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GOLDEN GATE BRIDGE, HIGHWAY AND
8 TRANSPORTATION DISTRICT

9 **UNITED STATES DISTRICT COURT**

10 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

11
12 GOLDEN GATE BRIDGE, HIGHWAY AND
TRANSPORTATION DISTRICT,

13 Plaintiff,

14 v.

15 UNITED STATES DEPARTMENT OF
16 LABOR; JULIE A. SU in her official capacity
as Acting Secretary of Labor;
17 OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION; and DOUGLAS L.
18 PARKER in his official capacity as Assistant
Secretary of Labor for Occupational Safety
19 and Health,

20 Defendants.

Case No. 3:24-cv-04985-RS

**PLAINTIFF GOLDEN GATE BRIDGE,
HIGHWAY AND TRANSPORTATION
DISTRICT'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Date: January 30, 2025

Time: 1:30 p.m.

Crtrm.: 3 - 17th Floor

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I. INTRODUCTION

1
2 The Golden Gate Bridge, Highway & Transportation District (the “District”) brings this
3 action to challenge the improper and dangerous relaxation of the scaffolding safety standards –
4 issued in 1996 – required by 29 C.F.R. § 1926.451(a)(1) and § 1926.450(b). In 2013, Defendant
5 Occupational Safety and Health Administration (“OSHA”) issued a Standard Interpretation Letter
6 construing the scaffolding safety standard to require a “factor-of-safety” of four to all loads
7 transmitted to the component being designed, including loads from the weight of other scaffold
8 members the component is supporting (transmitted loads) (“2013 Interpretation Letter”). OSHA’s
9 interpretation accurately reflected the plain language of § 1926.451(a)(1) and § 1926.450(b).

10 In 2020, OSHA deviated significantly from its established construction of the required
11 factor-of-safety and the plain language of the regulation itself by issuing a revision to the 2013
12 Interpretation Letter (“2020 Revised Interpretation Letter”). This revision was not a new letter but
13 a heavily redlined version of the 2013 Interpretation Letter, and it was unsigned by the new author.
14 The 2020 Revised Interpretation Letter relaxes the factor-of-safety because it states that transmitted
15 loads arising from the portion of scaffold weight carried by the component being analyzed are *not*
16 subject to the prescribed safety factor of four and, indeed, are not increased by *any factor of safety*
17 *at all*, contradicting the plain language of § 1926.451(a)(1) and § 1926.450(b). In issuing the 2020
18 Revised Interpretation Letter, OSHA abandoned decades of established safety standards without
19 complying with the Administrative Procedure Act’s (“APA”) rule-making requirements.

20 OSHA now moves to dismiss the complaint on jurisdictional grounds. First, OSHA argues
21 that the District lacks standing. OSHA does not dispute that the District has suffered an injury-in-
22 fact, but argues that the District’s injuries are not “fairly traceable” to the 2020 Revised
23 Interpretation Letter because they were caused by third parties, and are not redressable because the
24 injuries occurred in the past. OSHA ignores that its issuance of the 2020 Revised Interpretation
25 Letter, which purports to interpret the applicable scaffolding safety standard, directly led to the
26 harms alleged by the District. The District’s contractor used the 2020 Revised Interpretation Letter
27 to avoid complying with 29 C.F.R. § 1926.451(a)(1) and § 1926.450(b), resulting in delays to the
28 District’s federally-funded suicide deterrent project (which included building scaffolding for regular

1 Bridge inspections), litigation against the District, and the District’s additional incursion of millions
2 of dollars both to obtain compliance by its contractor with the applicable safety requirements and to
3 obtain alternate means to perform mandated inspections of the Bridge due to the lack of safety-
4 compliant scaffolding for those inspections. In addition, the District faces the ongoing threat to its
5 ability to protect the safety of workers on the Bridge in accordance with federal scaffolding safety
6 standards. That some of this harm involves the conduct of third parties does not mean the harm is
7 not “fairly traceable” to OSHA’s challenged conduct, as OSHA claims. The District sufficiently
8 alleges that OSHA’s Revised Interpretation Letter was a substantial factor in causing these harms,
9 and unless and until the 2020 Revised Interpretation Letter is withdrawn the District will continue
10 to be at risk of either paying its contractors more to comply with the applicable safety regulations
11 or being unable to do so and risk violating those regulations and being out of compliance with the
12 requirements for federal-aid construction projects. The law does not require the District to take that
13 risk. *Free Enterp. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (courts
14 “normally do not require plaintiffs to ‘bet the farm . . . by taking the violative action’ before ‘testing
15 the validity of the law’”) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)).
16 The District’s allegations are sufficient to establish standing.

17 Second, Defendants contend that OSHA’s 2020 Revised Interpretation Letter does not
18 constitute a final agency action, mischaracterizing it as a mere “clarification” of existing law devoid
19 of legal consequences. These arguments ignore the 2020 Revised Interpretation Letter’s substantive
20 regulatory shift, its significant impact on the District, and the legal and operational consequences it
21 has imposed—all of which clearly establish it as a final agency action subject to judicial review
22 under the APA. Courts have repeatedly emphasized that the APA requires agencies to adhere to
23 transparent rulemaking procedures and prohibits them from sidestepping accountability by labeling
24 substantive changes as procedural tweaks or clarifications. Doing so improperly places the
25 conclusion before the analysis. *See Faith International Adoptions v. Pompeo*, 345 F. Supp. 3d 1314,
26 1325 (W.D. Wash. 2018).

27 The motion to dismiss should be denied.

28

1 **II. STATEMENT OF ISSUES TO BE DECIDED**

2 1. Because Defendants do not dispute that the District sufficiently pleads injury-in-fact,
3 whether the District sufficiently alleges the causation and redressability prongs of the three-part test
4 for Article III standing.

5 2. Whether the 2020 Revised Interpretation Letter constitutes final agency action.

6 3. Whether Defendants' request for dismissal with prejudice should be denied.

7 **III. BACKGROUND**

8 **A. OSHA's Longstanding Scaffold Safety Standard**

9 The Occupational Safety and Health Act regulates the safety and healthfulness of the
10 nation's workplaces. The Act entrusts the Secretary of Labor (and by delegation OSHA) with the
11 authority, among other things, to issue safety and health standards for workplaces. 29 U.S.C. § 655.
12 In 1977, OSHA began a comprehensive review of scaffold standards due to safety concerns. FAC
13 ¶¶ 19-27. OSHA ultimately determined that the scaffold safety standard must be "strengthened to
14 provide additional protection" because "employees using scaffolds are exposed to a significant risk
15 of harm," citing to the percentage of scaffold-related injuries and deaths in the construction industry
16 due to load failure. *Id.*, ¶ 25-27.

17 Accordingly, in 1996, OSHA issued its Final Rule for Safety Standards for Scaffolds Used
18 In the Construction Industry. The Rule provides that "... each scaffold and scaffold component shall
19 be capable of supporting, without failure, its own weight and at least 4 times the maximum intended
20 load applied or transmitted to it." 29 C.F.R. §1926.451(a)(1). "Maximum intended load" is defined
21 as "the total load of all persons, equipment, tools, materials, transmitted loads, and other loads
22 reasonably anticipated to be applied to a scaffold or scaffold component at any one time." 29 C.F.R.
23 §1926.450.

24 In December 2013, OSHA issued a Standard Interpretation Letter regarding the factor of
25 safety to be applied to loads in temporary scaffold design pursuant to 29 C.F.R. §1926.451(a)(1)
26 and 29 C.F.R. §1926.450 ("2013 Interpretation Letter"), which explained that "[u]nder section
27 1926.451(a)(1), each component of a scaffold system must be able to support at least 4 times the
28 maximum intended load on that component, in addition to the weight of the component." FAC ¶¶

1 3, 31-37. The 2013 Interpretation Letter emphasized the need to apply a factor of safety of 4 to *all*
 2 *loads transmitted to the component being designed*, including loads from the weight of the other
 3 scaffold members the component is supporting.

4 **B. OSHA Arbitrarily And Capriciously Changes Existing Law Via A Revised**
 5 **“Interpretation “Letter**

6 In 2020, OSHA issued a revised version of the 2013 Interpretation Letter changing this long-
 7 standing guidance which directly conflicts with 29 C.F.R. §1926.451(a)(1) and 29 C.F.R. §1926.450
 8 (“2020 Revised Interpretation Letter”). *Id.*, ¶¶ 4-6, 38-48. Suddenly, OSHA stated that transmitted
 9 loads arising from the portion of scaffold weight carried by the component are *not subject to the*
 10 *prescribed safety factor of four*. *Id.*, ¶ 4, 40-41. In fact, the 2020 Revised Interpretation Letter states
 11 that the weight transmitted from scaffold members supported by the component is *not increased by*
 12 *any factor of safety at all* – deviating significantly from the regulations and its prior established
 13 construction of 29 C.F.R. §1926.451(a)(1) and 29 C.F.R. §1926.450. *Id.* The 2020 Revised
 14 Interpretation Letter newly defines the weight of the scaffold component to include “the weight of
 15 the component itself, in addition to the portion of the scaffold’s weight that is transmitted to that
 16 component,” differing significantly from the regulations which include the transmitted load in the
 17 calculation of the maximum intended load. *Id.*, ¶ 6, 42-44.

18 These changes, issued without public notice or an opportunity for comment, eliminated the
 19 application of the safety factor to critical transmitted loads, drastically reducing safety margins that
 20 account for unforeseen stresses, load miscalculations, and other risks inherent in construction work,
 21 exposing workers to less safe conditions. *Id.*, ¶¶ 6, 38-41, 45-47, 80-85.

22 The District – as a recipient of federal financial assistance on its construction projects – is
 23 required to comply with all applicable Federal OSHA regulations for its federal-aid projects,
 24 including 29 C.F.R. 1926. *Id.*, ¶ 49. The District’s Physical Suicide Deterrent System and Wind
 25 Retrofit Project, a federally-funded effort to prevent suicides and enhance safety on the Golden Gate
 26 Bridge, suffered substantial delays and skyrocketing costs due to OSHA’s revised safety standards.
 27 *Id.*, ¶¶ 50-55. The District incurred millions of dollars in additional expenses to resolve the scaffold
 28 design disputes that its contractor pursued based on the 2020 Revised Interpretation Letter to ensure

1 that the scaffolding complied with the stricter OSHA safety regulation. *Id.*, ¶¶ 54-56. The District
2 was forced to spend \$9 million to conduct federally mandated bridge inspections that could not
3 proceed as planned due to these delays. *Id.*, ¶ 56. Also because of these delays, the District’s ability
4 to perform timely inspection and maintenance essential for Bridge operations has been disrupted,
5 which directly impacts the District’s operational efficiency, increases its financial burdens, and
6 compromises the ongoing safety and integrity of the Golden Gate Bridge. *Id.*, ¶ 57. On account of
7 OSHA’s unlawful revision to the scaffold safety standard, the District reasonably believes that it
8 will be subject to increased costs and/or the risk of liability in future federal-aid projects involving
9 these scaffolding safety requirements. Its federally-funded Seismic Retrofit Project has already been
10 delayed, and now must account for the difference between the applicable, stricter safety
11 requirements under § 1926.451(a)(1) and the more relaxed standard introduced by the 2020 Revised
12 Interpretation Letter, which poses an additional financial and operational burden on the District. *Id.*,
13 ¶ 58.

14 IV. STANDARD OF REVIEW

15 In ruling on a motion to dismiss based on a facial attack to subject matter jurisdiction, “the
16 court assumes that the allegations are true and draws all reasonable inferences in the plaintiff’s
17 favor” and “must confine its inquiry to the allegations in the complaint.” *California v. Bernhardt*
18 (N.D. Cal. 2020) 460 F.Supp.3d 875, 884 (citations omitted).

19 “For purposes of ruling on a motion to dismiss for lack of standing, a complaint must be
20 viewed in the light most favorable to the plaintiff; all material allegations of the complaint must be
21 accepted as true.” *City and County of San Francisco v. Whitaker*, 357 F.Supp.3d 931, 940 (N.D.
22 Cal. 2018); *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 666, 671 (6th Cir. 2005)
23 (quoting *Courtney v. Smith*, 297 F.3d 455, 459 (6th Cir. 2002)). All material allegations must be
24 “liberally construe[d] ... in favor of the complaining party.” *Am. Canoe Ass’n, Inc. v. City of Louisa*
25 *Water & Sewer Com’n*, 389 F.3d 536, 540 (6th Cir. 2004).

26 The APA provides that “[a] person suffering legal wrong because of agency action, or
27 adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled
28 to judicial review thereof.” 5 U.S.C. § 702.

V. LEGAL ARGUMENT

Defendants contend that the District lacks Article III standing, and that the District’s claims are not subject to judicial review because the 2020 Revised Interpretation Letter was not a final agency action. The Court should reject these contentions and find that the District alleges facts sufficient to invoke federal jurisdiction.

A. The District Sufficiently Alleges Article III Standing

Article III standing requires that a plaintiff must have suffered an injury in fact that is fairly traceable to the challenged conduct, and that is likely to be redressed by a favorable decision. *Bernhardt*, 460 F.Supp.3d at 884. “[E]ach element of Article III standing ‘must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.’” *Bennett v. Spear* (1997) 520 U.S. 154, 167-68 (citation omitted). “[A]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss ‘we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Bennett, supra*, 520 U.S. at 168 (citation omitted).

When asserting a procedural violation under the APA, a plaintiff must demonstrate that it has a procedural right that, if exercised, could have protected its concrete interests, that the procedural requirements were designed to protect their concrete interests, and that a violation of those procedures poses a reasonably probable threat to those interests. *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961, 969-70 (9th Cir. 2003). Further, “[r]elaxed standards apply to the traceability and redressability requirements. *California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018 (citation omitted quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (“One who challenges the violation of ‘a procedural right to protect his concrete interests can assert that right without meeting all the normal standards’ for traceability and redressibility.”). Plaintiff “need not prove that the substantive result would have been different had he received proper procedure; all that is necessary is to show that proper procedure *could* have done so.” *Citizens for Better Forestry*, 341 F.3d at 976. This procedural standing analysis – which Defendants fail to acknowledge – is applicable to each of Defendants’ jurisdictional challenges. *Bernhardt*, 460

1 F.Supp.3d at 889-890.

2 **1. OSHA Concedes The District Has Suffered Injury In Fact**

3 Defendants do not dispute that the District sufficiently alleges an injury-in-fact.¹ Notably,
4 Defendants do not dispute that the District was denied notice and opportunity to comment on the
5 2020 Revised Interpretation Letter prior to its issuance.² Nor do Defendants dispute that the notice
6 and comment process could have protected and was designed to protect the District’s concrete
7 interests, or that the threat to the District’s concrete interests is reasonable probable. Indeed,
8 Defendants wholly ignore the procedural standing analysis applicable in this case where the District
9 asserts a procedural violation under the APA. *Citizens for Better Forestry*, 341 F.3d at 969-70. As
10 such, Defendants concede that the District pleads injury-in-fact sufficient to satisfy the first prong
11 of the Article III test, and therefore the District does not substantively address it.

12 **2. The District’s Injuries Are Fairly Traceable To The 2020 Revised**
13 **Interpretation Letter**

14 Defendants’ challenge to the District’s Article III standing focuses primarily on the causation
15 or “fairly traceable” prong of the three-part test, which is unpersuasive. Neither effort is persuasive.

16 **a. The District Meets The Relaxed Standard For Causation**

17 Where a procedural injury has been established – or, as here, there is no dispute that a
18 procedural injury has been alleged – a plaintiff “ha[s] standing to challenge the absence of notice-
19 and-comment procedures in promulgating [the rule at issue]....The causation and redressability

21 ¹ This represents a shift from their earlier motion, where they argued that the District failed to plead
22 any injury. Defendants’ repeated assertion that the District has had “two bites at the apple” and
23 “still” failed to establish standing is belied by their evolving argument.

24 ² The District sufficiently pleads that OSHA was required, but failed, to comply with rulemaking
25 requirements, established under the APA, codified in 5 U.S.C. § 553 and 29 U.S.C. § 655, including
26 requirements for public notice, comment periods, and hearings. OSHA’s internal guidelines, found
27 in 29 CFR Part 1911 (e.g., §§ 1911.3, 1911.10, 1911.18), reinforce these obligations by specifying
28 detailed steps for notice-and-comment rulemaking and public hearings. These procedures apply to
amendments of provisions in 29 CFR Part 1926, such as the scaffolding safety standards under 29
CFR § 1926.451. *See* FAC ¶¶ 59-75. Deprivation of the opportunity to comment where the
opportunity for notice and comment is required constitutes a procedural injury cognizable for
standing purposes. *Citizens for Better Forestry*, 341 F.3d at 970-971.

1 requirements are relaxed once a plaintiff has established a procedural injury.” *Azar*, 911 F.3d 558,
2 573 (quotations and citations omitted); *Citizens for Better Forestry*, 341 F.3d at 975 (once injury in
3 fact established, causation and redressability requirements are relaxed). Defendants ignore this
4 relaxed standard, which requires only that the District sufficiently plead “the ‘reasonable
5 probability’ of the challenged action’s threat to [its] concrete interest.” *Hall v Norton*, 266 F.3d 969,
6 977 (9th Cir. 2001).

7 Here, the District sufficiently pleads that its asserted injuries are traceable to Defendants’
8 issuance of the 2020 Revised Interpretation Letter in violation of the APA’s notice-and-comment
9 requirements. For example, the District alleges that its contractors took specific action against the
10 District resulting in demonstrated harm as a result of the 2020 Revised Interpretation Letter. In
11 addition, the District sufficiently alleges the reasonable probability of the 2020 Revised
12 Interpretation Letter’s threat to the safety of workers on the Bridge because it decreases the
13 applicable safety requirements and thus injures the District’s interest in protecting workers,
14 complying with federal regulations, and avoiding the risk of jeopardizing federal funding for its
15 federal-aid construction projects. *See Citizens for Better Forestry*, 341 F.3d at 972 (decrease in
16 environmental protections injured concrete interests in enjoying national forests); *see also*
17 *Bernhardt*, 460 F.Supp.3d at 889 (weakening of federal protections contribute to plaintiff’s interest
18 in protecting endangered species). That is sufficient to meet the relaxed standard for causation. *See*
19 *Azar*, 911 F.3d 558, 573; *see also Bernhardt*, 460 F.Supp3d at 889.

20 Defendants argue that the District’s alleged injury is “speculative” because it results from
21 independent third party conduct not “fairly traceable” to Defendants’ conduct. Motion at pp. 8-11.
22 Again, Defendants ignore the relaxed standard, discussed above, which in itself defeats their
23 argument; but Defendants also ignore well-established precedent holding that the defendant’s
24 actions need not be the very last step in the chain of causation to be fairly traceable to the challenged
25 action. *Bennett*, 520 U.S. at 168–69 (causation found where multiple links connected defendant’s
26 opinion letter to plaintiff’s injury); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (existence of causal
27 chain linking harm does not preclude standing); *Azar*, 911 F.3d at 571-572 (same).

28 Here, the District sufficiently alleges that the causal chain between OSHA’s 2020 Revised

1 Interpretation Letter and the District’s harm is reasonably probable. OSHA’s unlawful issuance of
2 the Revised Letter, which reversed decades of established scaffolding safety standards without
3 adhering to mandatory notice-and-comment rulemaking, provided grounds for the District’s
4 contractor to dispute its obligation to design scaffolds required for the Suicide Deterrent Project to
5 the applicable factor of safety, delay the project, and seek additional compensation for designing to
6 the stricter safety standard.³ Because of this dispute, the contractor did not build inspection
7 platforms necessary for the District to perform mandatory Bridge inspections therefore the District
8 was forced to spend millions to hire third party inspectors which it continues to pay.

9 In addition, the District has sufficiently alleged that the impact on worker safety, even if
10 arguably indirect, is reasonably probable. The 2020 Revised Interpretation Letter expressly states
11 OSHA’s construction of § 1926.451(a)(1)’s scaffold safety requirements, which sets forth
12 employers’ – like the District – duties and compliance obligations with respect to protecting workers
13 exposed to a significant risk of harm. Thus, although Defendants argue that the 2020 Revised
14 Interpretation Letter only serves as “guidance”, the District sufficiently pleads that its contractor
15 relied upon it to the District’s detriment, and that the District will with reasonable probability be
16 forced in the future to incur unnecessary costs and operational burdens that the improperly issued
17 2020 Revised Interpretation Letter makes possible by endorsing a lower factor of safety (and less
18 expensive alternative for contractors to meet) when building scaffolds for federal-aid projects. The
19 District is required to comply with 29 C.F.R. § 1926.450 and 29 C.F.R. § 1926.451(a)(1) (federal
20 OSHA safety regulations related to scaffolding), but the 2020 Revised Interpretation Letter changes
21 the meaning of those regulations by improperly reducing the required factor of safety. As long as
22 the 2020 Revised Interpretation Letter remains, the District is in a no-win scenario where it must

23
24 _____
25 ³ Defendants’ argument that the District “voluntarily agree[d]” to incur additional costs is irrelevant
26 and ignores the fact that the District was compelled to act to protect its interests in resolving an
27 action brought by its contractor based in part on OSHA’s unlawful regulatory shift. The District
28 could not avoid incurring costs to defend this action and ultimately resolve it to avoid incurring
additional costs, to ensure compliance with the applicable stricter safety standard, and to mitigate
risks to worker safety and project delays. These harms were directly caused by OSHA’s 2020
Revised Interpretation Letter.

1 expend unnecessary time and resources determining whether its contractors will comply with the
2 stricter factor of safety, or contend that the lesser safety requirement is applicable. If the latter, the
3 District will be forced to spend additional time and money to require compliance with the stricter
4 safety requirement or, otherwise, risk being out of compliance with that requirement and jeopardize
5 its federal funding. This type of injury is *immediate*, not speculative, and is not the result of
6 independent action by a third party. *See Citizens for Better Forestry*, 341 F.3d at 973 (injury
7 immediate where challenged rule made injury possible); *Bennett*, 520 U.S. at 168-169 (challenged
8 “advisory” opinion had coercive effect upon third parties demonstrating causation); *Mendia v.*
9 *Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (causation found where defendant’s conduct influences
10 third parties who contribute to alleged harm); *see also Dep’t of Com. v. New York*, 588 U.S. 752
11 (2019) (holding that the potential loss of future federal funds is sufficient to establish standing); *Mey*
12 *v. Got Warranty, Inc.*, 193 F.Supp.3d 641, 648 (lost time is sufficient to establish standing);
13 *Bernhardt*, 460 F.Supp.3d at 887 (increased risk of future injury is sufficient to establish standing).

14 Defendants’ reliance on *Pritikin v. Dep’t of Energy*, 254 F.3d 791 (9th Cir. 2001), *Simon v.*
15 *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), and *Clapper v. Amnesty Intern. USA*,
16 568 U.S. 398 (2013) is misplaced as none involve a procedural injury triggering the relaxed standing
17 inquiry applicable here. Moreover, neither *Clapper* or *Simon* involved a motion to dismiss and
18 plaintiffs’ alleged injuries in those cases were based on a series of hypothetical and speculative
19 events that the plaintiffs did not prove occurred or were likely to occur to avoid summary judgment.
20 *Clapper*, 568 U.S. at 411-412; *Simon*, 426 U.S. at 42-44. In *Pritikin*, the causal link between the
21 alleged harm and the defendant’s actions was too attenuated because it involved the discretionary
22 decisions of multiple agencies. 254 F.3d at 799.

23 As stated, the District’s allegations are not speculative or hypothetical. Plaintiff alleges that
24 contractors have explicitly tied their actions to the Revised Interpretation Letter’s conflicting safety
25 standard. For example, the District’s FAC ¶ 54 states:

26 “In reliance on the 2020 Revised Interpretation Letter, which reduces
27 the factor of safety required in scaffolding design, Shimmick delayed
28 finalizing the scaffolding systems design for the project. This has
delayed the timely completion of the Project, resulting in additional
costs which in turn has delayed achieving the District’s important goal

1 of deterring suicides on the Bridge and the Project’s life-saving
2 purpose, all to the District’s detriment.”

3 Defendants’ attempt to characterize third-party actions as “independent” ignores the legal
4 and practical reality of OSHA’s regulatory authority. Contractors are not independent actors in this
5 context; they are bound to comply with OSHA’s scaffolding safety regulations when designing and
6 implementing scaffolding systems on federal-aid projects. However, the 2020 Revised
7 Interpretation Letter relaxes those standards without the requisite notice-and-comment procedure,
8 resulting in disputes, redesign costs, delays, and heightened safety and compliance risks to the
9 District—all flowing directly from contractors’ reasonably probable reliance on the relaxed safety
10 standards sanctioned by the 2020 Revised Interpretation Letter. This is not an “independent” choice
11 by contractors but a predictable consequence of OSHA’s revised interpretation. The causation
12 requirement under Article III is sufficiently pled.

13 **b. Defendants’ Reliance On Cal/OSHA is Misplaced Because State**
14 **Authority Cannot Override Federal Mandates Governing Federally**
15 **Funded Projects**

16 Defendants argue that Cal/OSHA governs occupational health and safety practices, and
17 therefore federal OSHA standards are inapplicable. This argument is fundamentally flawed and
18 irrelevant. The District sufficiently alleges – and the Court must accept as true – that it must comply
19 with federal safety standards for federally funded projects, irrespective of Cal/OSHA jurisdiction.
20 FAC ¶¶ 7, 15, 58, 75. As such, Defendants’ argument that OSHA lacks jurisdiction under 29 U.S.C.
21 § 652(5) should be disregarded.

22 Even if the Court considers this argument, it is a red herring; federal grant compliance
23 mandates adherence to the federal safety regulations at issue. Specifically, the Federal Highway
24 Administration (“FHWA”) mandates specific contract provisions be included in every construction
25 contract receiving federal aid. *See* Form FHWA-1273, Required Contract Provisions; Federal-Aid
26 Construction Contracts, Section I.1 at p. 1, dated October 23, 2023 (Rev.), Request for Judicial
27 Notice (“RJN”), Ex. A (“FHWA-1273”). Those contract provisions mandate compliance with
28 Federal OSHA standards, including 29 CFR Part 1926 which incorporates the OSHA construction
safety standards:

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It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR Part 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704). 29 CFR 1926.10.

FHWA-1273, Section VII. "Safety: Accident Prevention", para. 2 at p. 10.

This language is dispositive: it explicitly ties federal-aid projects to OSHA's federal standards, not Cal/OSHA's or any other state-specific standards. Indeed, by incorporating 29 CFR Part 1926, federal-aid projects must comply with the federal scaffolding safety standards, which are directly impacted by OSHA's 2020 Revised Interpretation Letter.

Defendants' argument that OSHA lacks jurisdiction or authority over these projects is belied by FHWA-1273 itself. Paragraphs 3 of Section VII states:

Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

These provisions expressly authorize the Secretary of Labor, or OSHA representatives acting on the Secretary's behalf, to access and inspect any job site for compliance with 29 CFR Part 1926. Therefore, Defendants' position that OSHA lacks jurisdiction or enforcement authority is untenable. Federal-aid construction contracts explicitly provide for and require federal oversight, ensuring compliance with the federal safety regulations. By attempting to invoke Cal/OSHA or state jurisdiction, Defendants raise an irrelevant and distracting issue that does not obviate compliance with federal safety regulations applicable to the District's federally funded projects.

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1 **3. The District Adequately Alleges That An Order Setting Aside the 2020 Revised**
2 **Letter Would Redress The District's Injuries**

3 Defendants argue that the District's conceded injuries cannot be redressed because all of the
4 complained injuries occurred in the past. Motion at p. 11. Defendants again ignore the relaxed
5 requirement for redressability, and also fail to acknowledge all of the District's alleged injuries.

6 The District satisfies the more relaxed redressability standard that applies to procedural
7 claims under the APA. Courts have recognized that plaintiffs asserting procedural claims need only
8 demonstrate that the requested relief *could* prompt the agency to reconsider its decision, or would
9 reduce or eliminate their risk of injury. *See Citizens for Better Forestry*, 341 F.3d at 976; *see also*
10 *Bernhardt*, 460 F.Supp.3d at 889; *Bennett*, 520 U.S. 154, 170-71 (if opinion set aside, the agency
11 will not impose restrictions embodied in opinion). This standard reflects the principle that a plaintiff
12 can sufficiently allege redressability for a procedural violation, such as an agency's failure to follow
13 notice-and-comment rulemaking under the APA, even if the ultimate outcome remains uncertain
14 and "need not show that further analysis by the government would result in a different conclusion."
15 *Citizens for Better Forestry*, 341 F.3d at 976. Thus, a plaintiff in a case where due consideration is
16 required before promulgating rules "has a relatively easy burden to meet" to allege redressability.
17 *Id.*

18 Here, a declaration that the 2020 Revised Interpretation Letter is unlawful and a vacatur of
19 the Letter, *could* prompt OSHA to engage in the requisite notice-and-comment procedure and
20 reconsider its decision to decrease the factor of safety. Public comments would provide critical input
21 from affected stakeholders, such as the District and other public agencies, highlighting the
22 substantial financial, operational, and safety concerns that result from relaxing the current
23 scaffolding safety standards. Further, compelling OSHA to provide a reasoned explanation for its
24 position would promote transparency, accountability, and clarity regarding OSHA's longstanding
25 scaffolding safety standards and its apparent desire to revise those standards to reduce the requisite
26 factor of safety. Further, even if OSHA did not decide to do so, a vacatur of the 2020 Revised
27 Interpretation Letter would reduce or eliminate the risk of disputes over the required factor of safety
28 for scaffolding and the related costs and risks to worker safety as the 2020 Revised Interpretation

1 Letter would not exist to be a basis to claim that the factor of safety is less strict than the plain
2 language of § 1926.451(a)(1).

3 Accordingly, the District’s injuries are both traceable to OSHA’s unlawful action and
4 redressable through the relief sought. An order vacating the 2020 Revised Interpretation Letter and
5 requiring OSHA to comply with the APA’s procedural safeguards will directly address the District’s
6 harm and allow for meaningful reconsideration of the scaffolding safety standard through the
7 requisite notice and comment procedure. This satisfies both the traditional redressability standard
8 and the more relaxed standard applicable to procedural claims.

9 **B. The 2020 Revised Interpretation Letter Is A Final Agency Action**

10 Defendants argue that the District’s claims are not subject to judicial review because the
11 Revised Interpretation Letter is merely an “informational document” and not a final agency action.
12 Motion at pp. 11-14. Not so.

13 An agency action is final under the APA if it marks the consummation of the agency’s
14 decision-making, and if it affects legal rights or obligations, or produces legal consequences. *See*
15 *Bennett*, 520 U.S. at 177-78. The 2020 Revised Interpretation Letter satisfies these requirements.

16 **1. The 2020 Letter Marks The Consummation of OSHA’s Decision Making**
17 **Process**

18 The first prong of *Bennett* is satisfied when an agency’s action represents the culmination of
19 its decision-making process and constitutes a final determination on the issue. Courts have
20 consistently recognized that even a so-called “clarification” of agency regulations can qualify as
21 final agency action if it marks the conclusion of the agency’s deliberations and carries legal
22 consequences. *See Frozen Food Express v. United States*, 351 U.S. 40, 43–44 (1956) (holding that
23 agency action was final because it determined the rights and obligations of regulated parties by
24 classifying products as exempt or nonexempt). Courts have also emphasized that an agency’s action
25 need not follow a formal process to be final. Even informal communications, such as letters or
26 emails, can consummate an agency’s decision-making if they resolve a question of regulatory
27 interpretation and impose practical consequences. *See Navajo Nation v. U.S. Dep’t of Interior*, 819
28 F.3d 1084, 1090–92 (9th Cir. 2016) (finding an informal email and letter sufficient to satisfy the

1 first prong of *Bennett* because they resolved the agency’s interpretation of statutory requirements
2 and left no room for further deliberation). Similarly, where an agency asserts jurisdiction or
3 reinterprets regulations, such decisions are final if they mark the end of agency deliberation. See
4 *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 593 (9th Cir. 2008)
5 (concluding that a jurisdictional determination was final because it represented the agency’s ultimate
6 decision on the matter). Ultimately, the lack of a formalized process does not excuse the agency
7 from its obligation to adhere to prior practices or clearly articulate a change. Any action that
8 conclusively determines an agency’s interpretation of its regulations, imposes obligations, or
9 impacts rights satisfies the finality requirement of *Bennett*. This ensures regulated entities have a
10 clear understanding of their responsibilities under the law and prevents arbitrary shifts in regulatory
11 enforcement.

12 The 2020 Revised Interpretation Letter marks the consummation of OSHA’s decision-
13 making process. It provides the agency’s current construction of its scaffold safety standards –
14 namely, that transmitted loads arising from the portion of scaffold weight carried by the component
15 are not subject to the prescribed safety factor of four and newly defines the weight of the scaffold
16 component to include “the weight of the component itself, in addition to the portion of the scaffold’s
17 weight that is transmitted to that component.” FAC ¶¶ 40-44. This is a change from the plain
18 language of § 1926.451(a)(1) and a marked departure from OSHA’s 2013 Interpretation Letter,
19 which require a stricter safety factor of 4 times the maximum intended load, including loads
20 transmitted to the component. *See* §§ 1926.451(a)(1), 1926.450(b); see also FAC ¶¶ 28-30, 34-36,
21 40-44. This regulatory shift, drastically reducing the safety factor, marks the culmination of OSHA’s
22 decision-making process. *Faith International Adoptions v. Pompeo*, 345 F. Supp. 3d 1314, 1322
23 (W.D. Wash. 2018) (directive representing a “definitive shift in policy” and leaving no room for
24 further administrative deliberation satisfied the first prong of the *Bennett* test). Indeed, the 2020
25 Revised Interpretation Letter contemplates no future agency action for its strictures to be effective,
26 further indicating its finality. *Cf. La. State v. Army Corps of Eng’rs*, 834 F.3d 574, 584 (5th Cir.
27 2016) (action is not final if “it necessarily contemplates future agency action”). That finality is not
28 undercut simply because OSHA retains the authority to revise the 2020 Revised Interpretation

1 Letter. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (that agency decisions
2 may be revised “is a common characteristic of agency action, and does not make an otherwise
3 definitive decision nonfinal”).

4 Defendants’ argument also rests on circular logic. They claim the Revised Interpretation
5 Letter is not final because it was not issued through notice-and-comment rulemaking. However, the
6 District challenges the Revised Interpretation Letter *precisely because* it constitutes a substantive
7 change that OSHA imposed without following the required notice-and-comment procedures under
8 the APA. Allowing OSHA to evade judicial review by citing its own procedural failure would
9 eviscerate the APA’s protections and enable agencies to issue binding interpretations without
10 accountability. OSHA cannot insulate its actions from scrutiny by ignoring procedural safeguards.

11 Defendants’ attempt to downplay the 2020 Revised Interpretation Letter as “workaday
12 advice” ignores the clear change to the existing safety regulation and OSHA’s reversal of its prior
13 longstanding interpretation of that regulation. OSHA did not issue the 2020 Revised Interpretation
14 Letter in response to an isolated question or limited circumstance; rather, it states that the 2020
15 revision was necessary due to “confusion in the scaffold industry.” This is not routine or advisory—
16 it is OSHA’s final and definitive interpretation of the scaffolding standard, which has immediate
17 and far-reaching consequences for regulated entities like the District. By issuing the 2020 Revised
18 Interpretation Letter altering 29 C.F.R. § 1926.451(a)(1)’s safety factor requirement, OSHA has
19 definitively concluded its decision-making on this issue, satisfying *Bennett’s* first prong.

20 **2. The 2020 Revised Interpretation Letter Has Legal Consequences**

21 The 2020 Revised Interpretation Letter also affects legal rights or obligations. Under the
22 second prong of the *Bennett* test, an agency action determines rights, obligations, or legal
23 consequences when it imposes binding obligations or alters the legal framework governing regulated
24 entities. The 2020 Revised Interpretation Letter provides OSHA’s construction of the scaffold safety
25 standards with which the District and its contractors must comply which deviates significantly from
26 the plain language of the standard itself, reducing the safety factor for transmitted loads and
27 undermining compliance with established standards. This regulatory shift disrupted the District’s
28 federally funded projects, resulting in contractor disputes, delays, and increased costs. For example,

1 the Revised Letter caused a \$9 million expense for alternate inspections and raised future
2 compliance costs due to inconsistent safety requirements. As alleged, this plainly affects the
3 District’s ability to ensure compliance with the stricter safety standard and jeopardizes the District’s
4 federally-funded construction projects, impacting the District’s legal rights and obligations.

5 Defendants’ reliance on *Advanced Integrative Medical Science Institute v. Garland*
6 (“AIMSI”) is misplaced. In *AIMSI*, the DEA’s response to a general inquiry did not determine any
7 party’s legal rights or obligations, nor did it impose enforceable standards. The Ninth Circuit
8 emphasized that there was no finality because the letter at issue did not alter or create obligations
9 beyond the existing statute. By contrast, OSHA’s 2020 Revised Interpretation Letter does not simply
10 restate existing law, it *alters* it. Indeed, as alleged, contractors have relied, and others will with
11 reasonable probability rely, on the 2020 Revised Interpretation Letter to resist compliance with the
12 longstanding, stricter safety factor in favor of the less burdensome alternative. This reliance has led
13 and will reasonably lead to disputes, redesign costs, and delays, all traceable to OSHA’s action.
14 These legal and practical consequences demonstrate that the Revised Interpretation Letter is far
15 more than “workaday advice”—it is binding in effect and impacts the District’s rights and
16 obligations. Such risk is enough to make the Revised Interpretation Letter reviewable. *See La. State*,
17 834 F.3d at 583 (“Judicially reviewable agency actions normally affect a regulated party’s possible
18 legal liability; these consequences tend to expose parties to civil or criminal liability for non-
19 compliance with the agency’s view of the law....”).

20 Defendants’ assertion that the Letter merely “restates the Scaffolding Standard itself” is
21 contradicted by the 2020 Revised Interpretation Letter itself which explicitly acknowledges
22 “confusion in the scaffold industry.” Indeed, Defendants’ argument that their interpretation had no
23 legal consequences because it was merely clarifying existing law improperly puts the cart before the
24 horse. *Faith International Adoptions, Inc. v. Pompeo*, 345 F.Supp.3d 1314, 1325 (W.D. Wash.
25 2018). Whether an agency’s interpretation aligns with the “plain text” of a regulation is precisely
26 the issue courts are tasked with resolving. It is precisely because the 2020 Revised Interpretation
27 Letter seeks to amend rather than interpret existing regulation that it has legal consequences, and
28 can be distinguished from other OSHA documents that authentically interpret rather than legislate.

1 OSHA does not prove otherwise by simply assuming the contrary.

2 To accept OSHA’s position would allow it to bypass judicial scrutiny simply by asserting
3 that its interpretation tracks the regulation’s plain meaning. This would undermine the judicial
4 process, which exists to assess whether agency actions comply with statutory and regulatory
5 frameworks. OSHA cannot avoid review of its actions by characterizing them as mere clarifications
6 when those actions have the practical effect of altering established understandings and creating legal
7 or operational consequences. Courts have consistently rejected such “end runs” around procedural
8 safeguards designed to ensure transparency and accountability in agency decision-making. *Id.* at
9 1325.

10 **C. Defendants’ Request For Dismissal With Prejudice Should Be Denied**

11 As a general rule, leave to amend should be freely granted unless it is clear the complaint
12 could not be saved by any amendment. Fed. R. Civ. P. 15(a)(2); *Manzarek v. St. Paul Fire & Marine*
13 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Dismissal without granting leave to amend is proper
14 only in extraordinary cases. *Broom v. Gogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). If there is any
15 possibility that amendment can cure a perceived defect in a complaint, then leave to amend should
16 be granted. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701. Defendants’ request for dismissal
17 with prejudice should be denied. If the Court finds any insufficiency with the District’s pleading,
18 the District respectfully requests leave to amend.

19 **VI. CONCLUSION**

20 For the foregoing reasons, the District respectfully requests that the Court deny Defendants’
21 motion to dismiss.

22 DATED: January 10, 2025

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