UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 19-1661 JVS (KESx)	Date	February 12, 2020
Title	**M. Westland, LLC et al v. California Department of Transportation et al**		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motions to Dismiss and for a Preliminary Injunction**

Before the Court are three motions.

Defendant Orange County Transportation Authority ("OCTA") moved to dismiss M. Westland, LLC, Land Partners, LLC, Dorothy Sublett-Miller (as successor trustee), and Walter J. Miller (also as successor trustee) (together – "Plaintiffs'") Complaint. Mot., Dkt. No. 18. Plaintiffs opposed. Opp'n, Dkt. No. 46. OCTA replied. Reply, Dkt. No. 54.

Second, Defendants Toks Omishakin,[1] in his official capacity as Director of the California Department of Transportation ("Caltrans") and Caltrans moved to dismiss Plaintiffs' Complaint. Mot., Dkt. No. 16. Plaintiffs opposed. Dkt. No. 44. Caltrans replied. Reply, Dkt. No. 53.

Third, Plaintiffs moved for a preliminary injunction. Mot., Dkt. No. 27. Caltrans opposed. Dkt. No. 43. OCTA also opposed. Dkt. No. 50. Plaintiffs replied. Reply, Dkt. Nos. 55, 56.

For the following reasons, the Court **GRANTS** OCTA's motion, **GRANTS** Caltrans' motion, and **DENIES** Plaintiffs' motion **AS MOOT**.

[1] Plaintiffs originally sued Laurie Berman. Pursuant to Fed. R. Civ. P. 25(d), Toks Omishakin is automatically substituted as a party following Berman's retirement as a Director of the State of California, acting by and through the Department of Transportation. Dkt. No. 22.

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I. BACKGROUND

A. The Project

The following facts are alleged in Plaintiffs' Complaint. Dkt. No. 1. Plaintiffs seek declaratory and injunctive relief. Id. ¶ 1. They argue that OCTA and Caltrans have failed to supplement their environmental impact statement ("EIS") of the "San Diego Freeway (I-405) Improvement Project" (the "Project") to assess and fully disclose the environmental impacts of the drainage system that Caltrans and the OCTA propose to install next to Plaintiffs' property, in violation of the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). Id.

Plaintiffs' property, in Westminster, California, is immediately adjacent to the I-405 and home to thousands of residents of a mobile home park. Id. ¶¶ 2, 25-27. Plaintiffs rely on the drainage system that California installed within a right of way between their property and I-405 to drain stormwater. Id.

Caltrans issued the EIS on March 26, 2015. Id. ¶ 30; see also RJN, Ex. B at 10-11. On June 4, 2015, the Federal Highway Administration published its "Notice of Final Federal Agency Actions on Proposed Highway in California" regarding the Project in the Federal Register (the "Notice"). 80 Fed. Reg. 31,948 (June 4, 2015). RJN, Ex. A at 7. The Notice stated that all claims regarding the Project were barred unless filed by November 2, 2015. Id.

In the EIS, Caltrans and OCTA disclosed that they would need to modify, replace and add to existing stormwater drainage facilities to prevent flooding and other harmful environmental impacts during construction of the Project and after the widening of the freeway was complete. Id. ¶ 3. Caltrans and OCTA stated that the Project "would not create or contribute runoff that would exceed the capacity of existing or planned stormwater drainage systems" and that "impacts to stormwater facilities would be less than significant." Id.

Caltrans and the OCTA knew that properties situated along the I-405 depended on existing drainage facilities to accept and transport "upslope" stormwater flowing from, and traversing over, those properties to "downslope" drainage areas on the other side of the I-405 to prevent flooding. Id. ¶ 33. They also knew that they would

have to replace those drainage facilities to prevent harmful environmental impacts from the Project. Id. In the EIS, Caltrans and the OCTA disclosed that all of the:

> build alternatives would require modification of existing stormwater drainage channels and construction of new drainage and/or retention facilities necessary to accommodate project construction and provide sufficient drainage capacity to accommodate future runoff volumes generated with the built project in place.

Id.

Despite acknowledging they would have to modify, replace and add drainage facilities along the I-405, Caltrans and the OCTA assured Plaintiffs in the EIS that there would not be any "adverse effects to the existing drainage pattern" as a result of the Project. Id. ¶ 34. Caltrans and the OCTA represented that "[e]xisting drainage patterns would not be substantially altered; therefore, the proposed project would not have significant and/or adverse effects to the existing drainage pattern as a result of operations." Id.

After Caltrans and OCTA issued the EIS and selected their preferred building plan for the Project, they changed their drainage plans for it in ways that were not disclosed or assessed in the EIS. Id. ¶ 4. Next to Plaintiffs' property, Caltrans and OCTA plan to create a large attenuation basin to store stormwater before the water is conveyed to downstream drainage facilities. Id. Caltrans and the OCTA effectively plan to place a man-made lake of stagnant stormwater runoff next to the mobile home park. Id. The new drainage system would also cause additional significant amounts of stormwater runoff to backflow and flood Plaintiffs' property. Id.

Caltrans and the OCTA did not specify in the EIS the full scope of either the proposed temporary or permanent drainage plans. Id. ¶ 39. They failed to identify all of the drainage facilities that would be modified, replaced and added, and how those changes would be made. Id. No drainage plans or hydrology studies were provided for public review or comment. Id. But Caltrans and OCTA acknowledged in the EIS that hydraulic studies "would be necessary" in the future "to ensure that freeboard, headwater, and tailwater requirements are met." Id. ¶ 40.

Caltrans and the OCTA further assured Plaintiffs that, based on their "sound

engineering judgment," the Project "would not create or contribute runoff that would exceed the capacity of exiting or planned stormwater drainage systems" and that "implementation of the proposed project would not place structures in the 100-year flood hazard area that would pose a significant risk of loss, injury, or death involving flooding." Id. ¶ 41. They represented that "the build alternatives include modifications (extensions and widening) to existing stormwater drainage facilities within the state and local street ROWs to accommodate the widened freeway." Id. According to Caltrans and OCTA, "[a]ll storm drain systems for the build alternatives have been accounted for in the project design, and improvements were included in the design where necessary. Id. ¶ 42. Therefore, impacts to stormwater facilities would be less than significant." Id.

Prior to commencing construction of the Project, the OCTA's agent, Overland, Pacific & Cutler, LLC ("Overland Pacific"), contacted Plaintiffs to acquire temporary construction easements over the Property. Id. ¶ 43. In response, on March 23, 2018, Plaintiffs warned OCTA of the risk of flooding if the existing drainage facilities were removed. Id. ¶¶ 44-45.

On May 5, 2018, OCTA filed two actions in eminent domain to acquire temporary construction easements on the Property (the "State Court Actions"). These cases are currently pending in the Orange County Superior Court. RJN, Ex. D at 46-62, Ex. E at 63-78, Complaints in Orange County Transportation Authority v. Dorothy Sublett-Miller etc. et al., No. 30-2018-00994148 and Orange County Transportation Authority v. M. Westland, etc. et al., No. 30-2018-00994118.

The OCTA disclosed drainage plans for the Project on January 7, 2019. Id. ¶ 48. Two of the plans were dated September 17, 2018, and September 21, 2018—more than three years after Caltrans and the OCTA issued the EIS. Id. The third drainage plan that the OCTA provided was undated. Id. Plaintiffs retained Adams Streeter Civil Engineers ("Adams Streeter") to investigate whether and to what extent the Project might affect their property. Id. ¶ 47.

A series of rainstorms occurred in January and early February of 2019. Id. ¶ 49. Stormwater could not drain from the property because of defective drainage facilities Caltrans and the OCTA maintained. Id. This stormwater flooded the Property because Caltrans and the OCTA removed, altered, and/or damaged the existing drainage facilities. Id.

Adams Streeter concluded that the OCTA's drainage plans were inadequate to mitigate the flood risk and did not account for stormwater runoff contributions from the property, and requested that OCTA make changes to the plans. Id. ¶¶ 50-52.

Plaintiffs provided the OCTA with a copy of a "Right of Way" contract between Plaintiffs' predecessors-in-interest and the State of California, which required the State to accept drainage from the property. Id. ¶ 55. Caltrans and the OCTA were unaware of the State's obligations under the Right of Way Contract to accept drainage and, therefore, did not account for that obligation in formulating the drainage plans. Id.

In response to the new information provided by Plaintiffs about the drainage issues, the OCTA admitted that its original drainage plans "utilized undersized pipes." Id. ¶ 56. In a letter dated April 24, 2019, the OCTA wrote that it "agrees that the original plans, off which the Adams Streeter Review were based, utilized undersized pipes." Id. Based on the new information that Plaintiffs provided, the OCTA also admitted "that further revisions to its drainage plans in the area were warranted" and "identified an additional area within your clients' property which may increase drainage flow to the Caltrans channel." Id. The OCTA agreed to modify its drainage plans by increasing the size of the drainage from 24 inches to 48 inches, and provided "revised drainage plans." Id. ¶¶ 56-57. Adams Streeter reviewed the revised plans and concluded, with a "Summary of Findings," that the plans would likely further impair drainage and cause more severe flooding. Id. ¶ 58. Neither Caltrans nor the OCTA has responded to these findings. Id. ¶ 59.

Adams Streeter "has continued to confer with the OCTA and provide new and additional information about the proposed drainage plans" for the Project. Id. at ¶ 60. In an August 28, 2019 email, the OCTA wrote to Plaintiffs that "revised drainage plans were supposed to come in this week, but now the Designer is anticipating that the plans won't be ready for at least a couple of weeks. We will provide you with the revised drainage plans as soon as they come in." Id. ¶ 67. However, neither Caltrans nor the OCTA have indicated that they will revise their drainage plans such that their drainage system will accept and drain stormwater runoff that flows from and across the property and prevent flooding both during and after construction. Id. ¶ 68.

Plaintiffs allege that Caltrans and OCTA have failed to supplement their EIS for

the Project with an analysis of the environmental impacts of this drainage system, and bring this suit to compel them to do so, pursuant to OCTA and Caltrans' obligations under NEPA. Id. ¶¶ 5-6, 76-84. They filed suit on August 29, 2019, seeking relief under 5 U.S.C. §§ 706(1), (2)(A), and (2)(D).

B. Legal and Statutory Background

1. NEPA

NEPA ensures that federal agencies undertaking a major federal action take a "hard look" at a proposed project's environmental impacts before deciding how to proceed. Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998). In addition, NEPA ensures that "high quality" environmental information and relevant information about the impacts of a proposed project is available to the public before decisions are made and before actions are taken in order to provide a meaningful opportunity for the public's comment and participation in the federal decision-making process. 40 C.F.R. § 1500.1(b).

NEPA requires all federal government agencies to prepare a "detailed statement" that discusses the environmental effects of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must describe: (1) the "environmental impact of the proposed action;" (2) "any adverse environmental effects which cannot be avoided should the proposal be implemented;" and (3) any "alternatives to the proposed action." Id. The EIS must describe all direct and indirect effects of a proposed action or project and their significance. 40 C.F.R. § 1502.16. An EIS cannot be used to justify decisions already made. 40 C.F.R. § 1502.2(g).

Supplemental environmental review may be required after the agency finalizes the EIS if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action" have come to light after the EIS was approved. 40 C.F.R. §1502.9(c)(1); see Native Ecosystems Council v. Tidwell, 599 F.3d 926, 937 (9th Cir. 2010). Agencies may use a "re-evaluation" to determine whether a supplemental EIS is appropriate or required. N. Idaho Community Action Network v. U.S. Dep't of Transportation, 545 F.3d 1147, 1157 (9th Cir. 2008). "When

new information comes to light, the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [a supplemental EIS]." Friends of Clearwater v. Dombeck, 222 F.3d 552, 558 (9th Cir. 2000).

Claims under NEPA are reviewed under the APA. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375 (1989). Caltrans "stands in the shoes of" a federal agency fror purposes of NEPA. 23 U.S.C. §327(a)(2)(A)-(B); Pacificans for a Scenic Coast v. California Department of Transportation, 204 F. Supp. 3d 1075, 1081-82 (N.D. Cal. 2016).

2. APA

Under the APA, courts shall hold unlawful and set aside agency action, findings, or conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). In addition, the APA authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[O]nly agency action that can be compelled under the APA is action legally required." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 63 (2004).

The APA prohibits review of preliminary decisions: "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

This standard is deferential and narrow, requiring a "high threshold" to set aside agency action. River Runners for Wilderness v. Martin, 593 F.3d 1064, 1068, 1070 (9th Cir. 2010). A court must not substitute its judgment for that of the agency, but also must not "rubber-stamp" administrative decisions. The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), overruled on other grounds by Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008); Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001). Instead, the action is presumed valid and affirmed if a reasonable basis exists for the decision. Nw. Ecosystem Alliance v. FWS, 475 F.3d 1136, 1140 (9th Cir. 2007).

An action will be set aside as arbitrary or capricious if the agency can identify no "rational connection between the facts found and the choice made;" that is, if the

explanation for its decision "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

C. Request for Judicial Notice

OCTA filed a Request for Judicial Notice ("RJN," Dkt. No. 19) asking the Court to take notice of the following: (1) Federal Register, Vol. 80, No. 107, Thursday, June 4, 2015, pages 31948-31949 (Dkt. No. 19-1, Ex. A); (2) excerpts of the I-405 Improvement Project Final Environmental Impact Statement, dated March 26, 2015 (id., Ex. B); (3) details pertaining to the I-405 Improvement Project from the Orange County Transportation Authority website (id., Ex. C); and (4) complaints filed on May 18, 2018 in the Orange County Superior Court in Orange County Transportation Authority v. Dorothy Sublett-Miller, etc., et al. (No. 30-2018-00994148) and Orange County Transportation Authority v. M. Westland, etc., et al. (No. 30-2018-00994118) (id., Exs. D, E).

The Federal Register is judicially noticeable pursuant to 44 U.S.C. § 1507. And under Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not "subject to reasonable dispute." Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); see Fed. R. Evid. 201(b). The Court takes judicial notice of the documents in the RJN pursuant to Fed. R. Evid. 201. The documents in the RJN are public records and contain facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

II. LEGAL STANDARD

A. Rule 12(b)(1) Motion to Dismiss

Dismissal is proper when a plaintiff fails to properly plead subject matter jurisdiction in the complaint. Fed. R. Civ. P. 12(b)(1). A "jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the challenge is based solely upon the allegations in the complaint (a "facial attack"),

the court generally presumes the allegations in the complaint are true. Id.; Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). If instead the challenge disputes the truth of the allegations that would otherwise invoke federal jurisdiction, the challenger has raised a "factual attack," and the court may review evidence beyond the confines of the complaint without assuming the truth of the plaintiff's allegations. Safe Air, 373 F.3d at 1039. The plaintiff bears the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). If, however, the question of jurisdiction is intertwined with factual issues going to the merits, the court should not resolve genuinely disputed facts, and require the movant to establish that there are no material facts in dispute and that the movant is entitled to prevail as a matter of law. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

Pursuant to Article III of the Constitution, the Court's jurisdiction over the case "depends on the existence of a 'case or controversy.'" GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013) (citation and internal quotation marks omitted).

In evaluating whether a case is ripe, a court must consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998). The last two factors are now combined into one test on the "fitness of the issues for judicial decision." See Nat'l Park Hospitality Ass'n v. Dept't of Interior, 538 U.S. 803, 808 (2003). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or that may not occur at all." Texas v. U.S., 523 U.S. 296, 300 (1998) (internal citations and quotation marks omitted).

B. Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

C. Rule 12(f) Motion to Strike

Under Rule 12(f), a party may move to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). A motion to strike is appropriate when a defense is insufficient as a matter of law. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982). The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters of which the Court may take judicial notice. SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995).

The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). "As a general proposition, motions to strike are regarded with disfavor because [they] are often used as delaying tactics, and because of the limited importance of pleadings in federal practice." Sands, 902 F. Supp. at 1165-66 (alteration in original) (internal quotation marks omitted).

Therefore, courts frequently require the moving party to demonstrate prejudice "before granting the requested relief, and 'ultimately whether to grant a motion to strike falls on the sound discretion of the district court.'" Greenwich Ins. Co. v. Rodgers, 729

F. Supp. 2d 1158, 1162 (C.D. Cal. 2010) (quoting Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D.Cal. 2002)).

III. DISCUSSION

A. OCTA's Motion to Dismiss or Strike

1. Motion to Dismiss

The Court presumes the truth of Plaintiffs' claims because OCTA mounts a facial challenge, based solely upon the allegations in the Complaint.[2]

a. Section 706(1)

The Court finds that the claim fails as a matter of law because there is no ripe violation of NEPA to review. Importantly, the OCTA "recently indicated *it will once again revise the drainage plans* for the Project due to the issues raised by Plaintiffs" and will "provide [Plaintiffs] with *the revised drainage plans* as soon as they come in." Complaint ¶ 67 (emphasis added). And "[t]o date, there is no public NEPA document that assesses the environmental impacts of the current version of the proposed drainage plans for the Project." Id. ¶ 71. Adams Streeter "has continued to confer with the OCTA and provide *new and additional information* about the *proposed* drainage plans for the Project near the Affected Property," and "has advised Caltrans and the OCTA that the *proposed* drainage plans for the Project . . . are deficient." Id. ¶ 60 (emphasis added).

These allegations, on the face of the Complaint, acknowledge that the drainage system plans are still in their draft form and have not yet been approved. The Complaint does not allege that OCTA has rendered its final plans, and/or that it already decided against supplementing the EIS. Indeed, the Complaint alleges that OCTA has been presented with new information from Plaintiffs and Adams Streeter, and is still evaluating that information.

Plaintiffs' chief objection is that they are not challenging the draft drainage plans

[2] The Court disregards extrinsic evidence introduced by Plaintiffs from their concurrent Motion for a Preliminary Injunction. See Opp'n at 12-13.

but instead the "current construction" of the Project's drainage system. Opp'n at 5-9. They draw upon various allegations in their Complaint to make this point. See id. And, they point out that an EIS cannot be used to justify decisions already made. 40 C.F.R. § 1502.2(g). They note that supplemental environmental review may be required after the agency finalizes the EIS if the agency "makes *substantial changes* in the proposed action that are relevant to environmental concerns" or "significant *new circumstances or information* relevant to environmental concerns and bearing on the proposed action" have come to light after the EIS was approved. 40 C.F.R. §1502.9(c)(1)(i)-(ii); see Native Ecosystems, 599 F.3d at 937. Their allegations – that OCTA's proposed drainage plans are deficient (¶¶ 64), involved ripping out a drainage channel without replacing it (¶ 65), and are not consistent with representations in the EIS (¶ 74) – are, according to Plaintiffs, sufficient to suggest that OCTA is "now building a flood control system" that has not complied with NEPA procedures. Opp'n at 10.

Plaintiffs argue that they have adequately alleged the first prong of 40 C.F.R. §1502.9(c)(1) – that OCTA made "substantial changes" to the Project. Id. at 13. And, they argue that they have adequately alleged the second prong, that "new circumstances or information" has arisen, from their provision of the Adams Streeter reports to OCTA. Id. at 14.

In addition, Plaintiffs cite four main cases in support of their argument that OCTA must assess the environmental impacts of the Project *before* beginning construction, and that OCTA is rationalizing decisions already made. Opp'n at 14-15. These cases are Price Road Neighborhood Association v. United States Department of Transportation, 113 F.3d 1505, 1509 (9th Cir. 1997) (explaining that "NEPA requires an agency to take a hard look at the potential environmental consequences of proposed projects before taking action"), Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 567 (9th Cir. 2000) ("The phrase 'early enough' means at the earliest possible time to insure that planning and decisions reflect environmental values"), Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988) ("[a]n assessment must be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made"), and Beverly Hills Unified School District v. Federal Transit Administration, 2016 WL 4650428, at *52 (C.D. Cal. Feb. 1, 2016) ("an EIS is adequate if it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.") (internal citations and quotation marks omitted). The Court does not believe that the reasoning in these cases

regarding NEPA compliance and procedures changes the outcome here, but requests that OCTA address these cases at the February 10, 2020 hearing, as it did not do so in its Reply. See generally, Reply, Dkt. No. 54.

The Court is guided by the Supreme Court's reasoning that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized," because "[t]o require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh, 490 U.S. at 373. Taking the Complaint's allegation that OCTA is still revising the drainage plans as true – as the Court must, because this is a facial attack – leads the Court to conclude that there is no ripe controversy to review. The Court therefore lacks subject matter jurisdiction, and **grants** OCTA's motion to dismiss as to Plaintiffs' cause of action under 5 U.S.C. § 706(1).

b. Section 706(2)(A), (D)

The same allegations in the Complaint regarding the draft nature of the drainage plans render the claim under this section of the APA unripe, as well.

A challenge under §§ 706(2)(A) or (D) must target a "final" agency action. Norton, 542 U.S. at 61-62. A "final" agency action "marks the *consummation* of the agency's decision-making process . . . it must not be of a merely *tentative or interlocutory* nature" and "the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (emphasis added). The "APA … insulates from immediate judicial review the agency's preliminary or procedural steps." Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1196 (9th Cir. 1997). "[U]ntil [OCTA and Caltrans] actually make[] a final decision . . . a challenge .. . . under NEPA is not ripe for review." Id.

Based on these requirements, the Court agrees with OCTA that "[u]ntil a final decision regarding the drainage plans is made, a NEPA challenge related to that approval is not ripe for review." Mot. at 10. The Court is reluctant to interfere with the OCTA's decisionmaking process where there is no final agency action and the agency may still supplement or re-evaluate the EIS. Accordingly, the Court also **grants** OCTA's motion as to Plaintiffs' cause of action under §§ 706(2)(A) or (D).

2. Motion to Strike

The OCTA requested that the Court, in the alternative, grant its motion to strike portions of Plaintiffs' requested relief from the Complaint. Because the Court grants OCTA's motion to dismiss, the motion to strike is **moot**.

B. Caltrans' Motion to Dismiss

Caltrans similarly moves to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) on the basis that a final agency action has not yet occurred, and therefore, the Court lacks subject matter jurisdiction under the APA. See generally, Mot., Dkt. No. 16. Caltrans' motion constitutes a "factual attack" on the Complaint. Id. at 11-12. This means that the Court may consider extrinsic evidence to assess whether Plaintiffs have met their burden of establishing subject matter jurisdiction. See Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039, n.2 (9th Cir. 2003) ("Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.").

Caltrans submits the Declaration of Nooshin Yoosefi ("Yoosefi Decl."), Dkt. No. 16-2, to establish that it has not yet approved or rejected any proposed drainage design changes and that it has not determined whether the design change requires a supplemental EIS. Id. at 12. Yoosefi declares the following:

- On May 2, 2019, OCTA's contractor, O.C. 405 Partners, submitted Notice of Design Change-44 ("NDC-44") to OCTA. Id. ¶ 6. NDC-44 will increase the size of a drainage pipe, change the elevation of junction structures, and make minor modifications to a detention basin near Plaintiffs' property. Id. OCTA then submitted NDC-44 to Caltrans. Id.
- Once Caltrans receives a notice of design change, it must conduct an independent quality assurance review of the proposed design before approving, rejecting, or requesting additional changes. Id. ¶ 7.
- If Caltrans approves NDC-44, it then will follow its internal procedure for compliance with NEPA and determines whether the design change requires it to supplement its EIS. Id. ¶ 8. Caltrans documents its decision in a NEPA

Re-Validation Form. Id.; see Ex. A.

- Caltrans is still reviewing NDC-44, has not approved or rejected NDC-44, nor has it made a determination whether this design change warrants a supplemental EIS. Id. ¶ 9. Caltrans expects to make such decision no later than January 31, 2020. Id.

As discussed above, Plaintiffs' APA challenges may only proceed if there has been a "final" agency action. "Although an agency's own characterization of its action as non-final is not necessarily determinative, it provides an indication of the nature of the action." City of San Diego v. Whitman, 242 F.3d 1097, 1102 n.6 (9th Cir. 2001).

Plaintiffs do not allege any facts regarding if and when Caltrans made a final decision to approve the design changes or to decline to supplement the EIS. Instead, Plaintiffs claim that Caltrans has "failed to conduct an environmental reevaluation of the Project and its potential impacts" and failed to "supplement the final EIS for the Project." Complaint ¶ 69, 82-83. To attempt to meet their burden of establishing subject matter jurisdiction with extrinsic evidence, Plaintiffs point to evidence submitted with their concurrently filed Motion for a Preliminary Injunction. Opp'n, Dkt. No. 44 at 9-13; see Motion for Preliminary Injunction, Dkt. No. 27. This evidence purports to establish that Caltrans and OCTA are "presently installing" the drainage system, that the drainage system will cause flooding, that neither OCTA nor Caltrans assessed or disclosed the environmental impacts before beginning construction, and that the EIS never identified what choice the agencies made regarding what drainage facilities would be installed.

The Court agrees with Caltrans' argument that "Plaintiffs may challenge Caltrans's decision on whether NDC-44 required Caltrans to supplement its EIS once that decision is *final*," and that if the proposed drainage plans "change in the course of further negotiation and review of the parties—which is likely given the history of this case—the factual underpinnings of this lawsuit will also change." Mot. at 16. The issues are simply not fit for judicial decision at this time. The extrinsic evidence submitted concurrently with Plaintiffs' Opposition does not contradict Yoosefi's Declaration. Plaintiffs did not submit evidentiary objections to Yoosefi's Declaration or any evidence that Caltrans has, indeed, engaged in a final agency action. The evidence Plaintiffs point to goes to the *merits* of whether Caltrans and OCTA have committed a violation of NEPA; it does not establish that there has been a final agency action.

The Court concludes that the "final agency action" required for judicial review under the APA has not yet occurred. The Court therefore lacks subject matter jurisdiction over Plaintiffs' Complaint, and **grants** Caltrans' motion to dismiss.

C. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs' motion for a preliminary injunction is **moot** because the Court granted OCTA's and Caltrans' motions to dismiss.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** OCTA's motion, without prejudice, **GRANTS** Caltrans' motion, without prejudice, and **DENIES** Plaintiffs' motion as **MOOT**. The Court orders Caltrans and the OCTA to share with Plaintiffs, within seven days, their decision as to whether they will be supplementing the EIS, once they approve or reject NDC-44 and complete the NEPA Re-Validation Form.

IT IS SO ORDERED.

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