

1 UNITED STATES COURT OF APPEALS

2 FOR THE FOURTH CIRCUIT

3 CASE NUMBER: 21-1839

4
5 -----X

6 WILD VIRGINIA, ET AL.,

7 Plaintiff,

8 Vs.

9 COUNCIL ON ENVIRONMENTAL QUALITY, ET AL.,

10 Defendant

11 -----X

12 October 26, 2022

13 Richmond, VA

14
15 BEFORE:

16 Agee, Judge

17 Wynn, Judge

18 Motz, Judge

19
20 FOR THE PLAINTIFF:

21 Southern Environmental Law Center

22 BY: Kimberley Hunter, Esq., Nick Torrey, Esq., and

23 Megan Kimball, Esq.

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<p>1 FOR THE DEFENDANTS: 2 Council on Environmental Quality 3 BY: Allen Brabender, Esq. 4 5 FOR THE INTERVENERS: 6 American Farm Bureau Federation 7 BY: Michael Kimberly, Esq. 8 9 PLAINTIFFS' WITNESSES 10 None 11 12 DEFENDANTS' WITNESSES 13 None 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 MS. HUNTER: Well, certainly, 2 Your Honor, two years ago when we were 3 arguing this case before the District Court 4 a little--a little less than two years ago 5 that might have been the case. And at that 6 time the Biden administration-- 7 JUDGE WYNN: [Interposing] What 8 had been the case? That you would hold in 9 abeyance? 10 MS. HUNTER: Or that--or that, 11 that things looked like they would be 12 heading in the direction that our Plaintiff 13 groups would like them to, and that we 14 would have hoped-- 15 JUDGE MOTZ: [Interposing] When 16 did you argue before the District Court? 17 MS. HUNTER: I'm sorry, Your 18 Honor? 19 JUDGE MOTZ: When? 20 MS. HUNTER: Oh. 21 JUDGE MOTZ: The date? 22 MS. HUNTER: We argued in I think 23 January of, of 2020, so right after the 24 election. 25 JUDGE AGEE: Okay.</p>
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<p>1 [START 21-1839-20221026 4C 2 Hearing.mp3] 3 JUDGE AGEE: Hi. Please be seated. 4 I'll take up our next case, Wild Virginia 5 versus the Council on Environmental Quality. 6 Ms. Hunter? 7 MS. KIMBERLEY HUNTER: Thank you, 8 Your Honor. Good morning, Your Honors. 9 May it please the Court, I'm Kym Hunter 10 with the Southern Environmental Law Center. 11 And I have Nick Torrey and Megan Kimball 12 with me here at counsel table. And we 13 represent the 17 conservation groups who 14 are Plaintiffs in this case. 15 Your Honors, the National 16 Environmental Policy Act provides-- 17 JUDGE WYNN: [Interposing] The 18 first question that you're going to get 19 from us is you've had this policy and now 20 the Biden administration is working through 21 it. You got a lot of other cases similar 22 to this. Why in the world wouldn't we just 23 hold this thing and let's see how it's 24 going to pan out for you? It looks to me 25 it's going in your direction.</p>	<p>1 MS. HUNTER: And at that time 2 certainly-- 3 JUDGE AGEE: [Interposing] Well, 4 that would have had to have been 2021. 5 MS. HUNTER: 2021, I apologize, 6 Your Honor. At that time the Biden 7 administration was making representations 8 that they were moving forward to fix some 9 of these problems with the, the NEPA, the 10 rule that had been put in place by the 11 Trump administration. And they put in 12 their briefing and submitted to the court 13 at that time that there would be a two- 14 phased rulemaking. And the first phase of 15 that would fix some very discrete problems. 16 And that has been completed and we are 17 appreciative that those particular problems 18 have been fixed, but this is a massive 19 rulemaking. 20 JUDGE WYNN: - - with the aspect 21 of the courts getting involved in it at 22 this point. I mean you've got an 23 administration. You know these things take 24 time for the next registration. Otherwise 25 it would be arbitration, arbitrary and</p>

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<p>1 capricious. And so the two-phased process 2 is going forward. It's not like they 3 haven't done it. It's going forward but 4 may not at the speed you want it to go. Is 5 that-- 6 MS. HUNTER: [Interposing] Well-- 7 JUDGE WYNN: [Interposing] Is that 8 what you're saying? 9 MS. HUNTER: Respectfully, Your 10 Honor, I would--I would respond to two 11 things there. First of all, the Biden 12 administration stated that the second phase 13 of their rulemaking would be completed by 14 the June of this year. That has not 15 happened. We haven't seen any advanced 16 notice of rulemaking. 17 JUDGE WYNN: Well, there's a lot 18 of things that we thought be happening by 19 June of this year just as the political 20 side of these things. But my point being 21 is it's going somewhere. I mean we could 22 hold onto this case--this case for--who 23 said you're going to get a decision from us 24 anytime soon? You may be complaining that 25 we figured that we'd get something by</p>	<p>1 that there's a new-- 2 JUDGE WYNN: [Interposing] Have 3 the courts held it in abeyance pending? 4 MS. HUNTER: Oh, you mean this 5 particular rule? Yes. Well-- 6 JUDGE WYNN: [Interposing] Which 7 courts have done that? 8 MS. HUNTER: Plaintiffs in those 9 cases do not have the concrete injuries 10 that our Plaintiffs have, perhaps. I don't 11 know. I don't represent the Plaintiffs in 12 those cases. But if I could make two 13 points? First of all, the Biden 14 administration actually made clear in their 15 phase one rulemaking that they do not 16 intend to fully rescind all of the harms 17 that were set in place by the Trump 18 rulemaking. In fact, they said-- 19 JUDGE WYNN: [Interposing] We 20 should guess which ones they're going to do 21 it and which ones they're not going to do 22 it? 23 MS. HUNTER: Well, we don't need 24 to guess, Your Honor, because what we do 25 know is that the law in place today is the</p>
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<p>1 December. You might not get something 2 until next, next summer. By then you got 3 something. 4 But the point being is something 5 is being done, has already been done, many 6 of--much of what you--some of what you 7 brought in has been taken care of and it's 8 moving in that direction. I mean at some 9 point in time there's a separation of 10 powers issue to consider. That is, yeah, 11 we could but the administration, the 12 executive branch is moving in a direction 13 on this. And it just seems reasonable - -, 14 right? 15 MS. HUNTER: Well, respectfully, 16 Your Honor, other courts have stepped in 17 where Plaintiffs are being harmed. And if 18 I could say just two--make two points on 19 this? 20 JUDGE WYNN: Do you know what you 21 just said then? Respectfully other courts 22 have done what? 23 MS. HUNTER: Other courts have 24 stepped in and have vacated rules from the 25 Trump administration regardless of the fact</p>	<p>1 law which is governing all rulemaking 2 today and has been the law which has 3 governed all rulemaking since September-- 4 rules and NEPA process since September of 5 2020. And we also know that our Plaintiffs 6 today are being harmed by that rulemaking. 7 And then there's an additional 8 point that each-- 9 JUDGE AGEE: [Interposing] Well, 10 now which rulemaking are you talking about? 11 Are you talking about the original rule 12 from 2020? 13 MS. HUNTER: Yes, Your Honor. 14 JUDGE AGEE: You're not talking 15 about the rules that each of these agencies 16 are going to develop that implement that 17 rule as they see it? 18 MS. HUNTER: Well, if I could 19 correct a misconception from the District 20 Court, Your Honor? The way that NEPA works 21 and the way that the Supreme Court has been 22 clear that NEPA works and CEQ agrees that 23 NEPA works, is these CEQ rules are the 24 governing principle that govern all federal 25 agencies today. They are binding law on</p>

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1	all federal agencies. And that's from	1	government is no longer to do--required
2	the Andrus [phonetic] case and that is	2	to do the fact finding and no longer
3	clearly stated in the regulations.	3	required to give the notice that it has
4	JUDGE WYNN: I understand but here	4	previously been required to do under the
5	is something. Have they actually done any	5	longstanding NEPA regulations.
6	of that? How are you in a position where	6	And we have declaration testimony
7	it could happen because, as you say, it's	7	in the record showing how our Plaintiffs
8	binding? Has anything actually happened?	8	have already adjusted their behavior
9	MS. HUNTER: Yes. Yes, Your Honor.	9	because this new rule is the law of the
10	First, just yesterday, for example, I was	10	land today. And, yes, we can hope that the
11	informed that Plaintiffs in this case who	11	Biden administration at some undetermined
12	are the Cowpasture River Association are	12	point in the future will fix it.
13	now facing a new timber harvesting project	13	JUDGE WYNN: So let's look at that.
14	at Anchor Knob which is in that vicinity in	14	So really getting to the heart of it in
15	Virginia. And what they are finding is	15	terms of the issue before us, the standing
16	because the new rule is in place, they are-	16	and rightness of this case, aren't we to
17	-the Forest Service is no longer conducting	17	look at jurisdictional consideration from
18	the same on the ground fact finding that it	18	the time that you filed the lawsuit, as
19	would have had to do prior to the rule	19	well as throughout that suit?
20	being in place.	20	MS. HUNTER: Yes, Your Honor.
21	JUDGE AGEE: So why don't they	21	JUDGE WYNN: If you look at it
22	challenge that and just like the Supreme	22	from that light, how in the world is it
23	Court said in Ohio Forestry?	23	foreseeable, this forest plan issue was
24	MS. HUNTER: Well, Your Honor,	24	foreseeable?
25	this Court has been very clear that we	25	MS. HUNTER: Well, I was--I was
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1	don't have to wait for the consummation	1	telling you about the forest plan because
2	of injury to occur.	2	you asked about what has happened in the
3	JUDGE AGEE: Yeah but in the	3	past year and a half.
4	example you gave that certainly seems like	4	JUDGE WYNN: Yeah but you're
5	an Ohio Forestry case.	5	saying--you're telling me about it. I'm
6	MS. HUNTER: In, in that situation	6	getting to the standing issue in terms of
7	the Plaintiff's harm is not the	7	where we are right now today and some of
8	environmental harm on the ground as it was	8	the considerations that you bring. And
9	in Ohio Forestry. In Ohio Forestry, which	9	when we look at what those things are at
10	was brought under a substantive statute, the	10	the time that you filed the suit--
11	harm at issue was the harm to the forest.	11	MS. HUNTER: [Interposing]
12	And what the Court would have had to look	12	Absolutely, Your Honor.
13	at was whether the action was going to	13	JUDGE WYNN: --in terms of where
14	actually harm those people.	14	you--where you go with that.
15	The harm here is to the Plaintiffs	15	MS. HUNTER: Right. And at the
16	themselves, the Plaintiffs behavior, and	16	time we filed the suit this was a rule
17	what the Plaintiffs are having to do in	17	which was issued by the Trump
18	that case and a whole host of other	18	administration where they stand clear about
19	circumstances. Like, for example,	19	how this was cutting NEPA regulations and
20	Plaintiff's concerned about new poultry	20	eliminating red tape. And Plaintiff groups
21	farms in eastern North Carolina which are	21	at that time who had been using NEPA
22	harming their communities. What they're	22	consistently for years as a tool to fulfill
23	having to do is expend resources they	23	their organization missions both by getting
24	previously didn't have to do, to do fact	24	notice, getting information, and submitting
25	finding for themselves because the federal	25	their comments because as this Court has

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<p>1 recognized NEPA is a democratic decision</p> <p>2 making tool.</p> <p>3 At the time that rule was issued,</p> <p>4 it was extremely foreseeable that they</p> <p>5 would be impacted. And in fact they</p> <p>6 immediately were impacted because they</p> <p>7 immediately had to shift their behavior to</p> <p>8 adjust for this new, new scheme which is</p> <p>9 still in place today and which we have</p> <p>10 actually seen no concrete promise from the</p> <p>11 Biden administration that there will be a</p> <p>12 restoration to the previous scheme. And</p> <p>13 some of these changes were - -.</p> <p>14 JUDGE MOTZ: Well, excuse me. In</p> <p>15 sort of all the--all of your I'm sure very</p> <p>16 erudite discussion, I am losing track of</p> <p>17 the fact that the prior administration's</p> <p>18 rule that you objected to is gone. Right?</p> <p>19 MS. HUNTER: No, Your Honor.</p> <p>20 JUDGE MOTZ: It's been vacated.</p> <p>21 It's, it's not--was not being enforced.</p> <p>22 There's--okay, you tell me what the status</p> <p>23 is. And then we'll hear what the United</p> <p>24 States has to say.</p> <p>25 MS. HUNTER: Yes, Your Honor. The</p>	<p>1 JUDGE MOTZ: Okay.</p> <p>2 MS. HUNTER: And unfortunately</p> <p>3 there was a misrepresentation made by</p> <p>4 counsel who is no longer counsel in the</p> <p>5 District Court that these rules could not</p> <p>6 go into effect until other agencies made</p> <p>7 their own implementing regulations. And</p> <p>8 that fact is, is not correct and that is</p> <p>9 belied by the plain text of the regulation.</p> <p>10 JUDGE MOTZ: And is that in the</p> <p>11 District Court's opinion?</p> <p>12 MS. HUNTER: Yes, it is, Your</p> <p>13 Honor.</p> <p>14 JUDGE MOTZ: That is the basis for</p> <p>15 its holding? Is that what you're telling</p> <p>16 me?</p> <p>17 MS. HUNTER: That is in part the</p> <p>18 basis of its holding. Yes, Your Honor.</p> <p>19 JUDGE MOTZ: What are the other</p> <p>20 facts for its holding?</p> <p>21 MS. HUNTER: Well, Your Honor, the</p> <p>22 District Court based a lot of its opinion</p> <p>23 on Ohio Forestry which I was just</p> <p>24 discussing with Judge Agee is a very</p> <p>25 different factual circumstance and legal</p>
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<p>1 rule is in place today and if you look</p> <p>2 up--</p> <p>3 JUDGE MOTZ: [Interposing] But is</p> <p>4 it being enforced?</p> <p>5 MS. HUNTER: Yes, Your Honor. It</p> <p>6 is the law. And I can quote to you from</p> <p>7 Section 1506.13, states, "The regulations</p> <p>8 and the subchapter apply to any NEPA</p> <p>9 process begun after September 14th, 2020."</p> <p>10 And that is the law today. This rule is</p> <p>11 binding on all federal agencies.</p> <p>12 JUDGE MOTZ: So what was the basis</p> <p>13 for the District Court's conclusion that it</p> <p>14 wasn't right? And then we can get to--</p> <p>15 MS. HUNTER: [Interposing] Yes.</p> <p>16 JUDGE MOTZ: Telling me only the</p> <p>17 facts and arguments on your side and not</p> <p>18 addressing what at least the other side</p> <p>19 says--</p> <p>20 MS. HUNTER: [Interposing]</p> <p>21 Absolutely.</p> <p>22 JUDGE MOTZ: --doesn't advance</p> <p>23 your case much.</p> <p>24 MS. HUNTER: No, I'd be happy to,</p> <p>25 Your Honor.</p>	<p>1 circumstance to the one we have here.</p> <p>2 And largely that's because NEPA is a</p> <p>3 procedural statute that guarantees</p> <p>4 procedural rights. And so the Plaintiffs</p> <p>5 harms are the loss of that procedural right.</p> <p>6 They're not the loss of the harms on the</p> <p>7 ground.</p> <p>8 The rightness question is also</p> <p>9 really different than Ohio Forestry because</p> <p>10 in Ohio Forestry what the court had to do</p> <p>11 was get--</p> <p>12 JUDGE AGEE: [Interposing] So are</p> <p>13 you claiming that your injury now is an</p> <p>14 informational injury?</p> <p>15 MS. HUNTER: Your Honor, the</p> <p>16 Plaintiffs do have information injuries as</p> <p>17 well as the loss of procedural rights that</p> <p>18 they are guaranteed.</p> <p>19 JUDGE AGEE: The - - haven't</p> <p>20 gotten a very good reception from the</p> <p>21 courts.</p> <p>22 MS. HUNTER: Well, Your Honor,</p> <p>23 this Court in--</p> <p>24 JUDGE AGEE: [Interposing] They'll</p> <p>25 make the point that if you can claim an</p>

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<p>1 informational injury every time the 2 government agency either doesn't do enough 3 or weighs things different in terms of the 4 information they're going to give out, 5 everybody has standing.</p> <p>6 MS. HUNTER: That's exactly 7 correct, Your Honor. And that's why what 8 the courts have said is that that 9 information injury needs to be tied to a 10 concrete injury that is particularized to 11 the group in question. And that is 12 precisely what has been demonstrated in the 13 declarations here.</p> <p>14 These are not groups just saying 15 generally we wish we had more information. 16 These are groups saying we have a 17 longstanding practice of using the NEPA 18 process to get information, for example, 19 about new poultry farms in our neighborhood. 20 They have declared in sworn testimony that 21 has not been disputed that this is the tool 22 they have used. And they have subsequently 23 lost that tool. It was like a radar out 24 there which they could know, okay, we know 25 that this poultry farm is coming up. We</p>	<p>1 United States Supreme Court when you have 2 to adjust your behavior.</p> <p>3 JUDGE WYNN: What does that mean, 4 the declaration indicated that this was not 5 going to be enforced against that 6 controlled animal feeding operation. What 7 does that mean?</p> <p>8 MS. HUNTER: Well, NEPA is not 9 really about enforcement, Your Honor. NEPA 10 is about the guarantee of procedural 11 protections to the natural environments and 12 that no federal project can proceed without 13 them.</p> <p>14 JUDGE WYNN: If they're not 15 enforcing it, then what's the injury?</p> <p>16 MS. HUNTER: Well, we don't--we 17 don't know whether or that particular--one 18 particular agency official cannot just 19 vacate a case by saying they voluntarily 20 will choose to violate their own law.</p> <p>21 JUDGE WYNN: So what are you going 22 to do? How are you going to make them do 23 it? They say, "We're not going to do it." 24 Now you want the suit to say, "Don't do 25 it." And so then I'm trying to understand</p>
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<p>1 can tell our clients about it. We can 2 submit comments. And that radar for them 3 has gone dark.</p> <p>4 JUDGE AGEE: So they're saying 5 that without this they don't--there's no 6 way they're going to know there's a new 7 poultry farm going in?</p> <p>8 MS. HUNTER: Yes, Your Honor. 9 These are very small groups. For example, 10 Kemp Burdette who is a Plaintiff in this-- 11 in this case, he runs the River Keep, Cape 12 Fear Riverkeeper. And it's really just him 13 and some volunteers. And the rest of the 14 time he's literally kayaking up and down 15 the river, looking for harms in the river. 16 He's doing volunteer cleanups. He's doing 17 fundraising. And what he has declared in 18 his testimony is without this tool which he 19 has relied on--and he's certainly by many 20 means not the only one. Without this tool, 21 he has to shift his attention to doing 22 other--to doing the fact finding. And that 23 takes him away for things like the river 24 cleanups or the fundraising. And that is a 25 recognized injury by this Court and by the</p>	<p>1 it. What does it mean when the--you've 2 got an--you've got an administration that's 3 moving directly. And, yeah, it's not 4 gotten ridden of the whole matter but there 5 are at least two or three things that you 6 filed in your complaint that are clearly 7 moot as a result of phase one.</p> <p>8 MS. HUNTER: Yes, Your Honor.</p> <p>9 JUDGE WYNN: That's true. Is it 10 right?</p> <p>11 MS. HUNTER: Absolutely, Your 12 Honor.</p> <p>13 JUDGE WYNN: Then you've got this 14 exemption with this CAFO that's there. I 15 mean there's movement. And we also know 16 you can't just change a regulation 17 overnight. You'd like to when you come in 18 as a new President. You've got to go 19 through a whole process. Otherwise it's 20 arbitrary and capricious. And it's moving 21 in that direction and at least something 22 seems to be happening. You're shaking your 23 head but at the same time I guess the 24 question has been here how much is being 25 enforced. But when it says it's not</p>

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<p>1 enforced at least as the CFO, I was 2 asking what does that mean. And I don't 3 know. I'm just--this is new stuff to me. 4 When you said poultry, it sounded like to 5 me there's animal somewhere in that. 6 You're dealing with a controlled animal 7 feeding operation. So what does that 8 affect? And your point is the fact you 9 don't enforce it means it's still there. 10 Is that it? 11 MS. HUNTER: I think the fact that 12 our Plaintiffs no longer have a law in 13 place which says that these types of 14 poultry farms are subject to NEPA and that 15 they will get that notice and that 16 opportunity to participate in the process 17 is the injury to them because they have had 18 to shift resources to do that work 19 themselves. And I'll reserve the rest of 20 my time. 21 JUDGE AGEE: All right. Thank you 22 very much. Mr. Brabender, we'll hear from 23 you. 24 MR. ALLEN BRABENDER: Yes, thank 25 you. May it please the Court, my name is</p>	<p>1 provide citations to the notice in the 2 rulemakings in our briefs, Your Honor. 3 JUDGE MOTZ: Uh-huh. I thought 4 that her response was that somebody 5 misstated that in the District Court. 6 Counsel that is no longer representing you 7 all? 8 MR. BRABENDER: Sure. I think 9 that pertains to a different issue but let 10 me speak to that. 11 JUDGE MOTZ: Okay. 12 MR. BRABENDER: The former AAG 13 said something along the lines of the 2020 14 rule is a rule of rules that has no 15 immediate effect. 16 JUDGE MOTZ: That has what? 17 MR. BRABENDER: No immediate 18 effect. And that actually is a true 19 statements. Now, I think the District 20 Court mistook that to mean that the 2020 21 rule couldn't take effect-- 22 JUDGE MOTZ: [Interposing] I see. 23 MR. BRABENDER: --until these 24 other federal agencies promulgated their 25 own internal regulations. That's not true</p>
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<p>1 Allen Brabender and I represent the 2 Council on Environmental Quality. Although 3 this facial challenge was inappropriate 4 from the start, subsequent events now show 5 just how wrong Plaintiff's speculation 6 turned out to be. 7 For instance, when they filed 8 their complaint in July 2020, they couldn't 9 predict the results of the 2020 election. 10 Now CEQ under the Biden administration is 11 committed to revising the 2020 rule in such 12 a way as to avoid the kinds of harms that 13 Plaintiffs speculate could occur if some 14 federal agency-- 15 JUDGE MOTZ: [Interposing] Where 16 did you find that? I tried to tease that 17 out of your colleague but he wasn't going 18 there. He says the Biden administration 19 is--has said that it's going to-- 20 MR. BRABENDER: [Interposing] It 21 is committed to revising the-- 22 JUDGE MOTZ: [Interposing] Is 23 committed? Okay. So where do I find that 24 in the record? 25 MR. BRABENDER: It is--it is--we</p>	<p>1 but the 2020 rule is in effect. Judge 2 Jones [phonetic] was still correct that 3 this case is not ripe because it is not fit 4 for review under the National Wildlife 5 Federation case and because the hardships, 6 the relative hardships weigh in favor of 7 finding this case not to be ripe under Ohio 8 Forestry. 9 JUDGE AGEE: But here now opposing 10 counsel says that even in those situations 11 where they're not awaiting further 12 rulemaking on a particular project that 13 their injury, as I understand the argument, 14 is that because we're not getting the 15 information that we received before, our 16 groups are having to act differently now. 17 And that that injures us from a 18 constitutional perspective. 19 MR. BRABENDER: So Plaintiffs are 20 speculating that they won't receive 21 information. There has been no denial of 22 information as of yet. So they're taking 23 actions based on this speculation of non- 24 imminent, non-concrete harm which the 25 Supreme Court in Clapper [phonetic] said is</p>

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1	insufficient.	1	affected the information they would
2	JUDGE MOTZ: Excuse me. Are you	2	receive I presume without further
3	providing the information that was provided	3	regulation from the US Forestry Service or
4	before, before the Trump rule?	4	whatever agency handles that.
5	MR. BRABENDER: Well, that depends	5	MR. BRABENDER: Sure. And I am
6	on how any agency may interpret and apply	6	not familiar with the project they are
7	the rule because the rule is not self-	7	discussing but I would doubt that's the
8	implementing. It can only have effects to	8	case. Because CEQ has extended the
9	the extent some other federal agency	9	deadline for agencies to promulgate their
10	applies it during its own project decisions.	10	own internal regulations implementing the
11	JUDGE MOTZ: I thought your	11	2020 rule, agencies have responded by
12	representation just 30 seconds ago was that	12	continuing to apply their internal
13	they're saying they didn't get the	13	regulations implementing the 1978 rule.
14	information but they do. Now you're	14	And so I'm unaware of any project on the
15	telling me it depends on other agencies.	15	ground--
16	[Crosstalk]	16	JUDGE AGEE: [Interposing] So
17	MR. BRABENDER: I'm sorry. Go	17	they're implementing now the same
18	ahead, Your Honor.	18	regulations that existed before the 2020
19	JUDGE MOTZ: Are they getting the	19	rule?
20	information or not?	20	MR. BRABENDER: They continue to
21	MR. BRABENDER: They--it depends	21	apply the 19--their internal regulations
22	on how another federal agency--they're	22	because they haven't promulgated new
23	speculating that they're not going to get	23	regulations under the 2020 rule yet. And
24	the information because another federal	24	so, because of that, I'm unaware of any
25	agency is not going to give it to them.	25	project. I mean of course there are NEPA
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1	For instance, much of their claims of	1	challenges out there but I'm unaware of
2	harms are based on the notion that the 2020	2	any NEPA challenge where the argument is
3	rule deleted the definitions of indirect	3	that the harm is caused by the 2020 rule as
4	and cumulative. And therefore they're not	4	distinguishable from the 1978 rule. We're
5	going to get the types of information on	5	aware of no case where the argument is the
6	impacts that were previously classified as	6	2020 rule itself caused the harm.
7	cumulative such as climate change impacts,	7	And the large part of why
8	for instance.	8	Plaintiffs' declarations are filled with
9	What we're saying is they have no	9	speculation is that they filed two months
10	idea whether or not some agency is going to	10	before the rule even took effect. And even
11	analyze climate change in their decisions	11	two months later, when the rule was
12	or not. They are speculating that they	12	scheduled to go into effect, in order for
13	won't because of the 2020 rule but they--	13	the rule to--
14	that's just pure speculation. And that's	14	JUDGE MOTZ: [Interposing] We're
15	the kind of information they say that	15	talking about the Trump rule. Right?
16	they're not getting but they have no basis	16	MR. BRABENDER: Yes.
17	for that speculation.	17	JUDGE MOTZ: Okay.
18	JUDGE AGEE: Well, I understood	18	MR. BRABENDER: And so even two
19	opposing counsel to give us an example of	19	months later for the rule to have effect,
20	something apparently happened just in the	20	some other federal agency is going to have
21	last few days. Now, whether or not we can	21	to apply the rule to its own decision. But
22	take that into account a year, two years	22	that NEPA process takes months and
23	after filing of the suit is a different	23	sometimes years. Such that when the
24	question but they're saying that there was	24	Plaintiffs filed their suit in July 2020,
25	some forestry project and NEPA directly	25	any concrete application of the 2020 rule

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<p>1 was off in the distant future. And, 2 because of this, the declarations that 3 Plaintiffs submitted with their complaint 4 are necessarily and fatally based on pure 5 speculation about what some federal agency 6 might do in the future that might cause 7 them some harm. And that's just the sort 8 of speculation and guesswork which does not 9 amount to an Article 3 case or controversy. 10 JUDGE MOTZ: What is the status of 11 the 2020 rule now? 12 MR. BRABENDER: Well, it is still 13 in place although it has been revised by 14 CEQ's phase one rulemaking which did some 15 important things. It reinstalled the 16 definitions of indirect and cumulative, and 17 it made clear that the 2020 rule is the 18 floor and not the ceiling for 19 environmentally protective NEPA procedures. 20 Now, the adoption of phase one 21 means that the predicted harms that 22 Plaintiffs speculate could occur now will 23 not occur because many of the harms were 24 based on speculation that some federal 25 agency might not analyze an impact that was</p>	<p>1 any agency as of yet has promulgated 2 comprehensive regulations implementing the 3 2020 rule because it would be a waste of 4 time. They know that the Biden 5 administration is hard at work revising the 6 2020 rule, such that it wouldn't be prudent 7 to waste resources. 8 JUDGE MOTZ: How do we know that? 9 MR. BRABENDER: Based on what I'm 10 telling you, Your Honor. I don't know if 11 there's anything that you can look at. 12 It's if you-- 13 JUDGE WYNN: [Interposing] In 14 other words-- 15 MR. BRABENDER: [Interposing] If 16 you want, I can give you-- 17 JUDGE WYNN: [Interposing] - - in 18 June of 2022 at those 48 meeting according 19 to that Southern District of New York case 20 up there with the CEQ. And had all those 21 meetings and-- 22 MR. BRABENDER: [Interposing] 23 Right. 24 JUDGE WYNN: --nothing is going on. 25 MR. BRABENDER: Right. The fact</p>
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<p>1 previously classified as indirect or 2 cumulative. And they speculated from there 3 that this could cause environmental 4 consequences. It could deprive them of 5 information. And they would therefore have 6 to divert resources to get this information. 7 But of course now the phase one rule 8 restores those definitions, so these harms 9 will not occur. 10 Other harms are based on whether 11 or not an agency may decline to consider 12 their comments or may forego NEPA 13 altogether. But these harms, in addition 14 to being speculative, are based on the 15 notion that the 2020 rule created a ceiling. 16 They would claim, for instance, that the 17 federal agencies have no choice but to 18 apply what they call the heightened public 19 participation requirements or they have to 20 - - projects from NEPA. 21 JUDGE AGEE: So are you aware of 22 any agency that would be controlled by NEPA, 23 that has actually promulgated regulations 24 under the 2020 rule? 25 MR. BRABENDER: I do not believe</p>	<p>1 that there is, in fact, no regulation out 2 there shows that they're not working on - - . 3 JUDGE WYNN: They're what? I 4 didn't hear that. It shows? 5 MR. BRABENDER: The fact there is 6 no comprehensive regulation implementing 7 the 2020 rule shows at least agencies are 8 not making it a priority. 9 JUDGE MOTZ: That they're what? 10 MR. BRABENDER: They're not making 11 it a priority to adopt new regulations 12 implementing the 2020 rule. 13 JUDGE MOTZ: Well, what are we to 14 make of that? These Plaintiffs are here in 15 court with their claims and you're saying, 16 "Well, we're going to make a rule that 17 makes this all ridiculous and but we're 18 not--we're taking our time." 19 MR. BRABENDER: No, what I'm 20 saying--I'm not saying that, Your Honor. 21 JUDGE MOTZ: Okay. 22 MR. BRABENDER: I was responding 23 to the questions about the status-- 24 JUDGE MOTZ: [Interposing] I used 25 the information that you gave my colleague</p>

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<p>1 to make my--your response. You're right.</p> <p>2 You didn't say that. So what is your</p> <p>3 response to the fact that there hasn't been</p> <p>4 any action?</p> <p>5 MR. BRABENDER: Well, I mean CEQ</p> <p>6 is a small agency. It is hard at work on a</p> <p>7 comprehensive revision. It has had dozens</p> <p>8 and dozens of meetings with interested</p> <p>9 stakeholders. It's going to take some time.</p> <p>10 Yes, it's true that they originally</p> <p>11 targeted June 2020--June 2022. That's</p> <p>12 unfortunately been prolonged but CEQ is</p> <p>13 hard at work on a real--</p> <p>14 JUDGE MOTZ: [Interposing] It</p> <p>15 sounds like it's very possible that there</p> <p>16 will be another election and then this rule</p> <p>17 will be back in effect. Right? The way it</p> <p>18 exists right now?</p> <p>19 MR. BRABENDER: It is possible.</p> <p>20 That's true with respect to any rulemaking.</p> <p>21 You know, at the change of--</p> <p>22 JUDGE MOTZ: [Interposing] But not</p> <p>23 any rulemaking is in front of us.</p> <p>24 MR. BRABENDER: True.</p> <p>25 JUDGE AGEE: This one is.</p>	<p>1 loan guarantees.</p> <p>2 I would also note that Plaintiffs'</p> <p>3 claims here are speculative. As Judge</p> <p>4 Jones said, this is--out of the all of the</p> <p>5 speculation, this is some of the more</p> <p>6 attenuated speculation because Plaintiffs</p> <p>7 don't cite an example of a single operation</p> <p>8 in a geographic area in which they have</p> <p>9 interest. There is no proposal that they</p> <p>10 cite. So what they are saying is that</p> <p>11 there seems to be some statistical</p> <p>12 probability or reasonable likelihood that</p> <p>13 some private organization may try to locate</p> <p>14 an operation in a geographic area where</p> <p>15 they have interests. But post Summers and</p> <p>16 post Clapper, that kind of reliance on</p> <p>17 statistical probability or likelihoods is</p> <p>18 not enough to justify Article 3</p> <p>19 jurisdiction.</p> <p>20 From there, there's more</p> <p>21 speculation. So they speculate a private</p> <p>22 entity may locate an operation in a</p> <p>23 geographic area. They speculate that they</p> <p>24 will apply for a federal loan guarantee.</p> <p>25 They speculate that the FSA will grant that</p>
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<p>1 MR. BRABENDER: True. But of</p> <p>2 course jurisdiction is assessed at the time</p> <p>3 the complaint was filed. And at the time</p> <p>4 the complaint was filed Plaintiffs just</p> <p>5 don't have the facts to show that there was</p> <p>6 a ripe controversy or that they had</p> <p>7 standing.</p> <p>8 And let me address this claim</p> <p>9 regarding the concentrated animal feeding</p> <p>10 operations. Yesterday in their 28-J letter</p> <p>11 they claim that these exemptions for the</p> <p>12 CAFO's, as they're called, is automatic,</p> <p>13 which is not the case. There's no</p> <p>14 provision of the 2020 rule that's automatic.</p> <p>15 Some federal agencies, some federal</p> <p>16 decision maker has to make a decision to</p> <p>17 apply it.</p> <p>18 And as a fact of the matter, the</p> <p>19 Farm Service Agency has not been using this</p> <p>20 exemption. And the fact that the phase one</p> <p>21 rule now makes the 2020 rule the floor and</p> <p>22 not the ceiling for environmentally</p> <p>23 protective procedures means going forward</p> <p>24 the FSA can continue to do EA's or EIS's,</p> <p>25 or whatever they would like to do on these</p>	<p>1 guarantee. And they speculate that it</p> <p>2 will do so without doing NEPA. And then</p> <p>3 they further speculate that the reason they</p> <p>4 didn't do NEPA was the 2020 rule as opposed</p> <p>5 to some pre-existing exemption that would</p> <p>6 be available to it.</p> <p>7 So this is speculation upon</p> <p>8 speculation upon speculation. And even</p> <p>9 sort of one chain of speculation isn't</p> <p>10 sufficient but the sort of multiple chains</p> <p>11 of speculation is what Judge Jones said</p> <p>12 this is one of the more attenuated claims.</p> <p>13 JUDGE MOTZ: So you cite Judge</p> <p>14 Jones' opinion a couple of times. Is there</p> <p>15 anything that in your view is erroneous in</p> <p>16 Judge Jones' opinion?</p> <p>17 MR. BRABENDER: Yeah. I spoke to</p> <p>18 it earlier. It--Judge Jones seems to be of</p> <p>19 the impression that the 2020 rule couldn't</p> <p>20 take effect until these agencies</p> <p>21 implemented their own internal regulations.</p> <p>22 That's not the case. But, other than that,</p> <p>23 I think Judge Jones was absolutely correct.</p> <p>24 JUDGE MOTZ: So and you--I'm so</p> <p>25 sorry. And your response to that is the</p>

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<p>1 rule take effect but the agencies have to</p> <p>2 do something under it to have any--</p> <p>3 MR. BRABENDER: [Interposing]</p> <p>4 Right. The rule is a procedural rule.</p> <p>5 There's a lot of discretion.</p> <p>6 JUDGE MOTZ: I see. So it doesn't</p> <p>7 affect anybody in fact until the individual</p> <p>8 agencies act. Is that correct?</p> <p>9 MR. BRABENDER: That's absolutely</p> <p>10 correct, Your Honor.</p> <p>11 JUDGE MOTZ: Okay. Sorry.</p> <p>12 JUDGE AGEE: I think that's--</p> <p>13 MR. BRABENDER: [Interposing] Okay.</p> <p>14 JUDGE AGEE: Your argument here is</p> <p>15 the rule, the 2020 rule has taken effect</p> <p>16 but it doesn't affect anybody until these</p> <p>17 other agencies do whatever they're going to</p> <p>18 do?</p> <p>19 MR. BRABENDER: That's correct,</p> <p>20 Your Honor.</p> <p>21 JUDGE AGEE: All right.</p> <p>22 MR. BRABENDER: And we'd ask for</p> <p>23 the judgment to be affirmed. Thank you.</p> <p>24 JUDGE AGEE: All right. Thank you,</p> <p>25 sir. And now we'll hear from Mr. Kimberly.</p>	<p>1 ought to guide challenges to CEQ and NEPA</p> <p>2 regulations.</p> <p>3 JUDGE WYNN: Well, why should we</p> <p>4 get into those complicated standing issues</p> <p>5 if the rules are going to just change again</p> <p>6 anyway?</p> <p>7 MR. KIMBERLY: Well, I think the</p> <p>8 answer is, first and foremost, there has</p> <p>9 been one change but we don't even have--so</p> <p>10 in the two phase approach to changing the</p> <p>11 rules, the phase one is done and complete</p> <p>12 but that leaves plenty of live controversy</p> <p>13 here. The phase two rulemaking hasn't even</p> <p>14 commenced. There isn't even a notice of</p> <p>15 proposed rulemaking. And as my friend on</p> <p>16 the other side observed, there's no telling</p> <p>17 when that's actually going to come. So as</p> <p>18 of right now I mean it's likely to be years</p> <p>19 before we see a final phase two rule if</p> <p>20 ever we do before the possibility to</p> <p>21 change--</p> <p>22 [Crosstalk]</p> <p>23 JUDGE WYNN: --that while they're</p> <p>24 waiting on that, they're being injured in</p> <p>25 the interim.</p>
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<p>1 MR. MICHAEL KIMBERLY: Thank you,</p> <p>2 Judge Agee. If I may, I'll start. I'd</p> <p>3 like, if I can in the short time that I've</p> <p>4 got, briefly to address the question of an</p> <p>5 abeyance and then touch on the merits and</p> <p>6 offer what I think is a middle ground</p> <p>7 between the parties here.</p> <p>8 So first as to an abeyance, Judge</p> <p>9 Wynn, I think what would make an abeyance</p> <p>10 not warranted in this case at least in its</p> <p>11 current posture is that the District</p> <p>12 Court's decision was one based on standing.</p> <p>13 It was not about the merits of the rule</p> <p>14 itself. And as Judge Motz noted, the</p> <p>15 likelihood that there is going to be</p> <p>16 further rulemaking in this area is high.</p> <p>17 And at this point now the parties have</p> <p>18 spent more than a year litigating just the</p> <p>19 question of whether the Court has the</p> <p>20 authority to decide these sorts of</p> <p>21 challenges. The case is fully briefed and</p> <p>22 presented to this Court just on the</p> <p>23 question of standing. And I think having</p> <p>24 the Court's guidance for litigants moving</p> <p>25 forward on what sort of standing principles</p>	<p>1 MR. KIMBERLY: Well, that's</p> <p>2 right. And that's why I think it's</p> <p>3 important for this Court to reach the</p> <p>4 standing question. Of course our position</p> <p>5 on that front is that this Court should</p> <p>6 affirm what we take to be a very well-</p> <p>7 reasoned decision by the District Court</p> <p>8 below, providing helpful advice and</p> <p>9 guidance to other litigants who might--</p> <p>10 including my clients, who might find</p> <p>11 themselves challenging CEQ regulations</p> <p>12 moving forward. This is a live issue and</p> <p>13 it's one that I think would be helpful to</p> <p>14 have a decision on.</p> <p>15 JUDGE WYNN: Why don't you</p> <p>16 succinctly tell us from your client's</p> <p>17 perspective why the injury component of the</p> <p>18 appellant's argument is incorrect?</p> <p>19 MR. KIMBERLY: Right. So I--and</p> <p>20 on this score, Judge Agee, we would ask the</p> <p>21 Court to apply the same standard for</p> <p>22 standing that we would hold ourselves to</p> <p>23 with tables turned. And it's just to say</p> <p>24 that Article 3 requires allegations that</p> <p>25 are concrete, actual, and imminent. And</p>

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<p>1 they can't rest on speculation. So that</p> <p>2 doesn't describe the harms that the</p> <p>3 Plaintiffs have presented here because they</p> <p>4 haven't identified first a specific federal</p> <p>5 action, two, that is subject or imminently</p> <p>6 will be subject to a NEPA review will be</p> <p>7 conducted pursuant to the elements of the</p> <p>8 2020 rule that they challenge. And I'll</p> <p>9 come back to that in a moment because I</p> <p>10 think that's an important point, Judge,</p> <p>11 Motz, to some of the questions you were</p> <p>12 asking.</p> <p>13 Four, that result in some</p> <p>14 identifiable difference on both the--in</p> <p>15 either the scope of manner of the way that</p> <p>16 the NEPA review is conducted that in turn</p> <p>17 is substantially likely to cause the</p> <p>18 Plaintiffs members a concrete harm. And</p> <p>19 that might be the diversion of resources.</p> <p>20 It might be the frustration of</p> <p>21 institutional mission. It might be some</p> <p>22 environmental impact.</p> <p>23 At each one of those five steps,</p> <p>24 the Plaintiffs' standing declarations fail.</p> <p>25 And I would point the Court to the Burdette</p>	<p>1 environmental information to its members</p> <p>2 and the consequent injury it suffers when</p> <p>3 the information is not forthcoming in a</p> <p>4 NEPA review without more is not enough for</p> <p>5 standing because it would apply really to</p> <p>6 anybody. That is a generalized term.</p> <p>7 JUDGE WYNN: What is the base of</p> <p>8 your standing to intervene in this matter?</p> <p>9 MR. KIMBERLY: Well, the</p> <p>10 intervening, I suppose it's an open</p> <p>11 question whether Defendants--Defendant</p> <p>12 Interveners have to establish Article 3</p> <p>13 standing which is typically a standard.</p> <p>14 JUDGE WYNN: Let's assume that--</p> <p>15 what would give you standing to be in this</p> <p>16 case?</p> <p>17 MR. KIMBERLY: So our standing, if</p> <p>18 it were something that we had to prove in</p> <p>19 this case, would follow from the same basic</p> <p>20 standards that I just described. We have</p> <p>21 members who have identifiable projects that</p> <p>22 are under NEPA review where--</p> <p>23 JUDGE WYNN: [Interposing] You're</p> <p>24 being regulated?</p> <p>25 MR. KIMBERLY: That's exactly</p>
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<p>1 declaration which is the number one</p> <p>2 declaration cited in the reply. It is what</p> <p>3 was just cited in my friend's presentation.</p> <p>4 There at paragraph 13 of the Burdette</p> <p>5 declaration--this is JA-637. The statement</p> <p>6 is, "I am concerned that if the final rule</p> <p>7 is not vacated citizen input on project</p> <p>8 design will no longer be possible." No</p> <p>9 indication of an actual federal action to</p> <p>10 which NEPA review would be required, the</p> <p>11 ways in which citizen input would be</p> <p>12 inhibited, the ways in which that might</p> <p>13 influence of course the NEPA review</p> <p>14 resulting in injury.</p> <p>15 I would say also, Judge Agee, to</p> <p>16 your point about informational injury, the</p> <p>17 injury--this Court's cases teach that that</p> <p>18 kind of injury is really only applicable</p> <p>19 when there is an affirmative legal right to</p> <p>20 receive information and that information is</p> <p>21 being deprived. But as the DC circuit held</p> <p>22 in the case that we cite in our brief, this</p> <p>23 is the foundation on economic trends case.</p> <p>24 I'll just cite briefly from that case. An</p> <p>25 organization's desire to supply</p>	<p>1 right. We participate in the--in the</p> <p>2 NEPA review.</p> <p>3 JUDGE WYNN: So you've got some</p> <p>4 regulations that are directed at you. So</p> <p>5 you think that's enough to overcome the</p> <p>6 speculative aspect just like the other</p> <p>7 side?</p> <p>8 MR. KIMBERLY: That right. Our</p> <p>9 members participation in NEPA reviews when</p> <p>10 they're the ones, for instance, seeking</p> <p>11 permits is mandatory.</p> <p>12 JUDGE WYNN: You get regulations</p> <p>13 that's directed to you as the other side,</p> <p>14 that's good enough?</p> <p>15 MR. KIMBERLY: Well, actually just</p> <p>16 to clarify a point that counsel for CEQ</p> <p>17 just made, these are really regulations of</p> <p>18 agencies. The way that the agencies</p> <p>19 implement these NEPA regulations is by</p> <p>20 conducting NEPA reviews. So we still have</p> <p>21 to have a NEPA review as to which these</p> <p>22 rules apply. If it were, for instance, a</p> <p>23 challenge to the phase one rule, we'd have</p> <p>24 to show for instance that a member had a</p> <p>25 pending NEPA review, that the phase one</p>

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<p>1 rule would apply, and that it would</p> <p>2 inflict costs as a consequence on our</p> <p>3 members, for instance further delay in the</p> <p>4 completion of the NEPA review, or more</p> <p>5 burdensome analysis in the NEPA review.</p> <p>6 And our point is simply that the</p> <p>7 same standard should apply to the</p> <p>8 Plaintiffs.</p> <p>9 JUDGE MOTZ: Yeah, but you say</p> <p>10 they don't have standing. I think that's</p> <p>11 the gist of my colleague's--they don't have</p> <p>12 standing.</p> <p>13 JUDGE WYNN: I don't understand</p> <p>14 how if in a parallel case came up and you</p> <p>15 had to challenge these rules and specific--</p> <p>16 and first guess is--I'm just thinking about</p> <p>17 you and how you get in.</p> <p>18 MR. KIMBERLY: Well, I--</p> <p>19 JUDGE WYNN: [Interposing] Are you</p> <p>20 saying you're the Intervener, that you</p> <p>21 don't need Article 3 standing to just</p> <p>22 intervene, to get into it. But I'm just</p> <p>23 thinking you're standing here before us</p> <p>24 arguing.</p> <p>25 MR. KIMBERLY: Right.</p>	<p>1 JUDGE MOTZ: I would say that</p> <p>2 your standing, if you had to prove standing,</p> <p>3 is pretty comparable to the Plaintiffs.</p> <p>4 MR. KIMBERLY: Well, I think the</p> <p>5 point is that a Defendant doesn't have to</p> <p>6 prove Article 3 standing. But I--</p> <p>7 JUDGE WYNN: [Interposing] What's</p> <p>8 your interest in the case?</p> <p>9 JUDGE MOTZ: Yes.</p> <p>10 MR. KIMBERLY: Our interest in the</p> <p>11 case--</p> <p>12 JUDGE WYNN: [Interposing] The</p> <p>13 fact that you're even here--</p> <p>14 MR. KIMBERLY: [Interposing] Yes.</p> <p>15 JUDGE WYNN: --is the same basis</p> <p>16 they got. You think you're being regulated</p> <p>17 and that's speculative from their</p> <p>18 perspective but from yours you think it's</p> <p>19 something that gives you enough to be able</p> <p>20 to intervene in a case and argue just like</p> <p>21 you're the party here in front of us.</p> <p>22 MR. KIMBERLY: Well, respectfully,</p> <p>23 Your Honor, we are a party. We're an</p> <p>24 Intervener Defendant.</p> <p>25 JUDGE WYNN: That's what I'm</p>
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<p>1 JUDGE WYNN: You have some basis</p> <p>2 for doing so.</p> <p>3 MR. KIMBERLY: And with the table</p> <p>4 turned, as I say, we would have to prove</p> <p>5 what I've just shown. Judge Motz, to your</p> <p>6 point, our disagreement with the Plaintiffs</p> <p>7 is simply that what they have put forward,</p> <p>8 the 52 declarations that they've put</p> <p>9 forward fail at each step that I have</p> <p>10 suggested would be necessary. They don't</p> <p>11 actually identify any particular federal</p> <p>12 action to which NEPA review would apply</p> <p>13 under these rules conflicting--</p> <p>14 JUDGE MOTZ: [Interposing] I think</p> <p>15 I understand what you're arguing. What</p> <p>16 we're asking you is--or what is--what is</p> <p>17 your role here. And you're just saying</p> <p>18 that because we're an Intervener we don't</p> <p>19 have to show standing. Is that what you're</p> <p>20 saying?</p> <p>21 MR. KIMBERLY: Well, I think the--</p> <p>22 yes, our first point is that a Defendant--</p> <p>23 JUDGE MOTZ: [Interposing] It's</p> <p>24 pretty comparable to their standing.</p> <p>25 MR. KIMBERLY: I'm sorry?</p>	<p>1 trying to - - standing.</p> <p>2 MR. KIMBERLY: No, no, but there</p> <p>3 are very important distinctions.</p> <p>4 JUDGE WYNN: - - I'm going to have</p> <p>5 to really study that one now for Intervener,</p> <p>6 to see if you can just waltz in, anybody,</p> <p>7 without any standing, to just intervene.</p> <p>8 There has to be something. We have a basis</p> <p>9 there and that--</p> <p>10 MR. KIMBERLY: [Interposing] Right,</p> <p>11 Your Honor.</p> <p>12 JUDGE WYNN: It was just an</p> <p>13 interesting point. You don't have to go</p> <p>14 into it from my perspective but it was just</p> <p>15 interesting when I was sitting here</p> <p>16 thinking about who are you. I says you're</p> <p>17 in the same position as they are. You're,</p> <p>18 you're being regulated. And you feel like,</p> <p>19 well, that's it. That - -. And yet you</p> <p>20 say they don't--they don't have standing.</p> <p>21 They don't--they don't have enough to be</p> <p>22 here.</p> <p>23 MR. KIMBERLY: No. So, Your Honor,</p> <p>24 the distinction is I think you've just got</p> <p>25 to have a concrete entry. And that's so</p>

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<p>1 what--all they've put forward is sort of 2 general speculation about concern for 3 informational injury. 4 JUDGE WYNN: -- of you. If you 5 brought a parallel case, you'd have to have 6 a specific injury? 7 MR. KIMBERLY: We would have to 8 have a specific injury. We'd have to show-- 9 - 10 JUDGE WYNN: [Interposing] You 11 don't have a -- now? 12 MR. KIMBERLY: Well, we haven't 13 submitted declarations to the Court because, 14 again, that wasn't-- 15 JUDGE WYNN: [Interposing] -- we 16 don't have anything. You know, you're 17 just--you're in the same position. 18 MR. KIMBERLY: But, Your Honor, 19 again if I may complete the thought? 20 JUDGE AGEE: It seems like your 21 point would be, well, yeah, maybe I don't 22 have any kind of standing here but that 23 just proves they don't either. 24 MR. KIMBERLY: Well, I mean I 25 suppose--I suppose that would be the case.</p>	<p>1 JUDGE MOTZ: Excuse me. Before 2 you start, my colleague Judge Agee said at 3 point the 2020 rule is in effect but 4 doesn't have any affect. Isn't that 5 correct? 6 MS. HUNTER: It's not, Your Honor. 7 And my opposing counsel-- 8 JUDGE MOTZ: [Interposing] It 9 sounded like it pretty much-- 10 MS. HUNTER: [Interposing] It is 11 in effect and it is, as the Supreme Court 12 said in Andrus, CEQ regulations are binding 13 on all federal agencies. And I believe 14 CEQ's counsel admitted today that agencies 15 do not have to put their own implementing 16 regulations in place for the rule to take 17 into effect. 18 JUDGE AGEE: Counsel, if you want 19 to remove your mask, that would make it 20 just a little better. 21 MS. HUNTER: Thank you. And, you 22 know, we noted this in our reply brief. 23 For example, on page three we point to a 24 Forest Service EIS where it says, quote, 25 "All projects with notices of intent</p>
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<p>1 Although again the distinction is--so if 2 they could come forward and show, for 3 instance, that they had a member that was 4 participating in a particular NEPA review, 5 that they were demonstrably being denied 6 information that was available to them 7 before under the old rules, that is now not 8 available to them under the new rules, and 9 in the course of that actual rulemaking, 10 that actual NEPA review, they therefore had 11 to incur expenses, real expenses say filing 12 and litigating FOIA litigation. They would 13 have standing. 14 JUDGE AGEE: You're good? 15 JUDGE MOTZ: Sorry? 16 JUDGE AGEE: You're good? 17 JUDGE MOTZ: Well, I was just 18 going to ask--sorry, it's still early. 19 Okay. Yes, I'm fine. 20 JUDGE AGEE: All right. Thank you 21 very much. 22 MR. KIMBERLY: Okay, thank you. 23 JUDGE AGEE: All right. Ms. 24 Hunter, you have rebuttal time. 25 MS. HUNTER: Thank Your Honors.</p>	<p>1 initiated after September 14th, 2020, 2 will use the new regulations." That is 3 just the law. This is the law on the books. 4 And despite what my opposing counsel said, 5 this is not a fully discretionary rule. 6 JUDGE AGEE: So which regulations 7 is it that they're going to use? Because I 8 thought I understood opposing counsel to 9 say that he thought there weren't any 10 regulations implementing the 2020 rule out 11 there. So what specifically are you saying 12 is a regulation that injures you now? 13 MS. HUNTER: Yes. So they will 14 use the CEQ regulations as agencies 15 generally do and as cases which have come 16 before this Court, for example the 17 Department of Transportation relies on 18 those CEQ regulations. And what those 19 regulations do--and there are--there are 20 hundreds of changes in these regulations. 21 For example, they change when the agency 22 has to use up to date scientific 23 information. They change the standard for 24 when Plaintiff groups can get into court 25 and really raise the bar of what they have</p>

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<p>1 to do for exhaustion. So that is a harm</p> <p>2 that happens now to Plaintiffs today</p> <p>3 because they have to meet that exhaustion</p> <p>4 standard or risk losing something.</p> <p>5 JUDGE MOTZ: Can you point to</p> <p>6 somebody that has been harmed by any of</p> <p>7 this? I know you say in the--in the sphere</p> <p>8 your clients are all being harmed but that</p> <p>9 has actually partaken in this procedure?</p> <p>10 MS. HUNTER: Well, where we are at</p> <p>11 this point, Your Honor, is Plaintiffs who</p> <p>12 don't know whether NEPA is being used or</p> <p>13 not because they have previously relied on</p> <p>14 the NEPA process to alert them to when NEPA</p> <p>15 reviews will take place. But because this</p> <p>16 regulation specifically exempted with no</p> <p>17 discretion certain types of categories of</p> <p>18 environmental reviews from needing any NEPA</p> <p>19 review, those Plaintiffs are harmed.</p> <p>20 I can point to specific groups</p> <p>21 like Cowpasture River Association, like</p> <p>22 Mountain True, who rely on Forest Service</p> <p>23 regulations which have been changed in</p> <p>24 accordance with the 2020 regulations to</p> <p>25 exempt larger stands of trees from the NEPA</p>	<p>1 And just to answer Judge Wynn's concerns</p> <p>2 from before about why this is important,</p> <p>3 there has already been an attempt by</p> <p>4 congress to vacate phase one of these</p> <p>5 regulations. If there is another election,</p> <p>6 as you recognized, Judge Motz, we could be</p> <p>7 in a very different situation. And it's</p> <p>8 really important to restore--</p> <p>9 JUDGE MOTZ: [Interposing] So why</p> <p>10 does that--why does that help you?</p> <p>11 MS. HUNTER: Because right now the</p> <p>12 law of the land is the 2020 regulation and</p> <p>13 there needs to be some legal clarification</p> <p>14 on the question of whether that 2020 rule</p> <p>15 was promulgated according to law, according</p> <p>16 to the requirements of the APA. That is</p> <p>17 the question that these Plaintiffs want</p> <p>18 answered. And we want to be sure that, if</p> <p>19 that rule was illegally promulgated, it is</p> <p>20 stricken from the books and the 1978</p> <p>21 regulations again become the baseline from</p> <p>22 which CEQ can work from.</p> <p>23 JUDGE AGEE: So why didn't you</p> <p>24 challenge, make those challenges in the</p> <p>25 first instance? So then in your example</p>
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<p>1 process. And there are specific examples</p> <p>2 which are moving ahead today under those</p> <p>3 categorical exclusions which were</p> <p>4 promulgated under this new regulation.</p> <p>5 Another example would be the</p> <p>6 Mountain Valley Pipeline which needs</p> <p>7 additional NEPA review from the Bureau of</p> <p>8 Land Management. And today the law on the</p> <p>9 books, as I stated, is that the 2020 rule</p> <p>10 is what applies today. And--</p> <p>11 JUDGE MOTZ: [Interposing] Okay.</p> <p>12 Now, I know you want to tell us everything</p> <p>13 but it actually is important for you to</p> <p>14 listen to what we are concerned about.</p> <p>15 MS. HUNTER: Yes, Your Honor.</p> <p>16 JUDGE MOTZ: And so what would you</p> <p>17 have us do about all of those things? What</p> <p>18 is it you want us to do? You want us to</p> <p>19 reverse the District Court and do anything</p> <p>20 else?</p> <p>21 MS. HUNTER: And remand to the</p> <p>22 District Court to hear our motions on</p> <p>23 summary judgment, Your Honor. The CEQ is</p> <p>24 no longer defending the rule on the merits</p> <p>25 and we would like the rule to be vacated.</p>	<p>1 the Forestry Project, why wouldn't you</p> <p>2 challenge it then when you've got a very</p> <p>3 specific, concrete harm, as you see it,</p> <p>4 that they're cutting trees that before they</p> <p>5 wouldn't have cut, and that creates an</p> <p>6 injury that's cognizable? Why wouldn't you</p> <p>7 do it then?</p> <p>8 MS. HUNTER: So I think there's</p> <p>9 two reasons, Your Honor. First of all,</p> <p>10 that would be a challenge to the Forest</p> <p>11 Service but the bad actor here is CEQ.</p> <p>12 It's CEQ's rulemaking which was--is the</p> <p>13 problem here but it wasn't--</p> <p>14 JUDGE AGEE: [Interposing] Yeah,</p> <p>15 but you can challenge--you can challenge</p> <p>16 both of those at that time.</p> <p>17 MS. HUNTER: And the second reason,</p> <p>18 as the Plaintiffs and this Court has</p> <p>19 recognized this in Gaston Copper and other</p> <p>20 cases, Plaintiffs in environmental cases do</p> <p>21 not have to wait until trees are being cut</p> <p>22 down in order to have an injury. The</p> <p>23 redressability and imminence requirements</p> <p>24 for environmental standing is significantly</p> <p>25 lowered for that reason. And at the time</p>

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<p>1 the Plaintiffs brought this case it--the 2 harm was imminent. And we have seen that 3 harm payout as these Plaintiff groups no 4 longer have that procedural tool and that 5 notice that they had in the past to use. 6 And they've had to shift their missions 7 accordingly. And they may result now in 8 not being able to get into court, to 9 challenge projects harmful to them because 10 of the changes and this rule. And that's 11 real harm to community groups who can ill 12 afford experts to do that comment writing 13 for them. 14 JUDGE AGEE: All right. Anything 15 else you want to tell us in about 30 16 seconds? 17 MS. HUNTER: I think the key point 18 is that this is not a speculative rule. 19 Yes, we are grateful for these changes to 20 indirect and cumulative impacts and 21 alternatives, but there are a number of 22 other really key provisions that were 23 changed in the 2020 rule which are in place 24 today, which mandate that agencies have to 25 do less than they previously did. And to</p>	<p>1 C E R T I F I C A T E 2 I, Brandi Chamberlain, certify that 3 the foregoing transcript of 21-1839- 4 20221026 4C Hearing.mp3 was prepared using 5 standard electronic transcription equipment 6 and is a true and accurate record. 7 8 Signature: <%979,Signature%> 9 Date: November 2, 2022 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>Page 59</p> <p>1 suggest that agencies are just going to 2 voluntarily go above and beyond what the 3 baseline is, the significantly lowered 4 baseline, is a type of speculation that 5 courts have found strains credulity. 6 And with that I would ask that you 7 vacate the District Court's opinion and 8 return this for a full hearing on summary 9 judgment on the legality of that rulemaking. 10 Thank you. 11 JUDGE AGEE: All right. Thank you 12 very much. We appreciate the argument from 13 all counsel. And we regret we're not able 14 that this time to come down and greet you 15 as we normally do, and hope you'll return 16 on another occasion when we can do that. 17 So, with that, I'll ask the clerk to 18 adjourn court until our next session. 19 [END 21-1839-20221026 4C 20 Hearing.mp3] 21 22 23 24 25</p>	

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