

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2012

4 (Argued: September 14, 2012 Decided: October 24, 2012)

5 Docket Nos. 11-3408-cv, 11-3285-cv

6 - - - - -
7 TOWN OF BABYLON,

8 Plaintiff-Appellant,

9 v.
10

11 FEDERAL HOUSING FINANCE AGENCY, EDWARD DEMARCO, in his capacity
12 as Acting Director of Federal Housing Finance Agency, OFFICE OF
13 THE COMPTROLLER OF THE CURRENCY, a component of the United
14 States Department of the Treasury, JOHN G. WALSH, Acting
15 Comptroller of the Currency,

16 Defendants-Appellees,
17

18 CHARLES E. HALDEMAN, JR., in his capacity as Chief Executive
19 Officer of the Federal Home Loan Mortgage Corporation, MICHAEL
20 J. WILLIAMS, in his capacity as Chief Executive Officer of the
21 Federal National Mortgage Association,
22

23 Defendants.
24 - - - - -

25 NATURAL RESOURCES DEFENSE COUNCIL, INC.,

26 Plaintiff-Appellant,

27 v.
28
29

30 FEDERAL HOUSING FINANCE AGENCY, EDWARD DEMARCO, Acting
31 Director, FEDERAL HOUSING FINANCE AGENCY, OFFICE OF THE

1 COMPTROLLER OF THE CURRENCY, a component of the United States
2 Department of the Treasury, JOHN G. WALSH, Acting Comptroller
3 of the Currency,
4

5 Defendants-Appellees.
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8 Before: WINTER, CABRANES, and CARNEY, Circuit Judges.

9 This opinion disposes of two separate appeals from two
10 district courts heard in tandem. Plaintiffs-appellants Town of
11 Babylon and the National Resources Defense Council appeal from
12 grants of motions to dismiss in favor of appellees Federal
13 Housing Finance Agency and the Office of the Comptroller of the
14 Currency in the Eastern District of New York (Leonard D.
15 Wexler, Judge) and Southern District of New York (Shira A.
16 Scheindlin, Judge), respectively. Appellants argue that the
17 district courts erred in concluding that 12 U.S.C. § 4617
18 precludes judicial review of a Directive issued by the FHFA to
19 Fannie Mae, Freddie Mac, and the Federal Home Loan Banks and
20 also that they lacked standing to pursue their claims against
21 the Office of the Comptroller of the Currency. We affirm.

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33 and John G. Walsh.

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36 WINTER, Circuit Judge:

37 This opinion disposes of separate appeals from two different
38 district courts. We heard the appeals in tandem because of the
39 similarity of the issues raised.

40 The Town of Babylon and the Natural Resources Defense
41 Council, Inc. ("NRDC") appeal from orders entered by Judge Wexler
42 in the Eastern District of New York and Judge Scheindlin in the

1 Southern District of New York, respectively. The district courts
2 dismissed appellants' complaints against the Federal Housing
3 Financing Agency ("FHFA")¹ and the Office of the Comptroller of
4 the Currency ("OCC").² Appellants claimed that a Directive of
5 the FHFA and a Bulletin of the OCC adversely impacted the
6 operation of first-lien Property Assessed Clean Energy ("PACE")
7 programs. The district courts dismissed the actions on the
8 grounds that: (i) the claims against the FHFA were precluded by
9 12 U.S.C. § 4617(f), and (ii) appellants lacked Article III
10 standing to pursue claims against the OCC. We affirm.

11 BACKGROUND

12 PACE programs are operated by local governments. They
13 encourage property owners to make home improvements that reduce
14 energy consumption, promote clean energy, create local jobs, and
15 reduce greenhouse gas emissions, thereby mitigating the effect of
16 global climate change. The local governments offer financing to
17 commercial and residential property owners to fund the cost of
18 the property improvements. Typically, the owners repay the
19 particular local government, which calls the financing advances

¹ The Federal Housing Finance Agency, or FHFA, was established in 2008 by the Housing and Economic Recovery Act ("HERA") to regulate Fannie Mae, Freddie Mac, and/or the Federal Home Loan Banks ("FHLBs"). See 12 U.S.C. § 4511(a), (b)(2). Under 12 U.S.C. § 4617, the FHFA has the power to appoint itself as a conservator or receiver of Fannie Mae, Freddie Mac, and/or the FHLBs. The FHFA appointed itself conservator over both Fannie Mae and Freddie Mac in September 2008 and remains conservator over both entities. See Fed. Hous. Fin. Agency, Statement of FHFA Director James B. Lockhart Announcing Conservatorship of Fannie Mae and Freddie Mac (2008).

² The Office of the Comptroller of the Currency is a federal agency that charters, regulates, and supervises all national banks.

1 "assessments," on a scheduled periodic basis. If a scheduled
2 payment is not made, in many PACE programs, the delinquent amount
3 attaches to the real property as a "tax lien." Such a lien has
4 priority over any other lien attached to the property, including
5 new and preexisting mortgage liens, and stays with the property
6 in the event of sale. However, some PACE programs do not carry
7 such priority and are not affected by this litigation. The Town
8 of Babylon operates a PACE financing program styled the Long
9 Island Green Homes program ("LIGH"). It includes a lien-priority
10 provision.

11 NRDC alleges that "first lien status is critical to the
12 success of PACE programs" because junior lienholders typically
13 lose the entire value at stake in a foreclosure. In contrast, it
14 alleges, "PACE lien seniority is immaterial to holders of the
15 underlying mortgages," because the assessments are relatively
16 small, the risk of default is lessened by the improvement in the
17 owner's financial status due to energy cost savings, and the
18 value of the collateral is increased.

19 The Federal National Mortgage Association, commonly known as
20 Fannie Mae, and the Federal Home Loan Mortgage Corporation,
21 commonly known as Freddie Mac, are federally chartered
22 corporations of a type commonly referred to as Government-
23 Sponsored Enterprises. The entities together own or guarantee
24 close to half of the home loans in the United States, and the
25 value of the combined debt and mortgage-related assets of the two

1 entities along with the Federal Home Loan Banks ("FHLB") exceeds
2 \$5.9 trillion. As noted by Judge Wexler in the Town of Babylon
3 matter, "The position held in the home mortgage business by
4 Fannie Mae and Freddie Mac make them the dominant force in that
5 market. . . . [I]t is not a stretch to assume that lenders in the
6 home financing market are guided in their decisions by Fannie Mae
7 and Freddie Mac requirements." Town of Babylon v. Fed. Hous.
8 Fin. Agency, 790 F. Supp. 2d 47, 49-50 (E.D.N.Y. 2011). In
9 September 2008, as discussed in more detail infra, FHFA appointed
10 itself conservator over Fannie Mae and Freddie Mac.

11 On July 6, 2010, the FHFA issued a Directive ("FHFA
12 Directive" or "Directive") directing Fannie Mae and Freddie Mac
13 to take "prudential actions," "not limited to" certain enumerated
14 suggestions not pertinent here,³ to protect themselves against
15 safety and soundness concerns -- risks -- raised by PACE programs

³ These suggestions were as follows:

Adjusting loan-to-value ratios to reflect the maximum
permissible PACE loan amount available to borrowers in
PACE jurisdictions;

Ensuring that loan covenants require approval/consent
for any PACE loan;

Tightening borrower debt-to-income ratios to account
for additional obligations associated with possible
future PACE loans;

Ensuring that mortgages on properties in a
jurisdiction offering PACE-like programs satisfy all
applicable federal and state lending regulations and
guidance.

Fed. Hous. Fin. Agency, Statement on Certain Energy Retrofit Loan Programs
2 (2010).

1 that impose priority or first-liens on participating properties
2 like LIGH. Fed. Hous. Fin. Agency, Statement on Certain Energy
3 Retrofit Loan Programs 2 (2010). The Directive also directed the
4 FHLBs "to review their collateral policies in order to assure
5 that pledged collateral is not adversely affected by energy
6 retrofit programs that include first liens." Id.

7 The concerns expressed were related only to the
8 subordination of mortgage liens to PACE-related first-lien
9 priorities. Nothing in the Directive or other associated
10 publications of the FHFA suggests any concern over PACE programs
11 that do not impose first-lien priorities. Indeed, FHFA expressly
12 disclaimed any such concern in its Directive Id. ("Nothing in
13 this Statement affects the normal underwriting programs of the
14 regulated entities or their dealings with PACE programs that do
15 not have a senior lien priority.").

16 The same day, the OCC issued "Supervisory Guidance" in the
17 form of a Bulletin ("Bulletin" or "OCC Bulletin") stating that
18 national banks "need to be aware of the FHFA's directives" and
19 "should take steps to mitigate exposures and protect collateral
20 positions," as well as "consider the impact of tax-assessed
21 energy advances on . . . asset valuations" when investing in
22 mortgage-backed securities. Office of the Comptroller of the
23 Currency, OCC Bull. No. 2010-25, Property Assessed Clean Energy
24 (PACE) Programs 1-2 (2010).

25 Subsequent to the actions of the FHFA and the OCC, Fannie

1 Mae and Freddie Mac each issued statements declaring that they
2 would no longer purchase mortgages secured by properties subject
3 to first-lien PACE obligations. See Freddie Mac, Bull. No. 2010-
4 20, Mortgages Secured by Properties with an Outstanding Property
5 Assessed Clean Energy (PACE) Obligation 1 (2010); Fannie Mae,
6 Announcement SEL-2010-12, Options for Borrowers with a PACE Loan
7 2 (2010). On February 28, 2011, the FHFA, by letter, directed
8 Fannie Mae and Freddie Mac to "continue to refrain from
9 purchasing mortgage loans secured by properties with outstanding
10 first-lien PACE obligations," and "undertake other steps as may
11 be necessary to protect their safe and sound operations from
12 these first-lien PACE programs." Letter from Alfred M. Pollard,
13 General Counsel, FHFA, to Timothy J. Mayopoulos, General Counsel,
14 Fannie Mae, and Robert E. Bostrom, General Counsel, Freddie Mac
15 (February 28, 2011).

16 The alleged result of these various statements has been
17 reduced participation in, and diminished viability of, LIGH and
18 other first-lien PACE programs. The Town of Babylon and the NRDC
19 then brought the present actions asserting a host of legal
20 theories, including, as relevant to this appeal, violation of the
21 Administrative Procedure Act ("APA"), 5 U.S.C. § 706, for acting
22 in an arbitrary and capricious manner; violation of the APA, 5
23 U.S.C. § 553(b),(c), and the Housing and Economic Recovery Act
24 ("HERA"), 12 U.S.C. § 4526(b), for failure to solicit notice and
25 comment; and violation of the National Environmental Policy Act

1 ("NEPA"), 42 U.S.C. § 4332(2)(C), for failure to prepare an
2 environmental impact statement. See Complaint at 14-18, ¶¶ 53-
3 75, Town of Babylon v. Fed. Hous. Fin. Agency, 790 F. Supp. 2d 47
4 (E.D.N.Y. 2011) (No. 10-cv-4916); Second Amended Complaint at 19-
5 20, ¶¶ 55-66, NRDC v. Fed. Hous. Fin. Agency, 815 F. Supp. 2d 630
6 (S.D.N.Y. 2011) (No. 10-cv-7647). Both district courts concluded
7 that the claims against the FHFA for the issuance of the
8 Directive were expressly precluded by 12 U.S.C. § 4617(f). Town
9 of Babylon, 790 F. Supp. 2d at 54; NRDC v. Fed. Hous. Fin.
10 Agency, 815 F. Supp. 2d at 642. Both district courts also
11 concluded that appellants lacked constitutional standing to
12 challenge the OCC's actions because the redressability
13 requirement was not satisfied. Town of Babylon, 790 F. Supp. 2d
14 at 55-56; NRDC v. Fed. Hous. Fin. Agency, 815 F. Supp. 2d at 639-
15 41. The district courts therefore dismissed appellants'
16 respective complaints. Town of Babylon, 790 F. Supp. 2d at 56;
17 NRDC v. Fed. Hous. Fin. Agency, 815 F. Supp. 2d at 642. For the
18 reasons stated infra, we affirm.

19 DISCUSSION

20 We review a district court's grant of a motion to dismiss
21 under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) de
22 novo, Klein & Co. Futures, Inc. v. Bd. of Trade, 464 F.3d 255,
23 259 (2d Cir. 2006), accepting as true factual allegations made in
24 the complaint, and drawing all reasonable inferences in favor of
25 the plaintiffs. Holmes v. Grubman, 568 F.3d 329, 335 (2d. Cir.
26 2009).

1 a) Section 4617(f)

2 In 2008, the FHFA appointed itself as the conservator of
3 Fannie Mae and Freddie Mac pursuant to authority granted by 12
4 U.S.C. § 4617. The appointment was based on a determination that
5 "unsafe or unsound condition[s]" existed. 12 U.S.C. §
6 4617(a)(3)(C). See Fed. Hous. Fin. Agency, Statement of FHFA
7 Director James B. Lockhart Announcing Conservatorship of Fannie
8 Mae and Freddie Mac (2008).

9 Section 4617 empowers the FHFA as a conservator to "take
10 such action as may be -- (i) necessary to put the regulated
11 entity in a sound and solvent condition; and (ii) appropriate to
12 carry on the business of the regulated entity and preserve and
13 conserve the assets and property of the regulated entity." 12
14 U.S.C. § 4617(b)(2)(D). Judicial review of "the exercise of
15 powers or functions of the [FHFA] as a conservator" is prohibited
16 "[e]xcept as provided in [Section 4617]." Id. § 4617(f).
17 Nothing in Section 4617 authorizes judicial review in the present
18 circumstances.

19 Appellants argue that the Directive was not issued pursuant
20 to FHFA's powers as a conservator. They note that even as a
21 conservator, FHFA continues to have powers as a regulator,
22 pursuant to 12 U.S.C. § 4526, that when exercised are subject to
23 the notice and comment procedures of the APA and reviewable under
24 5 U.S.C. § 704. They then argue that FHFA exercised this general
25 regulatory authority, rather than its powers as a conservator,
26 when issuing the Directive because either: (i) the agency's

1 conservator powers do not include the power to issue the
2 Directive; or (ii) the agency did not rely on powers as a
3 conservator when issuing the Directive.

4 Argument (i) lacks any basis in the statutory language or
5 legislative purpose. The FHFA Directive to Fannie Mae and
6 Freddie Mac related concerns that PACE priority liens enhanced
7 the risks associated with subordinated mortgages and directed the
8 entities to protect themselves against such risks. As a
9 conservator, FHFA was expressly empowered to take "such action as
10 may be -- (i) necessary to put [Fannie Mae and Freddie Mac] in a
11 sound and solvent condition; and (ii) appropriate to . . .
12 preserve . . . [their] assets and property." 12 U.S.C. §
13 4617(b)(2)(D). Directing protective measures against perceived
14 risks is squarely within FHFA's powers as a conservator.

15 Even if FHFA's powers as a regulator and conservator
16 overlap, the exclusion of judicial review over the exercise of
17 the latter would be relatively meaningless if it did not cover an
18 FHFA directive to an institution in conservatorship to mitigate
19 or avoid a perceived financial risk.

20 As for argument (ii), the FHFA's supposed silence in the
21 Directive regarding the authority under which it was acting is
22 irrelevant.⁴ The statute excludes judicial review of "the

⁴ Much ink has been consumed in arguments concerning a later statement by the FHFA (issued after these actions were filed) that it had acted in its role as a conservator in issuing the Directive to Fannie Mae and Freddie Mac. We need not address the issue because of our conclusion that the exclusion of judicial review under Section 4617(f) was triggered by the conservatorship and the nature of the Directive. The subsequent statement certainly did not render the Directive subject to judicial review.

1 exercise of powers or functions" given to the FHFA as a
2 conservator. Id. § 4617(f). A conclusion that the challenged
3 acts were directed to an institution in conservatorship and
4 within the powers given to the conservator ends the inquiry. See
5 Volges v. Resolution Trust Corp., 32 F.3d 50, 52 (2d Cir. 1994)
6 (interpreting the scope of a virtually identical jurisdictional
7 bar in the Financial Institutions Reform, Recovery, and
8 Enforcement Act of 1989, and concluding that no jurisdiction
9 existed where "[t]he proposed sale of the Volges mortgages
10 plainly f[ell] within the 'powers or functions of the [Resolution
11 Trust Corporation] as a conservator or receiver'"). No
12 particular talismanic incantation of authority is required to
13 trigger Section 4617(f).⁵

14 b) Standing to Pursue Claims Against the OCC

15 "Article III, Section 2 of the Constitution limits the
16 [subject matter] jurisdiction of the federal courts to the
17 resolution of 'cases' and 'controversies.'" Mahon v. Ticor Title

⁵The FHFA's Directive addressed not only Fannie Mae and Freddie Mac but also the FHLBs. However, unlike Fannie Mae and Freddie Mac, the FHLBs are not under a conservatorship. Therefore the FHFA's Directive, insofar as it is directed to the FHLBs, is not shielded from judicial review by Section 4617(f).

However, to the extent that appellants challenge the FHFA Directive as it applies to the FHLBs, they have failed to show that the alleged injury is likely to be redressed by the relief sought. Unlike the Directive's direction to Fannie Mae and Freddie Mac to undertake affirmative action, the Directive required the FHLBs only "to review their collateral policies in order to assure that pledged collateral is not adversely affected by [PACE] programs that include first liens." Fed. Hous. Fin. Agency, Statement on Certain Energy Retrofit Loan Programs 2 (2010). For reasons discussed in Part b, infra, withdrawal of the Directive would not make it likely that the FHLBs would alter their practices.

1 Ins. Co., 683 F.3d 59, 62 (2d Cir. 2012) (citation and internal
2 quotation marks omitted). "In order to ensure that this . . .
3 case-or-controversy requirement is met, courts require that
4 plaintiffs establish their standing as the proper parties to
5 bring suit." Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 89 (2d
6 Cir. 2009) (quoting W.R. Huff Asset Mgmt. Co. v. Deloitte &
7 Touche LLP, 549 F.3d 100, 106 (2d Cir. 2008)) (internal quotation
8 marks omitted). To establish Article III standing, one must
9 show: (i) injury-in-fact, (ii) causation, and (iii)
10 redressability. Id. The district courts found with regard to
11 these claims that the last element, redressability, was absent.
12 We agree.

13 Appellants allege both procedural injury -- the lack of
14 solicitation of notice and comment as required by the APA, 5
15 U.S.C. § 553, and of an environmental impact statement as
16 required by NEPA, 42 U.S.C. § 4332(2)(C) -- as well as
17 substantive injury -- arbitrary and capricious agency action by
18 the OCC -- resulting from the OCC's promulgation of the Bulletin.

19 Where, as here, a litigant complaining of procedural or
20 substantive injury is not the regulated party, the litigant must
21 demonstrate that favorable action by the agency is likely to
22 result in favorable action by the regulated party in addition to
23 demonstrating a link between the procedural or substantive injury
24 to the litigant and the adverse agency action. See Lujan v.
25 Defenders of Wildlife, 504 U.S. 555, 561 (1992) (noting the
26 general rule that "it must be likely, as opposed to merely

1 speculative, that the injury will be redressed by a favorable
2 decision" (internal quotations omitted); id. at 562 (explaining
3 that "when the plaintiff is not himself the object of the
4 government action or inaction he challenges, standing is not
5 precluded, but it is ordinarily 'substantially more difficult' to
6 establish." (quoting Allen v. Wright, 468 U.S. 737, 758 (1984)));
7 id. at 570-71 (plurality opinion) ("[R]edress of the only injury
8 in fact respondents complain of requires action . . . by the
9 individual funding agencies; and any relief the District Court
10 could have provided in this suit against the Secretary was not
11 likely to produce that action."); Simon v. E. Ky. Welfare Rights
12 Org., 426 U.S. 26, 42-43 (1976) ("The complaint here alleged only
13 that petitioners, by the adoption of [the] Revenue Ruling . . .
14 had 'encouraged' hospitals to deny services to indigents. . . .
15 It is purely speculative whether the denials of service specified
16 in the complaint fairly can be traced to petitioners'
17 'encouragement' or instead result from decisions made by the
18 hospitals without regard to the tax implications."); St. John's
19 United Church of Christ v. FAA, 520 F.3d 460, 463 (D.C. Cir.
20 2008) (holding that a plaintiff injured by a regulated third
21 party must demonstrate a likelihood that the third party would
22 change action in the event that the defendant agency changes
23 action, notwithstanding the fact that plaintiff has alleged a
24 procedural injury).

25 Excluding the harm alleged to have resulted from the non-
26 reviewable Directive to Fannie Mae and Freddie Mac, the only

1 injury alleged is the harm from the alteration of lending
2 practices by national banks -- the institutions that are
3 regulated by the OCC but are not parties to this litigation.
4 However, if the OCC Bulletin were vacated, the national banks
5 would remain entirely free to treat PACE-related properties on an
6 unfavorable basis.⁶

7 Town of Babylon's pleadings and affidavits contain no
8 allegation or assertion that the national banks regulated by the
9 OCC would act differently were the OCC Bulletin vacated. NRDC's
10 complaint similarly lacks any allegation that national banks
11 regulated by the OCC would alter current practices if the OCC
12 Bulletin were vacated.

13 NRDC did provide declarations by three municipal officials
14 with experience on the city-planning side of PACE-program
15 implementation. Each stated that if both the FHFA Directive and
16 the OCC Bulletin were vacated, then national banks' lending
17 practices would revert to the status quo ante (pre-July 6, 2010).

18 However, the FHFA Directive, as applied to Fannie Mae and
19 Freddie Mac, cannot be vacated for reasons stated above, and none

⁶ Therefore, the instant matter is distinguishable from New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003). In Whitman, we stated briefly and in dicta that the lax standard traditionally applied to claims of procedural injury applied in the context of an injury caused in part by the actions of a regulated party. Id. at 326. Whitman involved a petition to the EPA regarding the failure to issue objections to draft permits issued by the state agency that were not in compliance with the Clean Air Act. Id. at 319, 323. If the EPA were to object to the permits, the cessation of the injury-causing action (that led to uncertainty about harm caused by the stationary pollution source) would have necessarily followed. 42 U.S.C. § 7661d(b)(3). Here, even if the Bulletin were vacated, the banks regulated by the OCC would still be entirely free to adjust mortgage practices regarding LIGH and other first-lien PACE program participating homes.

1 of the declarations stated, or could state, that vacatur of the
2 OCC Bulletin alone would result in national banks resuming their
3 status quo ante lending practices. Nothing in the OCC Bulletin
4 compelled national banks to take any action. The Bulletin is
5 labeled "Supervisory Guidance," and is couched in entirely
6 permissive language. See Office of the Comptroller of the
7 Currency, OCC Bull. No. 2010-25, Property Assessed Clean Energy
8 (PACE) Programs 1-2 (2010) ("National banks need to be aware of
9 the FHFA's directives National bank lenders should take
10 steps to mitigate exposures and protect collateral positions
11 [B]anks that invest in mortgage backed securities . . .
12 should consider the impact of tax-assessed energy advances."
13 (emphasis added)). The Bulletin alerts recipient banks only to
14 the need for calculating a risk that varies from locality to
15 locality. Were the Bulletin withdrawn, the need for a
16 calculation would remain.

17 A return to the status quo ante by the banks after vacatur
18 of the Bulletin would be a likely result only if the banks
19 calculated the risks and benefits exactly as they are alleged to
20 be by NRDC. That is not a necessary result. More critically,
21 however, even if the OCC Bulletin were vacated, Fannie Mae's and
22 Freddie Mac's refusal to purchase mortgages of properties subject
23 to first-lien PACE programs would remain in force. Any
24 contention that national banks would continue to lend on the same
25 terms as before the issuance of the OCC Bulletin must simply
26 ignore the impact of Fannie Mae's and Freddie Mac's changes in
27 policy.

