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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE WHITEWATER DRAW
NATURAL RESOURCE
CONSERVATION DISTRICT et al.,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY et al.,
Defendants.

Case No.: 16cv2583-L-BLM

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

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

I. BACKGROUND

Plaintiffs are environmentalists, environmental groups, natural resource conservation groups and cattle ranchers from the southwestern region of the United States. They allege that Defendants, the United States Department of Homeland Security
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1 and its Secretary¹ (collectively, “DHS”), violated the National Environmental Policy Act,
2 42 U.S.C. § 4331 *et seq.* (“NEPA”), and corresponding regulations. They seek to set
3 aside DHS actions they deem noncompliant. Because NEPA itself does not provide for
4 judicial review, Plaintiffs are proceeding under Administrative Procedure Act, 5 U.S.C. §
5 101 *et seq.*

6 NEPA requires federal agencies to identify environmental impacts of proposed
7 actions, consider alternatives or mitigating measures capable of lessening the impact on
8 the environment, and prepare a report detailing these considerations. *See* 42 U.S.C. §
9 4332. It was passed in part due to the recognition of “the profound influences of
10 population growth” on the environment. *Id.* § 4331(a). NEPA established the Council on
11 Environmental Quality (“CEQ”), which promulgates regulations guiding agency
12 compliance. *Id.* The CEQ regulations provide that an agency’s environmental report
13 may take the form of an Environmental Assessment (“EA”), Environmental Impact
14 Statement (“EIS”), or a Finding of No Significant Impact (“FONSI”). *See* 40 C.F.R. §§
15 1508.9, 1508.11, 1508.13.

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

22 DHS policies and NEPA compliance procedures are contained in the DHS
23 Instruction Manual on Implementation of the National Environmental Policy Act
24

25
26 ¹ The current Secretary is Chad Wolf.

27 ² Unless otherwise noted, internal quotation marks, citations, and footnotes are
28 omitted throughout.

1 (“Manual”) and Directive 023-01, Implementation of the National Environmental Policy
2 Act (“Directive”). (Doc. nos. 71-3 through 71-9 (“DHS App’x”) at DIR00309.) The
3 Manual supplements the CEQ regulations as provided in 40 C.F.R. § 1507.3. (*See id.*)

4 CEQ regulations permit a “categorical exclusion” for those agency actions
5 which do not individually or cumulatively have a significant effect on the
6 human environment and which have been found to have no such effect in
7 procedures adopted by a Federal agency in implementation of these
8 regulations (§ 1507.3) and for which, therefore, neither an environmental
assessment nor an environmental impact statement is required.

9 40 C.F.R. § 1508.4. Pursuant to this provision, the DHS Manual provides for several
10 categorical exclusions. (*See* DHS App’x at DIR00330.)

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

13 Promulgation of rules, issuance of rulings or interpretations, and the
14 development and publication of policies, orders, directives, notices,
15 procedures, manuals, advisory circulars, and other guidance documents of
the following nature:

- 16 (a) Those of strictly administrative and procedural nature;
- 17 (b) Those that implement, without substantive change, statutory or
regulatory requirements;
- 18 (c) Those that implement, without substantive change, procedures,
manuals, and other guidance documents;
- 19 (d) Those that interpret or amend an existing regulation without
20 changing its environmental impact[.]

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

- 23 (1) The April 2015 Adjustments to Limitations on Designated School Official
24 Assignment and Study by F-1 and M-2 Nonimmigrants (“DSO Rule”)
25 amended the Student and Exchange Visitor Program by allowing for a
26 greater number of designated school officials to oversee the program, and by
27 allowing the spouses and children of visiting students to take classes, as long

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1 as they are not taking a full course load. (DHS App’x at DSO00009-18 and
2 DSO00271-329 (80 Fed. Reg, 23680 *et seq.* (Apr. 29, 2015)).)

- 3 (2) The March 2016 rule entitled Improving and Expanding Training
4 Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-
5 Gap Relief for All Eligible F-1 Students (“STEM Rule”), allowed
6 nonimmigrant students with degrees in STEM fields (science, technology,
7 engineering or mathematics) from United States universities to participate in
8 training opportunities for an additional 24 months and strengthened the
9 reporting requirements to help DHS track students in the program. (DHS
10 App’x at STEM00055-137, STEM005298 (81 Fed. Reg, 13040 *et seq.* (Mar.
11 11, 2016)).)
- 12 (3) November 2018 rule entitled Retention of EB-1, EB-2, and EB-3 Immigrant
13 Workers and Program Improvements Affecting High-Skilled Nonimmigrant
14 Workers (“AC21 Rule”) amended regulations regarding several existing
15 employment-based visa programs to enable U.S. employers to employ
16 highly skilled workers with employment-based visas and increase the ability
17 of visa-holding workers to change positions or employers. (DHS App’x at
18 AC0124-236 (81 Fed. Reg, 82398 *et seq.* (Nov. 18, 2016)).)
- 19 (4) The January 2017 rule established criteria for the use of DHS discretionary
20 authority on a case-by-case basis to temporarily parole into the United States
21 individual entrepreneurs of startup businesses with significant potential for
22 growth and job creation (“International Entrepreneur Rule”). (DHS App’x
23 at IER00041-93 (82 Fed. Reg, 5238 *et seq.* (Jan. 17, 2017)).)

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

26 briefly present[] the reasons why an action, not otherwise excluded (§
27 1508.4), will not have a significant effect on the human environment and for
28 which an environmental impact statement therefore will not be prepared. It
shall include the environmental assessment or a summary of it and shall note

1 any other environmental documents related to it (§ 1501.7(a)(5)). If the
2 assessment is included, the finding need not repeat any of the discussion in
3 the assessment but may incorporate it by reference.

4 40 C.F.R. § 1508.13. Plaintiffs seek to vacate the FONSI issued in relation to the June 2,
5 2014 Response to the Influx of Unaccompanied Alien Children Across the Southwest
6 Border (“UAC Response”). The program entailed an infrastructure expansion for
7 temporary detention, transportation and medical care of children and families crossing the
8 border. DHS prepared an EA which defined the parameters for when a more detailed
9 NEPA analysis for site-specific proposals would be required. Accordingly, in August
10 2014, DHS prepared a supplemental EA before construction of a housing facility for up
11 to 2,400 women and children near Dilley, Texas, and issued a FONSI. (DHS App’x at
12 UAC00534-58, UAC00568-71, and UAC00775-948.)

13 DHS had previously moved to dismiss Counts I and II of Plaintiffs’ operative
14 amended complaint (doc. no. 44 (“FAC”)). Count I alleged that the DHS Manual
15 violated NEPA because it did not require immigration program compliance. (*Id.* at 71.)³
16 Count II alleged that DHS violated NEPA by failing to engage in NEPA review with
17 respect to seven immigration statutes pertaining to employment-based immigration,
18 family-based immigration, long-term nonimmigrant visas, parole, Temporary Protected
19 Status, refugees, and asylum, and because it did not initiate NEPA compliance with
20 regard to the immigration non-enforcement policy known as Deferred Action for
21 Childhood Arrivals. (*Id.* at 73.) The motion to dismiss Counts I and II was granted
22 pursuant to Federal Rule of Civil Procedure 12(b)(6). (*See* doc. no. 55.)

23 At issue on the pending cross-motions for summary judgment are Plaintiffs’
24 remaining Counts III through V, alleging that on its face CATEX A3 is not sufficiently
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27 ³ Unless otherwise noted, page citations in this Order refer to those generated by the
28 court’s CM/ECF system.

1 defined to comply with NEPA, that the application of CATEX A3 to the DSO, STEM,
2 AC21 and International Entrepreneur Rules violated NEPA, and that the EA which led to
3 the UAC Response FONSI was inadequate under NEPA. (FAC at 74-80.)

4 Plaintiffs move for summary judgment on Counts III through V. DHS cross-
5 moves for summary judgment based on lack of Article III standing, or in the alternative,
6 on the merits of Counts III through V.

7 **II. DISCUSSION**

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

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

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

21 *See C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480
22 (9th Cir. 2000) (citations omitted). If the nonmoving party would bear the burden at trial,
23 the moving party can meet the burden on summary judgment by pointing out the absence
24 of evidence with respect to any one element of the opposing party's claim or defense.

25 *See Celotex*, 477 U.S. at 325.

26 When the moving party has carried its burden . . . , its opponent must do
27 more than simply show that there is some metaphysical doubt as to the
28 material facts[, but] must come forward with specific facts showing that
there is a genuine dispute for trial. Where the record taken as a whole could

1 not lead a rational trier of fact to find for the non-moving party, there is no
2 genuine issue for trial.

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

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

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

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

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

19 When making this determination, the court must view all inferences drawn from
20 the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*
21 *Electric Indus. Co., Ltd.*, 475 U.S. at 587. “The district court may limit its review to the
22 documents submitted for the purpose of summary judgment and those parts of the record
23 specifically referenced therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d
24 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated “to scour the record in
25 search of a genuine issue of triable fact.” *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.
26 1996) (citing *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995)).

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1 The filing of cross-motions for summary judgment "does not necessarily mean
2 there are no disputed issues of material fact and does not necessarily permit the judge to
3 render judgment in favor of one side or the other." *Starsky v. Williams*, 512 F.2d 109,
4 112 (9th Cir. 1975). Furthermore, "each motion must be considered on its own merits,"
5 and the court must consider evidence submitted in support of and in opposition to both
6 motions before ruling on each one. *Fair Hous. Council of Riverside County, Inc. v.*
7 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

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

13 "[T]he party asserting federal jurisdiction . . . has the burden of establishing it."
14 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). Furthermore, "[e]ach
15 element of standing must be supported with the manner and degree of evidence required
16 at the successive stages of the litigation." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068
17 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))
18 (ellipsis omitted). Accordingly, Plaintiffs as the parties who commenced this action in
19 federal court, have the burden of establishing Article III standing with the type of
20 evidence required at summary judgment.

21 Article III standing "requires federal courts to satisfy themselves that the plaintiff
22 has alleged such a personal stake in the outcome of the controversy as to warrant *his*
23 invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488,
24 493 (2009) (emphasis in original). When, as here, a plaintiff seeks injunctive relief, the
25 plaintiff "must show that he is under threat of suffering injury in fact that is concrete and
26 particularized; the threat must be actual and imminent, not conjectural or hypothetical; it
27 must be fairly traceable to the challenged action of the defendant; and it must be likely

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1 that a favorable judicial decision will prevent or redress the injury.” *Id.* He or she must
2 do so with regard to each type of relief sought. *Id.*

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

8 deprivation of a procedural right without some concrete interest that is
9 affected by the deprivation—a procedural right *in vacuo*—is insufficient to
10 create Article III standing. Only a person who has been accorded a
11 procedural right to protect his concrete interests can assert that right without
meeting all the normal standards for redressability and immediacy.

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

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

24 asserted injury arises from the government’s allegedly unlawful regulation
25 (or lack of regulation) of someone else, . . . causation and redressability
26 ordinarily hinge on the response of the regulated (or regulable) third party to
27 the government action or inaction—and perhaps on the response of others as
28 well. The existence of one or more of the essential elements of standing
depends on the unfettered choices made by independent actors not before the
courts and whose exercise of broad and legitimate discretion the courts

1 cannot presume either to control or to predict; and it becomes the burden of
2 the plaintiff to adduce facts showing that those choices have been or will be
3 made in such manner as to produce causation and permit redressability of
4 injury. Thus, when the plaintiff is not himself the object of the government
5 action or inaction he challenges, standing is not precluded, but it is
6 ordinarily substantially more difficult to establish.

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

8 DHS argues that Plaintiffs cannot meet their burden to show injury in fact and
9 causation. In their complaint, Plaintiffs request a finding that CATEX A3 violates
10 NEPA, and seek to set aside its application to the DSO, STEM, AC21 and International
11 Entrepreneur Rules, as well as the FONSI relative to the UAC Response. (FAC at 74-
12 82.) Their theory of standing is that DHS is charged with enforcing and administering
13 immigration laws, immigration drives population growth, which has a negative effect on
14 the environment. Plaintiffs claim an interest in the quality of their environment. (*See*
15 doc. no. 70-1 (“Pls’ Mot.”) at 8.)

16 Plaintiffs point to the affidavits filed in support of their amended complaint. (*See*
17 Pls.’ Reply at 16, 19.) They filed expert reports prepared by Jessica Vaughan, Director
18 for Policy Studies for the Center for Immigration Studies (Pls.’ Ex. 3 (“Vaughan Rept.”)),
19 Steven A. Camarota, Ph.D., Director of Research, Center for Immigration Studies (Pls.’
20 Ex. 4 (“Camarota Rept.”)), and Philip Cafaro, Ph.D. (Pls.’ Ex. 5 (“Cafaro Rept.”)). (Doc.
21 nos. 44-4 through 44-6, respectively.) The reports support Plaintiffs’ contention that
22 immigration causes an increase in population and that population growth has a negative
23 effect on the environment. In addition, Plaintiffs filed affidavits of Plaintiff association
24 members and individual Plaintiffs, which reference population growth and resulting
25 impact on the environment in the areas where they reside or enjoy visiting. They
26 attribute the growth to immigration. (Pls.’ Reply at 16 (citing doc. nos. 44-9 through 44-
27 15 (Lamm, Rosenberg, Willey, Oberlink, Schneider, Hurlbert and Colton Decl.,
28 respectively), 19 (citing doc. nos. 44-7, 44-8, and 44-16 through 19 (F. Davis, P. Davis,
Cowan, Ladd, Oliver and Pope Decl.).)

1 **A. Count III -- Challenge to CATEX A3**

2 NEPA regulations allow for exclusions from environmental assessment and
3 environmental impact statement requirements for actions the agency finds do not have a
4 significant effect on the environment. *See* 40 C.F.R. § 1508.4. Accordingly, CATEX A3
5 excludes promulgation of rules, issuance of rulings, and development of policies and
6 other guidance documents that are “strictly administrative and procedural nature,” that
7 “implement, without substantive change,” statutory, regulatory or procedural
8 requirements, or “interpret or amend an existing regulation without changing its
9 environmental impact[.]” (*See* DHS App’x at DIR00355.)

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

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

20 CATEX A3 is not a concrete and particular project. On its face, CATEX A3 has
21 no effect on the environment, because it applies only to “strictly administrative and
22 procedural” documents, implementation of other provisions “without substantive
23 change,” and interpretation or amendment of existing regulations “without changing their
24 environmental impact.” (*See* DHS App’x at DIR00355.) None of Plaintiffs’ evidence
25 supports a reasonable inference that CATEX A3 causes an increase in immigration.

26 Plaintiffs have not shown with reasonable probability that CATEX A3 on its face
27 threatens their interest in the environment or that their claimed environmental injury is
28 dependent on CATEX A3. Because Plaintiffs have not raised a genuine issue of material

1 fact as to the injury-in-fact and causation requirements, they lack Article III standing on
2 Count III.

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

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

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

13 Declarations of Plaintiff association members and individual Plaintiffs attribute
14 environmental damage to an increase in population, which they attribute to immigration
15 in general, or alternatively, to illegal immigration across the southwest border. The
16 Camarota Report provides past and projected population growth numbers attributable to
17 immigration in general. The Cafaro Report links environmental damage to population
18 growth from immigration in general. The Vaughan Report provides past population
19 increase numbers attributable to broad immigration programs. (Vaughan Rept. at 29-34.)
20 The report, however, does not show that any increase is attributable to the DHS rules
21 under challenge in the complaint.

22 The Vaughan Report includes a discussion of eight DHS programs, including
23 employment-based immigration, the nonimmigrant visa program, and the parole program.
24 Although it alludes to the DSO, STEM, AC21 and International Entrepreneur Rules
25 (Vaughan Rept. at 15 (F-1 and M-2 visas), 18 (DSO and STEM Rules), 11-12 (EB-1, EB-
26 2 and EB-3 visas only and *not* referencing AC21 Rule), 22 (referencing International
27 Entrepreneur Rule)), it does not address them apart from the broad immigration programs
28 in which they are included—The Nonimmigrant Visa Program (*id.* at 14-19),

1 Employment Based Immigration Program (*id.* at 11-12), and Parole Program (*id.* at 19-
2 22).

3 The AC21 Rule is a case in point. It amends the existing employment visa
4 program authorized by Congress (*see* DHS App’x at AC00153; Vaughan Rept. at 11) and
5 applies to immigrants who already hold EB-1, EB-2 or EB-3 visas (*see* DHS App’x at
6 AC00219). It is therefore not reasonably probable that it will result in an increased
7 immigration.

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

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

20 This is often difficult when, as here, the alleged injury arises from government
21 regulation of someone other than the plaintiff him- or herself. *See Summers*, 555 U.S. at
22 493. In such cases, causation “ordinarily hinge[s] on the response of the regulated . . .
23 third party to the government action . . .” *Lujan*, 504 U.S. at 562. Causation then
24 “depends on the unfettered choices made by independent actors not before the courts and
25 whose exercise of . . . discretion the courts cannot presume either to control or to predict .
26 . . .” *Id.*

27 So it is here with regard to the DSO and STEM Rules, which apply to student
28 visas. As acknowledged in the Vaughan Report, these rules are included in the “The

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

14 The same is true with regard to the International Entrepreneur Rule. By its own
15 terms, the rule provides entry into the United States on a *temporary* basis. (DHS App’x
16 at IER00041; *see also* Vaughan Rept. at 20 (“The alien paroled into the country is
17 therefore temporarily ‘lawfully present.’”).) Unlike with other parole programs, Vaughan
18 does not contend that the International Entrepreneur Rule leads to permanent residency.
19 (*See* Vaughan Rept. at 20-22.) Accordingly, as with student visas, to the extent persons
20 admitted under the International Entrepreneur Rule remain in the United States on a long-
21 term basis, it is the product of their independent decision making rather than the rule
22 under challenge. The Vaughan Report provides no evidence to the contrary. (*See id.* at
23 30, 32 (Tables 1, 3 provide no information for the number of international
24 entrepreneurs).)

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

1 **C. Count V – Challenge to the UAC Response FONSI**

2 Finally, Plaintiffs challenge the sufficiency of the EA prepared in support of the
3 FONSI related to the UAC Response. DHS prepared an EA relative to the UAC
4 Response, as well as a supplemental EA for the decision pursuant to the UAC Response
5 to construct a housing facility near Dilley, Texas for up to 2,400 illegal border crossers.
6 (DHS App’x at UAC00769, UAC00773 *et seq.*) In both instances, DHS issued a FONSI.
7 Plaintiffs have not provided sufficient evidence to show it is reasonably probable that this
8 DHS action will increase illegal crossings, as the action was taken *in response* to the
9 illegal crossings already in progress. Plaintiffs have provided no evidence that the UAC
10 will foster additional illegal border crossings.

11 Plaintiffs argue the Court should focus on the environmental effect of the “border
12 crisis itself,” rather than on the UAC Response they challenge in their complaint. (Pls.’
13 Reply at 21.) This argument is unavailing, because Plaintiffs must tie the asserted
14 procedural violation to a “concrete and particular” DHS action. *See Wilderness Soc.*, 622
15 F.3d at 1260. The declarations of individual Plaintiffs and members of Plaintiff
16 associations describe the environmental damage caused by illegal border crossers in
17 along the southwest border in Arizona and New Mexico (*see* doc. nos. 44-7, 44-8, 44-16,
18 44-17, 44-19), however, the damage is attributed to illegal crossings in general, including
19 drug trafficking, rather than to the UAC Response in particular.

20 Furthermore, to the extent Plaintiffs’ challenge is directed at the FONSI relative to
21 the facility in Texas, no Plaintiffs or Plaintiff association members who filed declarations
22 reside in Texas. (*See* doc. nos. 44-7, 44-8, 44-16, 44-17, 44-19.) To meet their burden
23 with regard to injury in fact on a procedural injury theory, Plaintiffs must show that their
24 “concrete interest” lies in the relevant geographic area. *See Summers*, 555 U.S. at 499
25 (“to establish standing plaintiffs must show that they use the area affected by the
26 challenged activity and not an area roughly in the vicinity of a project site”). Plaintiffs
27 have not done so.

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

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

12 **III. CONCLUSION**

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

17 **IT IS SO ORDERED.**

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19 Dated: June 1, 2020

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21 Hon. M. James Lorenz
22 United States District Judge
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