UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HUMANE SOCIETY OF THE UNITED STATES, MERCY FOR ANIMALS, FARM SANCTUARY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, VETERINARY SERVICES, KEVIN SHEA, BURKE HEALEY, MARK DAVIDSON,

Defendants.

Case No. 20-03258 AB (GJSx)

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Before the Court is a Motion to Dismiss First Amended Complaint ("Motion," Dkt. No. 44) filed by Defendants United States Department of Agriculture ("USDA"), the Animal and Plant Health Inspection Service ("APHIS"), Veterinary Services; Kevin Shea, in his official capacity as Administrator of USDA APHIS; Dr. Burke Healy, in his official capacity as the Deputy Administrator of Veterinary Services and Chief Veterinary Officer of APHIS; and Dr. Mark Davidson, in his official capacity as Associate Administrator of APHIS and former Veterinary Services' Associate Deputy Administrator (collectively, "Defendants," or "APHIS"). Plaintiffs the Humane Society of the United States ("HSUS"), Mercy for Animals ("MFA"), and Farm

Sanctuary (collectively, "Plaintiffs") filed an opposition and Defendants filed a reply. The Court heard oral argument on November 20, 2020. For the following reasons, the Motion is **DENIED**.

## I. PLAINTIFFS' COMPLAINT

Plaintiffs' First Amended Complaint ("FAC," Dkt. No. 42) alleges that APHIS violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, in connection with its December 2015 Final Environmental Assessment, *High Pathogenicity Avian Influenza Control in Commercial Poultry Operations – A National Approach* ("Final EA"). FAC ¶ 6.

### A. Statutory Context

#### 1. The National Environmental Policy Act

The purpose of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347, is to ensure that federal agencies are fully aware of the impact of their decisions on the environment. *See Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 985 (9th Cir. 1985). To that end, NEPA establishes a process requiring federal agencies to consider the environmental impacts of their actions. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). NEPA imposes procedural, not substantive, requirements. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

Under NEPA, a federal agency must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS serves two purposes: it "ensures that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences, and it provides the public with information on the environmental impact of a proposed action and encourages public participation in the development of that information." *Oregon Env't Council v. Kunzman*, 817 F.2d

484, 492 (9th Cir. 1987).

If it is not clear whether a proposed action is significant enough to warrant an EIS, the agency prepares an Environmental Assessment ("EA"). 40 C.F.R. § 1501.4(b), (c); 40 C.F.R. § 1508.9. If the agency concludes based on the EA that the proposed action will not significantly impact the environment, the agency issues a finding of no significant impact ("FONSI") instead of preparing an EIS. 40 C.F.R. § 1508.13; *see generally Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-58 (2004).

**2. The Animal Health Protection Act**

The Animal Health Protection Act ("AHPA"), 7 U.S.C. §§ 8301-8322, authorizes the Secretary of Agriculture (Secretary) to "carry out operations and measures to detect, control, or eradicate any pest or disease of livestock." 7 U.S.C. § 8308(a). HPAI is one such disease of livestock. To carry out these operations, the AHPA also authorizes the Secretary to cooperate with other Federal agencies, States, political subdivisions of States, and Tribal nations, among others. *Id.* § 8310(a).

The Secretary has delegated the authority under the AHPA to APHIS, an agency within the USDA. 7 C.F.R. § 2.80(a)(37). And within APHIS, Veterinary Services (VS) is responsible for providing direction and coordination for programs and activities under the AHPA. *Id.* § 371.4(b)(xii).

AHPA allows the Secretary to hold, seize, quarantine, treat, destroy, dispose of, or take other remedial action with regard to, animals, including poultry, that are moving or have been moved in *interstate* commerce if the Secretary has reason to believe they may be affected by a livestock disease. 7 U.S.C. § 8306(a)(1). The Secretary may restrict *intrastate* movement of such animals only if the Secretary declares an extraordinary emergency. *Id.* § 8306(b)(1). The Act authorizes the Secretary to indemnify poultry owners for animals that the Secretary required to be destroyed (*id.* § 8306(d)), and permits the Secretary to indemnify owners who destroyed animals pursuant to a state order of destruction. *Id.* § 8310(a); 9 C.F.R. § 53.2(b).

**B. Factual Background**

Following 2014-2015 outbreaks of highly pathogenic Avian Influenza ("HPAI")[1] affecting wild birds and backyard and commercial poultry flocks, in 2015 the United States Department of Agriculture ("USDA") initiated a process to update its HPAI control and response protocols ("HPAI control plan"). FAC ¶ 2. This process included review of impacts to the human environment pursuant to NEPA, and the agency accepted public comment on the HPAI control plan and associated NEPA analysis, including from HSUS. FAC ¶¶ 2, 3.

In July 2015, pursuant to NEPA, APHIS prepared its first Environmental Assessment ("EA") addressing the impacts of HPAI and APHIS's control plan for a national response ("July 2015 EA"). APHIS considered two responses to an HPAI crisis: (1) a "no action" alternative, meaning state and local authorities would be responsible for response measures like depopulation, transport, disposal of carcasses, disinfection, etc., or (2) the "adaptive management program" alternative, which means "to provide assistance to States and local authorities in establishing and enforcing HPAI quarantines and conducting bird flu control activities as outbreaks occur throughout the nation." FAC ¶ 57. This second alternative is consistent with APHIS's response to the prior HPAI outbreak. APHIS considered this second option the "preferred alternative," analyzed environmental impacts of methods within that alternative, and issued a FONSI, concluding that "there would be no significant impact to the human environment from the implementation of the preferred alternative." FAC ¶ 59.

After APHIS made the July 2015 EA and FONSI available to the public for review and comment, HSUS submitted a comment on APHIS's HPAI control plan. HSUS argued that APHIS could prevent future HPAI outbreaks by requiring that

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[1] "Highly pathogenic Avian Influenza ('HPAI') is an extremely infectious and fatal form of [avian influenza, commonly known as the bird flu], that spreads rapidly within and between flocks or herds and can disastrously affect humans." FAC ¶ 1.

animals raised for food and egg production be placed in cage-free, low stocking-density environments. FAC ¶ 60. HSUS proposed that APHIS could accomplish that by "conditioning the USDA's reimbursement of poultry producers for lost stock on their adoption of improved confinement measures would help limit future HPAI outbreaks from rapidly spreading and potentially causing significant harm to humans, animals, and the environment." FAC ¶ 60.

In December 2015, APHIS published a supplemental EA setting forth an HPAI control plan that was essentially the same as the original EA. In this Final EA, APHIS didn't "broaden the scope or depth of its analysis of alternative containment approaches and failed to sufficiently respond to the serious concerns raised by HSUS in its comment." FAC ¶ 61. APHIS declined to adopt HSUS's proposed alternative of establishing indemnification conditions that would reduce the density of poultry operations. *Id.* APHIS stated that "APHIS and the poultry industry agree that the impact of an HPAI outbreak is amplified where poultry production is highly concentrated or networked," but that "APHIS is not going to adopt this type of governmental restriction at this time." APHIS reaffirmed its FONSI and declined to prepare an EIS. *Id.*

Plaintiffs allege that "APHIS's analyses are egregiously insufficient to satisfy NEPA for several reasons, including for failing to sufficiently evaluate reasonable alternatives, inadequately examining the consequences, environmental impacts, and adverse effects of its actions, and failing to prepare an EIS." FAC ¶ 63. Plaintiffs also allege that "APHIS's proposed depopulation and disposal methods threaten to violate multiple state and federal laws, including federal laws enacted to protect the environment, such as the Clean Water Act, the Clean Air Act, the Endangered Species Act, and the respective implementing regulations associated with such acts. Because APHIS failed to adequately evaluate the potential impact of its HPAI control plan on these important environmental laws, APHIS's failure to prepare an EIS violates NEPA." FAC ¶ 64.

Based on the foregoing allegations, Plaintiffs now sue under NEPA and the APA, asking the Court to vacate and set aside APHIS's EA and FONSI, to remand the HPAI control plan to APHIS for reconsideration under NEPA, and to require APHIS to prepare an EIS that satisfies the requirements of NEPA. *See* FAC Prayer pp. 56-57.

Plaintiffs also allege a violation Executive Order 12898, which requires federal agencies to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12898, § 1-101 (Feb. 11, 1994). FAC ¶ 114.

Plaintiffs are three animal welfare organizations. *See* FAC ¶¶ 9, 14, 19 (describing Plaintiffs' missions). All three Plaintiffs sue as associations on behalf of their members, and one of them—Farm Sanctuary—argues it has organizational standing to proceed directly. The FAC includes general allegations about the Plaintiffs' memberships (¶¶ 10, 15, 20), and further allegations about 10 specific (albeit unnamed) members or employees. *See* FAC ¶¶ 11, 12, 16, 17, 18, 21. Among these members are organic chicken farmers who are situated near large industrial poultry operations (FAC ¶ 11) or persons who keep chickens and other birds in their yards (FAC ¶ 12, 16), all of whom argue that they and their flocks are at greater risk of being exposed to avian influenza as a result of APHIS's HPAI control plan. Other members are veterinarians who have participated in the traumatizing "depopulation of birds at a farm sanctuary." (FAC ¶ 12.) Other individuals are involved in farm animal rescue and sanctuary work, including with birds, who allege they have an interest in preventing the spread of HPAI to the animals they rescue and work with. FAC ¶ 16-17. One MFA member is a member of the Lumbee Tribe of North Carolina who lives near a large-scale poultry operation and who is concerned about APHIS's "failure to conduct an environmental justice analysis and to identify and address the impact of the HPAI control plan on his community and on other vulnerable communities in Robeson County." FAC ¶ 18. Finally, one Farm Sanctuary employee is actively

involved in rescuing and caring for animals, including birds, that she has personal relationships with and is emotionally attached to, and she has an interest in preventing the spread of HPAI to the animals and sanctuary staff. FAC ¶ 21.

Defendants move to dismiss for lack of subject matter jurisdiction, arguing that none of the Plaintiffs have pled facts sufficient to show injury-in-fact, causation, and redressability, and therefore they lack standing. Plaintiffs contend their allegations satisfy all elements of standing

## II. LEGAL STANDARD

### A. Rule 12(b)(1) Challenge to Subject Matter Jurisdiction

Federal district courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citation omitted). The plaintiff has the burden of establishing that the court has the subject-matter jurisdiction to grant the relief requested. *Id.*

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a party may move to dismiss a complaint for lack of subject matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction," *id.*, and the court "assume[s] [plaintiff's factual] allegations to be true and draw[s] all reasonable inferences in his favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). But, as with a Rule 12(b)(6) motion, courts do not accept the truth of any legal conclusions contained in the complaint. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

### B. Legal Standard for Standing

Article III standing is a "threshold jurisdictional question" that a court must decide before it may consider the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). To establish Article III standing, "a plaintiff must show (1) it has

suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1079 (9th Cir. 2015) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

A plaintiff that is an organization can assert standing associationally, that is, by basing its standing on that of its members, or directly as an organization, that is, by alleging injury to itself.[2] *See Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). To proceed as an associational plaintiff on behalf of members, a plaintiff must demonstrate that its members would have standing to sue in their own right. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 917-18 (9th Cir. 2018); *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). Thus, the complaint must allege facts that would permit a member to satisfy the three elements above—injury-in-fact, causation, and redressability—that are the "irreducible constitutional minimum" of Article III standing. *Friends of Santa Clara River*, 887 F.3d at 908 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S 555, 560 (1992)).

An organization may also assert standing to proceed directly, in which case it must *itself* satisfy the three elements of standing. To show injury-in-fact on its own behalf, an organization must allege facts showing that the challenged action has "[1] frustrated its mission and [2] caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) (stating elements in context to challenge to injury-in-fact element); *see*

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[2] The cases refer to an organization's standing on behalf of members as associational, representational, or representative standing. The Court will use the term "associational standing." An organization suing on its own behalf asserts "organizational standing."

*Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (organization suing in its own right satisfied injury-in-fact element with allegations of frustration of purpose and resulting diversion of resources).

A plaintiff must demonstrate standing "for each claim he seeks to press" and for " 'each form of relief sought.' " *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352 (2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.,* 528 U.S. 167, 185 (2000)). The plaintiff bears the burden to establish standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990)).

## III. DISCUSSION

### A. Defendants' Challenge Under *Summers* is Unavailing.

Defendants first argue that Plaintiffs cannot establish organizational standing because they did not identify the individual injured members by name, as Defedants say is required by *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1147, 173 L. Ed. 2d 1 (2009). Defendants overstate *Summers*.

In *Summers*, the organizational plaintiffs sued the Forest Service for violating NEPA, seeking to bar it "from enforcing regulations that exempt small fire-rehabilitation and timber-salvage projects from the notice, comment, and appeal process used by the Forest Service for more significant land management decisions." *Summers*, 555 U.S. at 490. The Court found that the organizations lacked standing because they did not identify any particular member who would be impacted by the regulations in issue. For example, they did not identify a single member who visited or visits the location. The Court also specifically rejected the dissent's view, which would have found standing based on a "probabilistic" claim of injury that because an

organizational plaintiff had 700,000 members including thousands of members in California who use and enjoy Sequoia National Forest where the small parcel was located, it is *probable* that some of them would visit the specific parcels in issue and suffer harm. *Id.* The Court emphasized that such allegations stated only possible harm based on probabilities and statistics, not actual harm based on particular individuals. Thus, the Court observed that precedent required plaintiffs to "make specific allegations establishing that at least one identified member ha[s] suffered or w[ill] suffer harm" from the defendants' alleged actions. *Summers*, 555 U.S. at 498. Accordingly, in *Summers*, the plaintiffs lacked standing because their alleged harm was not tied to any specific person. But requiring an organizational plaintiff to tie its injury to specific, identifiable members is not equivalent to requiring that plaintiff to name those members at the pleading stage. Thus, "[w]here is it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (rejecting argument that *Summers* requires plaintiff's members to "be specifically identified" for the plaintiff to satisfy Article III standing).

Notably, here, Plaintiffs do not rest their claim of standing on probabilities and statistics. Rather, the FAC alleges particular facts about 10 individuals going to how Defendants' conduct allegedly injures them. Furthermore, as demonstrated by their thorough memoranda, Defendants were able to fully and substantively contest the Plaintiffs' standing despite not knowing the individuals' names. Although Plaintiffs have not alleged these individuals' names, they are plainly "identified," albeit as-yet-unnamed, members, and individualized allegations are made as to each of them. This is sufficient under *Cegavske*.

Defendants argue that the Court will not be able to determine whether a geographic nexus exists between the claimed injury and the location of the impacts (as is required in environmental cases) unless the plaintiffs are named. But the FAC *pleads* a geographic nexus for these individuals, and simply naming the individuals reveals nothing about their location. Certainly (and as Plaintiffs' affirmed at oral argument), the members would be named in the course of discovery for Defendants to test the FAC's allegations. A plaintiff need only establish standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). This case is at the pleading stage, so "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990)). The individual's names add nothing to the standing analysis at this stage, so the Court rejects Defendants' argument under *Summers*. The Court now proceeds to its standing analysis.

**B. Farm Sanctuary has not pled an injury on its own behalf.**

To assert standing on its own behalf, Farm Sanctuary must allege facts showing that the challenged action has "[1] frustrated its mission and [2] caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary,* 950 F.3d at 1265. An organization's mission is frustrated when the challenged action "'perceptibly impaired' their ability to perform the services they were formed to provide." *Id.* at 1266.

Here, Farm Sanctuary alleges that its mission is to protect and provide sanctuary to farmed animals, including poultry. FAC ¶ 19. The FAC lacks allegations showing that APHIS's EA impairs Farm Sanctuary's ability to do these things. Nor does the FAC allege the second prong, diversion of resources. Plaintiffs direct the Court to FAC ¶¶ 20, 58, 60, 69, and 79 as alleging that Farm Sanctuary has to increase biosecurity measures, and thus diverts resources, to mitigate the threats allegedly

caused by APHIS's EA, but none of these paragraphs alleges anything like that. Therefore, Farm Sanctuary has not pled facts establishing injury-in-fact on its own behalf, so Farm Sanctuary lacks standing to sue on its own behalf.

**C. The Plaintiffs Have Associational Standing.**

The Court turns to whether Plaintiffs have associational standing to sue on behalf of their members.

To satisfy the injury in fact requirement for a procedural injury, Plaintiffs must demonstrate that "(1) [the agency] violated certain procedural rules; (2) these rules protect Plaintiffs' concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (citing *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003)).

First, Plaintiffs allege that APHIS violated NEPA by its EA and FONSI, and its failure to prepare an EIS. This is the violation of procedural rules, a cognizable injury. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (noting that the failure to prepare a proper NEPA analysis is cognizable injury).

Second, Plaintiffs allege facts showing that NEPA's EIS requirement protects their concrete interests. The Ninth Circuit has described the "concrete interest" test "as 'requiring a geographic nexus between the individual asserting the claim and the location suffering an environmental impact.' " *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (quoting *Citizens for Better Forestry*, 341 F.3d at 971). Here, Plaintiffs allege that several of their individual members raise chickens on their properties, and that they are in proximity to large-scale poultry producers where, they allege, HPAI outbreaks are more likely to occur. They allege that the risk of HPAI outbreaks would be reduced if producers changed to low-density operations, which APHIS could readily incentivize by changing their indemnification program. By requiring APHIS to meaningfully consider such alternatives and produce an EIS to analyze environmental impacts, NEPA protects

Plaintiffs' concrete interests.

Third, Plaintiffs allege facts showing that is *reasonably* probable that APHIS's action will threaten their concrete interests. The FAC includes allegations to the effect that APHIS's existing indemnification program subsidizes high-density livestock conditions that are likely to foster HPAI outbreaks, and that the alternative indemnification program Plaintiffs' propose—but that APHIS failed to consider in violation of NEPA—would likely cause poultry farmers to reduce the density of their operations and therefore lower the risk of HPAI outbreaks. *See e.g.*, FAC ¶¶ 4, 54-55. Defendants challenge these allegations as conclusory, speculative, and attenuated. The Court disagrees. They are sufficient to satisfy Plaintiffs' burden to show harm at the pleading stage.[3]

None of Defendants' arguments against the injury-in-fact element of standing has merit. First, Defendants characterize the Plaintiffs' concern about the possibility of another HPAI outbreak as the injury, and say it is too speculative and hypothetical to count towards standing, which requires an "imminent" injury. This misstates the injury. The injury here is the procedural injury of APHIS's alleged failure to comply with NEPA's requirements for preparing an EIS. That injury has already occurred. Plaintiffs' concern about future HPAI outbreaks and its impacts on their members and

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[3] The FAC alleges that the EA was deficient in numerous ways other than its failure to consider restructuring APHIS's indemnification program. For example, the FAC alleges that the EA failed to consider the environmental consequences of the adaptive management program (the preferred alternative), which permits the killing and disposal of birds using practices that are hazardous to the environment and public health, including burying carcasses in unlined pits, rendering or composting carcasses, burning them through open-air incineration, and the mass deployment of ventilation shutdown ("VSD") or suffocation. FAC ¶¶ 5, 17. According to Plaintiffs, through these disposal methods, "the carcasses of infected birds are broken down, and their bodily fluids, chemical and biological leachate components, agricultural dust, and other gases (including dioxin29) are released into the surrounding environment, threatening the health and safety of both humans and wildlife." FAC ¶¶ 58. Plaintiffs allege that the EA failed to consider the effects of these practices on the environment. *See, e.g.,* FAC ¶ 10. However, the parties' memoranda did not meaningfully discuss these other alleged shortcomings of APHIS's EA, so the Court will not address them.

their animals goes to the second element—whether they have concrete interests affected by the alleged violation. Second, Defendants characterize Plaintiffs as asserting a procedural right *in vacuo* that cannot support standing. Not so. A mere procedural right *in vacuo* would be, for example, being "denied the ability to file comments on some Forest Service actions," without any connection to the proposed Forest Service actions. *Summers*, 555 U.S. at 496, 129 (characterizing the mere denial of right to comment as violation of "a procedural right in vacuo"). By contrast, a plaintiff who alleges some concrete interest that is affected by the deprivation is necessarily asserting more than a mere procedural right *in vacuo*. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 fn. 7, (1992) (observing that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered," whereas "persons who live [] at the other end of the country from the dam" have no such concrete interest but are asserting mere procedural rights and thus lack standing).

The Court next turns to the causation and redressability components of standing. As Plaintiffs point out, "[o]nce a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Citizens for Better Forestry,* 341 F.3d at 975 (internal quotations omitted). "Where a procedural violation is at issue, a plaintiff need not 'meet[ ] all the normal standards for redressability and immediacy.'" *Cottonwood Env't L. Ctr.*, 789 F.3d at 1082–83. *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n. 7 (1992) (stating "There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). In such a case, " 'a litigant need only demonstrate that he has a procedural right that, if exercised, *could* protect his concrete interests and that those interests fall within the

zone of interests protected by the statute at issue.' " *Nat. Res. Def. Council v.* Jewell, 749 F.3d 776, 783 (9th Cir. 2014) (internal alterations and quotations omitted); *see also Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) ("Hall's procedural right reduces [his] burden of proving redressability. A plaintiff [] who asserts inadequacy of a government agency's environmental studies under NEPA need not show that further analysis by the government would result in a different conclusion. [] It suffices that, as NEPA contemplates, the BLM's decision could be influenced by the environmental considerations that NEPA requires an agency to study.") (internal quotations and citations omitted).

Here, undertaking a full EIS would redress Plaintiffs' alleged procedural injury, and the result *may* alleviate the alleged harm to their concrete interests. Because "it is enough that a revised [NEPA analysis] may redress plaintiffs' injuries," causation and redressability are satisfied. *Kraayenbrink,* 632 F.3d at 485 (quoting *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1113 (9th Cir. 2002)).

Defendants strenuously argue that Plaintiffs cannot show causation and redressability. They argue that even if APHIS were to engage in a full EIS and revise its indemnification program to incentivize poultry producers to switch to lower-density operations, those third parties would not be obligated to change and might instead decline indemnification and keep their operations high-density. Likewise, other third parties (states, localities, and private producers) respond to outbreaks, and they are not subject to the Defendants' control. Thus, Defendants argue that causation and redressability are too attenuated from the procedural violation and its remedy to establish standing. Defendants' argument fails. First, Defendants fail to grapple with the relaxed standards for causation and redressability in procedural cases like this one. Defendants rely on *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (concurrence), *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142-43 (9th Cir. 2013), *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017), and *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (*see* Mot. 15-16 and

Reply 12-14), but none of these cases deal with procedural rights, or anything close to a NEPA procedural right.

The only case that is somewhat close is *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir. 2015), but it does not help Defendants. *Salmon Spawning* did involve a similar procedural injury—the alleged procedural inadequacy of a biological opinion issued under the Endangered Species Act. The Court found that the plaintiffs could not satisfy the relaxed causation and redressability standards because the biological opinion was issued in connection with the United States's decision to enter into a treaty with Canada—a decision entrusted solely to the Executive Branch and that was simply beyond the Court to set aside. Accordingly, the Court found that even if the Court did set aside the biological opinion and order a new one, the plaintiffs could not demonstrate that "that right, if exercised, *could* protect their concrete interests." *Salmon Spawning*, 545 F.3d at 1226 (citation omitted). There is no comparable insurmountable obstacle to redressability here, because if APHIS adopts the alternative indemnification program, third party producers *could* adopt lower-density operations, thereby tending to protect Plaintiffs' concrete interests. That third party producers *might not* change their operations does not negate the possibility that they could. This is sufficient show that Plaintiffs' procedural injury is redressable.

For the foregoing reasons, Plaintiffs have associational standing to pursue their claims.[4]

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[4] The Court has not addressed two matters that Defendants raised but did not meaningfully put in issue. First, Defendants argue that Plaintiffs can't show redressability in the context of the EA because APHIS separately considered and rejected the proposed alternative in the *rulemaking* on the indemnification regulations which are not before this Court. This argument is presented only in a cursory manner in a footnote (*see* Mot. 16-17, fn. 6), so the Court does not address it. Second, Defendants argue that insofar as Plaintiffs' claims are premised on APHIS's alleged failure to comply with Executive Order 12898, they fail because that EO does not give rise to a cause of action. Defendant presented this argument only in a footnote and for

## IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**.

The Court **ORDERS** the parties to meet and confer and file the Stipulation and Proposed Order regarding a case schedule described in Dkt. No. 49.

**IT IS SO ORDERED.**

Dated: March 26, 2021

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE

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the first time in their reply (*see* Reply p. 5-6, fn. 1) so the Court does not address it.