity testing procedures." That guidance, plaintiffs assert, "is *ultra vires* and exceeds [the EPA's] statutory authority because the guidance document was not promulgated . . . as a formal rule under the APA." As we have explained, the district court determined that plaintiffs' challenge was untimely. We review the district court's dismissal de novo and "may affirm on any ground supported by the record." *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1104 (9th Cir. 2020). We find it

unnecessary to consider the timeliness of the complaint because we affirm the dismissal on the alternative ground that the 2010 guidance was not final agency action.

The APA authorizes district courts to review only "final agency action." 5 U.S.C. § 704. Here, the EPA acknowledges that its guidance was "agency action," a concept that "cover[s] comprehensively every manner in which an agency may exercise its power." *San Francisco Herring Ass'n v. Department of the Interior*, 946 F.3d 564, 575–76 (9th Cir. 2019) (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001)). This case therefore turns on whether the guidance was "final."

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court set out two requirements that must be satisfied for agency action to be deemed final: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177–78 (first quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and then quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The EPA concedes that the 2010 guidance meets the first requirement. But the EPA argues that the guidance does not meet the second requirement because the guidance "imposed no rights, obligations, or legal consequences."

As the District of Columbia Circuit has explained, courts must "make *Bennett* prong-two determinations based on the concrete consequences an agency action has or does not have." *California Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019); *accord Whitewater Draw Nat.*

Res. Conservation Dist. v. Mayorkas, No. 20-55777, 2021 WL 3027687, at *7 (9th Cir. July 19, 2021); *Gill v. United States Dep't of Justice*, 913 F.3d 1179, 1185 (9th Cir. 2019). For example, in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Supreme Court determined that the Corps of Engineers' decision about whether a property contained "waters of the United States" was final agency action because it fixed "the Government's position" in subsequent litigation and could "limit[] the potential liability a landowner faces for discharging pollutants." *Id*. at 1814. By contrast, in *California Communities Against Toxics*, the court determined that an EPA memo was not final agency action because it merely "advise[d] EPA employees of the agency's position" and did not "bind state permitting authorities or assure regulated entities" of any rights. 934 F.3d at 639.

Plaintiffs attempt to demonstrate the requisite concrete consequences through several steps. The Clean Water Act requires the EPA to "promulgate guidelines establishing test procedures for the analysis of pollutants," 33 U.S.C. § 1314(h), and also to "publish" rules relating to water quality, *id*. § 1314(a)(2)(C), (a)(8). Consistent with that mandate, the EPA's 2002 rule incorporated into published regulations three WET test manuals, which had "selected" and "recommended" certain statistical methods. 67 Fed. Reg. at 69,964; *see also* 40 C.F.R. § 136.3(a) (Table IA). But the EPA's 2010 guidance allowed permitting authorities to use the TST as "another statistical option to analyze valid WET test data for . . . permit compliance determinations," even though the agency did not publish the TST as a rule or add it to the methods listed in 40 C.F.R. § 136.3. As a result, plaintiffs contend, the 2010 guidance changed the legal regime by allowing permitting authorities to use the TST.

The EPA disagrees with plaintiffs' construction of the relevant regulations, relying on language in the 2002 rule that describes the selected methods for interpreting WET test data as "not the only appropriate techniques." 67 Fed. Reg. at 69,964. We find it unnecessary to resolve that dispute because even under plaintiffs' interpretation, the 2010 guidance is not final agency action.

Even if the 2010 guidance represents a departure from the view reflected in the earlier regulations, it creates no concrete consequences on its own. To be sure, under plaintiffs' theory, the 2010 guidance suggests that permitting authorities have a new testing option. But it is permits, not guidance documents, that create consequences for regulated entities like plaintiffs. Plaintiffs point out that permit holders may be subject to criminal penalties or civil enforcement actions for failing the TST if a state or federal permit requires it. *See* 33 U.S.C. § 1319. But the "if" is key. The statute authorizes civil enforcement actions and criminal penalties for violations of "permit conditions." *Id.* § 1319(a)–(c). In other words, permit holders are subject to concrete consequences only if a state or federal permit incorporates the TST. We have previously recognized that an agency action is not final when subsequent agency decision making is necessary to create any practical consequences. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001). That principle is controlling here.

Significantly, the guidance document itself disclaims "any legally binding requirements on EPA, states, . . . permittees, or laboratories conducting or using WET testing for permittees." Plaintiffs correctly point out that such boilerplate disclaimers are not necessarily controlling. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000); *Regents of the Univ. of Cal. v. Department*

of Homeland Sec., 908 F.3d 476, 516 (9th Cir. 2018), *rev'd in part on other grounds*, 140 S. Ct. 1891 (2020). But the rest of the guidance confirms that it does not bind anyone to anything. To the contrary, it explains that the "EPA developed the TST approach as another statistical option" to use for evaluating WET test data, and it does not "preclude the use of" the EPA's existing approved methodologies. It advises that "[p]ermitting authorities should consider the practical programmatic shift from the traditional hypothesis testing approach to the TST approach by opening a dialogue with their regulated community," adding that "they might want to begin to identify what changes might be needed to assimilate the TST approach." That is the language of suggestion—and mild suggestion at that—not command. *Cf. Appalachian Power Co.*, 208 F.3d at 1023.

In urging a contrary conclusion, plaintiffs rely primarily on *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000), but that case does not help them. In *Barrick*, the District of Columbia Circuit considered EPA guidance clarifying that waste rock was not subject to a de minimis exception applicable to other regulated activities, which meant that Barrick, whose business involved moving waste rock containing trace amounts of toxic substances, had to report those toxins to the agency. *Id*. at 47. The court held that the guidance was final agency action because if Barrick did not comply, it faced "enforcement action and fines." *Id*. at 47–48. Here, by contrast, plaintiffs do not explain how the 2010 guidance, standing alone, will cause them to face anything. Instead, "as a bare statement of the agency's opinion," the 2010 guidance "can be neither the subject of 'immediate compliance' nor of defiance." *Fairbanks North Star Borough v. United States Army Corps of Eng'rs*, 543 F.3d 586, 593–94 (9th Cir. 2008) (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 239–40 (1980)). Neither

plaintiffs nor anyone else "can rely on it as independently authoritative in any proceeding," and there is "no penalty or liability of any sort in ignoring it." *California Cmtys. Against Toxics*, 934 F.3d at 638.

Plaintiffs argue that even if the 2010 guidance itself was not final, the EPA's later actions "crystallized" it into final agency action. Plaintiffs first point to a spreadsheet that the EPA circulated to state water regulators in May 2012. The agency described the spreadsheet as an "easy to use, inexpensive way" for States and EPA regional offices to "analyze and evaluate valid WET data." But the spreadsheet has the same finality problems as the 2010 guidance itself: It makes clear that the TST is an option, not a requirement. *See Sierra Club v. EPA*, 955 F.3d 56, 64 (D.C. Cir. 2020) (explaining that guidance is not final agency action when States "retain discretion to utilize the [guidance] or maintain the status quo in their individual permitting programs").

The same is true of two 2015 emails that the EPA sent to state permitting authorities. In one, the agency assured California regulators that the State was "still able to use" the TST despite the EPA's withdrawal of the alternative test procedure that plaintiffs' first lawsuit had challenged. In the other, the EPA "strongly recommend[ed]" that California regulators add a detailed description of the TST to a state-issued permit. Setting aside any argument that the EPA's recommendation effectively required state permitting authorities to use the TST—a theory plaintiffs expressly disclaimed at oral argument—the emails reflect the same thing as the 2010 guidance: The EPA considers the TST one option for interpreting the WET test data necessary to obtain a discharge permit.

Of course, as the EPA acknowledges, permits themselves are final agency actions. But plaintiffs have

disclaimed any challenge to specific permits in this litigation, and rightly so. Federally issued permits may not be challenged in an APA action in district court because they are subject to exclusive review in the court of appeals. *See* 33 U.S.C. § 1369(b)(1)(F). As for State-issued permits, we have held—in unrelated litigation brought by these same plaintiffs—that the statute "does not contemplate federal court review of state-issued permits" and that such permits are subject to review only in state court. *Southern Cal. All. of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1086 (9th Cir. 2017) (quoting *American Paper Inst. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989)).

Plaintiffs object that if they are unable to challenge the TST in district court, then their challenge cannot be heard in any other forum. That is incorrect. We have previously observed that "state courts can interpret federal law, and thus can review and enjoin state authorities from issuing permits that violate the requirements of the Clean Water Act." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1434 (9th Cir. 1991). Indeed, California courts have often interpreted the Act. *See, e.g.*, *City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 869–70 (Cal. 2005). Plaintiffs' challenge to the EPA's decision to allow use of the TST in individual permits is appropriately adjudicated in the context of individual permit decisions. *Cf. Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990).

AFFIRMED.

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 immigration-related policies.

[*] 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.

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

Julie Axelrod (argued), Washington, D.C.; John C. Eastman and Anthony T. Caso, Center for Constitutional Jurisprudence, Orange, California; Lesley Gay Glackner, Legal Fellow, Center for Immigration Studies, Washington, D.C.; for Plaintiffs-Appellants.

Kevin W. McArdle (argued), Barclay T. Samford, and Robert J. Lundman, Attorneys; Eric Grant, Deputy Assistant Attorney General; Jonathan D. Brightbill, Principal Deputy Assistant Attorney General; Environment and Natural Resources Disivion, United States Department of Justice, Washington, D.C.; Amber N. Napolitano, Attorney, Office of General 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 long-term 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,"

[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).

id. § 1507.3(a), and "integrate the NEPA process with other 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 CO_2 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 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),

[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.

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 part-time 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.

[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.

[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."

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 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);
>
> 2) Family-based immigration, authorized by INA § 203(a) and INA § 201(b);

> 3) Long-term nonimmigrant visas, authorized by INA § 214;
>
> 4) Parole, authorized by INA § 212(d)(5)(A);
>
> 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

[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.

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.

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]

[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*.").

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. 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 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

[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.

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 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

[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).

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]

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

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

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 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**.