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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL PARKS CONSERVATION ASSOCIATION, WILDEARTH GUARDIANS, and THE HUMANE SOCIETY OF THE UNITED STATES,

Plaintiffs,

v.

DAVID BERNHARDT, U.S. Secretary of the Interior, U.S. FISH AND WILDLIFE SERVICE, WILBUR ROSS, U.S. Secretary of Commerce, and NATIONAL MARINE FISHERIES SERVICE,

Defendants,

Case No. 4:19-cv-05206-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-06812-JST

OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Congress passed the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, in 1973 to affirm our nation's commitment to the conservation of threatened and endangered species and their habitat – the forests, grasslands, prairies, rivers, and seas these species need to survive. Congress specifically gave "conservation" a sweeping definition – the use of all methods and procedures necessary to recover threatened and endangered species so that they no longer need the Act's protections. 16 U.S.C. § 1532(3). The ESA works, in part, by placing the survival and recovery of imperiled animals, fish, and plants at the forefront of every federal action and decision.

For over 40 years, the Department of the Interior and the Department of Commerce, acting through the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively "the Services"), have administered the ESA through joint regulations. This case challenges three regulatory revision packages promulgated by the Services that amend regulations that implement the ESA ("Final Regulations"). The Final Regulations made sweeping changes to core regulatory requirements. The Services issued revisions to the regulations governing ESA Section 4, 16 U.S.C. § 1533, the rules for listing and delisting species and designating critical habitat. 84 Fed. Reg. 45,020 (Aug. 27, 2019). The Services issued extensive revisions to ESA Section 7 regulations, 16 U.S.C. § 1536, governing interagency biological consultations. 84 Fed. Reg. 44,976 (Aug. 27, 2019). At the same time, FWS repealed a regulation that had for decades given default protections to species listed as threatened under ESA Section 4(d), 16 U.S.C. § 1533(d). 84 Fed. Reg. 44,753 (Aug. 27, 2019).

The process undertaken by the Services in promulgating the Final Regulations was fundamentally flawed. First, the Services failed to consider and disclose the significant environmental impacts from these regulations in violation of the National Environmental Policy

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Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* The Final Regulations are major federal actions subject to NEPA; none qualify for categorical exclusions from NEPA compliance; and each affect the human environment by undermining the ESA's purpose and protections. Second, the Services failed to consult under ESA Section 7 on the Final Regulations, regulations that easily trigger consultation as ones that "may affect" ESA-listed species and critical habitat. Section 7 consultation provides a vital check on the biological impacts and risks that stem from regulatory actions, like the promulgation of the Final Regulations. Third, the Services failed to comply with public notice and comment requirements under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, by finalizing regulatory language that was not included in the proposed rules. And finally, the Final Regulations lack a reasoned basis for departure from longstanding agency practice and are arbitrary and capricious under the APA § 706(2)(A).

These are weighty procedural concerns that undermine the validity of the Final Regulations. And beyond these errors, the Final Regulations violate the plain language of the ESA, as well as the spirit and purpose of the Act to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species… ." 16 U.S.C. § 1531(b).

The seven conservation groups that brought this challenge center their activities on imperiled species, habitats, and the ESA protections that have been in place for 40 years. It is no exaggeration to say that these groups are the principal non-governmental movers of ESA policy and practice. Members of each of the conservation groups—Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Natural Resources Defense Council, National Parks Conservation Association, WildEarth Guardians, and The Humane Society of the United

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States—live, work, study, volunteer, and recreate in areas where imperiled species live. Many devote countless hours to the protection and restoration of habitat for threatened and endangered species or species proposed as threatened and endangered. The groups themselves are built around the rhythm of ESA listings, designation of critical habitat, and interagency consultations. Each group and thousands of their individual members participated in the rulemaking process for the Final Regulations. Through outreach, education, advocacy, and litigation, the conservation group plaintiffs have long been committed to the survival and recovery of imperiled species.

Despite this focus, dedication, and years of advocacy to protect imperiled species and their habitat, federal defendants moved to dismiss this case (and the related cases brought by 19 states, the District of Columbia, and the City of New York and Animal Legal Defense Fund) on standing and ripeness grounds. Federal defendants' motion is based on a fundamental misrepresentation of the conservation groups' complaint and claims. Neither the conservation group plaintiffs nor the plaintiffs in the related cases bring a challenge to the future implementation of the Final Regulations. Instead, the claims in this case center on the violations inherent in the promulgation of the Final Regulations themselves – both procedural and substantive. Federal defendants' argument that the required "imminence" of harm is lacking is baseless; the regulations are now in effect and are already having adverse effects on the plaintiff conservation organizations and the interests they represent. Accordingly, no further factual development is necessary for this Court's review of the purely legal issues raised by plaintiffs. Finally, plaintiffs and species are being and would continue to be harmed by withholding judicial review. The Court should deny federal defendants' Motion to Dismiss.

ARGUMENT

The conservation group plaintiffs have standing to bring their procedural and substantive claims now. The Court's standing inquiry focuses on who is bringing the action. The standing

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requirements of injury, causation, and redressability exist to ensure that plaintiffs have a particularized interest and specific harm that can be redressed by the Court. Conservation group plaintiffs meet the injury-in-fact requirement. Promulgation of the Final Regulations harmed members of the conservation groups, and the groups themselves, where procedural safeguards that ensure real species protection went missing; regulatory language appeared in the final version without previous notice-and-comment; revised regulations reversed decades of long-standing, well-reasoned agency policy without explanation; and regulatory provisions violated the language and spirit of the ESA itself. The Services are using the Final Regulations now and will continue to do so, easily satisfying the imminence requirement for injury-in-fact.

The Court's ripeness inquiry focuses on when the action is brought. That inquiry evaluates whether the facts are final and clear enough for the Court to rule without further factual development. Conservation group plaintiffs meet these standards as well. The challenged rules are final; they are being used by the Services; this case presents purely legal issues which need no further factual development; and plaintiffs would be harmed by a delay in judicial review.

Federal defendants' motion trumpets a consistent theme: while the 2019 Final Regulations may one day be challengeable, today is not that day. In effect, their position boils down to one where unlawful regulations would be unreviewable except in the context of a particular action that uses those regulations. This is not the law under either a standing or ripeness analysis.

STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(1), a defendant may challenge a plaintiff's jurisdictional allegations facially, by accepting the truth of the plaintiff's allegations but asserting that they "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve such a facial attack, this Court must accept the

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plaintiff's allegations as true and draw all reasonable inferences in the plaintiff's favor. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). For purposes of establishing standing and ripeness, the Court can consider affidavits and other extra-record evidence. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Additionally, in reviewing plaintiffs' standing, the Court does not decide the merits and must assume plaintiffs would be successful in their claims. *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *e.g.*, *Legal Aid Soc'y of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1333 n.27 (9th Cir. 1979).

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE FINAL REGULATIONS.

To establish standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1079 (9th Cir. 2015) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000)). To demonstrate standing to bring a procedural claim—such as one alleging a NEPA violation, ESA failure to consult, arbitrary and capricious decisionmaking, or notice-and-comment failing—a plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011). Conservation group plaintiffs' claims that the Final Regulations are arbitrary and capricious under the APA are considered procedural claims for the purposes of standing. As this Court recently found, "where plaintiffs allege that an agency's action is arbitrary and capricious under § 706(2)(A) because of the agency's failure to follow the basic procedural requirement of providing any reasoned explanation whatsoever, a procedural standing analysis is appropriate." *City and Cnty. of San Francisco v. Whitaker*, 357

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F. Supp. 3d 931, 942 (N.D. Cal. 2018) (quotation and citation omitted); *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) ("one of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions….") (emphasis added).

For an environmental interest to be "concrete," there must be a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Id.* "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw Envtl. Servs.*, 528 U.S. at 183. Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, "the causation and redressability requirements are relaxed." *W. Watersheds Project*, 632 F.3d at 485. "Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, could protect their concrete interests." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008) (emphasis in original).

A. Plaintiffs Are Proper Parties To Bring This Challenge.

The judicial standing inquiry focuses on the party seeking to present a claim in federal court. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968). The conservation organizations presented standing allegations in the First Amended Complaint, ECF No. 28. Concurrent with this opposition, the conservation group plaintiffs submit declarations demonstrating that their members have concrete recreational, aesthetic, and professional interests in the survival and recovery of imperiled species and their designated critical habitat, as well as interests in the valid implementation of the ESA. *See, e.g.*, Declarations of Vivian Beck (Florida key deer); Bob Clark (lynx); George H. Corn (wolverine); Tierra Curry (Nashville crayfish); Patrick Donnelly (Mount Charleston butterfly); C. Elaine Giessel (black-footed ferret, whooping crane); D. Noah

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Greenwald (CBD Endangered Species Program Director); John C. Horning (WildEarth Guardians Executive Director); Taylor Jones (prairie chicken); Wendy Keefover (grizzly bear); Jane Davenport McClintock (North Atlantic right whale); Bart Melton (monarch butterfly, whitebark pine); Christopher D. Nagano (Glacier stoneflies); David Pauli (wolverine); David Pengelley (northern spotted owl, red tree vole, marbled murrelet, horned grebe); Daniel Ritzman (polar bear); Jason Rylander (piping plover, red knot); Michael P. Senatore (Defenders VP for Conservation Law); Jim Stratton (California spotted owl, golden winged warbler, piping plover); Scott Trageser (dunes sagebrush lizard); Andrew Whitehurst (Gulf sturgeon); Kent Wimmer (Red-cockaded woodpecker).

These affidavits demonstrate injuries that give rise to standing to challenge actions that fail to protect threatened and endangered species, species that may become threatened or endangered, and habitat crucial for species' survival and recovery. *See Laidlaw Envtl. Servs.*, 528 U.S. at 183; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *Cantrell v. Long Beach*, 241 F.3d 674, 681 (9th Cir. 2003). Moreover, the conservation group plaintiffs by no means present an abstract interest "held in common by all members of the public," as in *Shlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974). Fed. Br. at 24 (ECF No. 33). As the First Amended Complaint and declarations aver, conservation group members hold deep and committed interests in imperiled species and their habitat that go well beyond generalized harm. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (organizational standing based on members' injuries).

Environmental organizations often facially challenge federal regulations and guidance that fundamentally change the way federal agencies comply with the law. For example, environmental plaintiffs won a facial challenge to a prior revision of the ESA § 7 interagency

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consultation regulations on the impacts of pesticides on threatened and endangered species, prevailing against both standing and ripeness arguments by the Services. *See Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1168, 1173 (W.D. Wash. 2014) ("[T]he regulation here is the action being challenged.") (emphasis in original). Environmental organizations also brought a facial challenge to federal regulations enabling the authorization of take of polar bears and Pacific walrus because the regulations themselves harmed the groups' members. *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707-08 (9th Cir. 2009).

Environmental organizations also prevailed in a challenge to the 2005 nationwide repeal of the Roadless Rule, again overcoming standing and ripeness arguments. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006). The district court found that plaintiffs "have shown their concrete interest by submitting numerous declarations from organizational members and State officials regarding their geographic proximity to areas that will be affected by changed roadless area policies." *Id.* at 885 (quoting from sample of declarations). Similarly, in *Western Watersheds Project v. Kraayenbrink*, environmental groups challenged the Bureau of Land Management's regulations governing grazing on federal lands nationwide. 632 F.3d 472 (9th Cir. 2011). There, the appellate court explained that plaintiffs had standing because their declarations "establish[ed] a geographic nexus between [plaintiff's] members and the locations subject to the 2006 Regulations." *Id.* at 476.

In each of those cases, as here, environmental plaintiffs brought facial challenges to final regulations. Federal defendants attempt to frame this case differently, incorrectly asserting that the plaintiffs' claims "all presuppose that the Services will apply these revised regulations in a manner that harms their interests in ESA-listed species." Fed. Br. at 14. To the contrary, it is not the particular application of the regulations that is at issue. First, the procedural injuries under

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NEPA, the ESA, and the APA have already happened. Second, plaintiffs here allege that the Final Regulations themselves are unlawful and cause harm to their interests in imperiled species whenever they are used. "The regulation itself effects a significant change in the Services' involvement in FIFRA actions, and it is this change that is protested by Plaintiffs, not its effect on future pesticide registrations or re-registrations (although it could be fairly said that Plaintiffs protest the change because of its expected future effects)." *Wash. Toxics Coal.*, 457 F. Supp. 2d at 1173 (emphasis in original). This is precisely the shape of the challenge presented here.

B. Plaintiffs Satisfy the Imminence Requirements of Standing for All Claims.

Federal defendants do not seriously contend that the conservation group plaintiffs are not proper parties to bring this case. Instead, federal defendants argue that plaintiffs are not injured yet because they have filed this case too soon. "We are not arguing that Plaintiffs can never establish standing. … Plaintiffs have quite simply jumped the gun." Fed. Br. at 24. Yet federal defendants admit, as they must, that the Services are using the Final Regulations now. Fed. Br. at 4-13; *see, e.g.*, Whitehurst Decl. ¶¶ 11-13 (One Lake Project biological opinion uses Final Regulations); Donnelly Decl. ¶ 11 (same for Lee Canyon Ski Area biological opinion).

Federal defendants stress that the Final Regulations are not retroactive, Fed. Br. at 16-17, a fact that is uncontested by the conservation group plaintiffs. As the proposed defendant-intervenors note, that the rules are prospective does not change the fact that they are final and being used now; plaintiffs and intervenors "are affected by the rules today and will likely be affected in additional ways in the near future." Kenneth Klemm *et al.* Motion to Intervene, ECF No. 41, at 13, n.6; *see also* American Farm Bureau Federation *et al.* Motion to Intervene, ECF No. 36, at 10-13 (listing ways the Final Regulations currently favor development interests over imperiled species that would be undone by plaintiffs' requested relief of vacatur); Decl. of Douglas Vincent-Lang, Alaska Dep't of Fish & Game, ECF No. 47-4, at ¶ 23 (if plaintiffs

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succeed, "Alaska's land and waters, and development of the underlying oil and gas, and other mineral resources, will be hindered by way of delayed exploration and development.").

Moreover, the imminence component of standing is satisfied not only when a plaintiff has sustained an actual injury, but also when he or she is threatened with injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). As the Ninth Circuit has noted, the fact that "the injury is 'threatened' rather than actual' does not defeat the claim… . Nor need the risk of injury be certain, as opposed to contingent." *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir. 1992). It has long been settled that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pa. v. W. Va.*, 262 U.S. 553, 593 (1923). Additionally, in this Circuit, plaintiffs have standing "to challenge programmatic management direction [even] without also challenging an implementing project that will cause discrete injury." *Cottonwood*, 789 F.3d at 1081. Federal defendants' argument otherwise is contrary to this law.

As the new regulations have replaced the prior ones, the Services are now using and applying the challenged regulations in listing and delisting decisions, designation of critical habitat, and interagency consultations. The injuries from application of these regulations are "certainly impending."

C. Plaintiffs' Procedural Claims Meet the Lower Standing Barrier.

Federal defendants admit that plaintiffs' NEPA and ESA consultation claims "can give rise to procedural injury in appropriate circumstances," but state that plaintiffs must set forth a specific interest in "at least one ESA-listed species that is concretely affected by the revised regulations." Fed. Br. at 23. This is not the law.

Plaintiffs asserting procedural injury must establish that "(1) the [defendants] violated certain procedural rules; (2) these rules protect [plaintiffs'] concrete interests; and (3) it is

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reasonably probable that the challenged action will threaten their concrete interests." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003). Plaintiffs satisfy this standard. Plaintiffs allege that federal defendants violated procedural rules requiring (1) environmental analysis under NEPA (First Claim for Relief); (2) consultation with federal wildlife experts under ESA § 7 (Sixth Claim for Relief); advance notice and the opportunity to comment on specific regulatory language under the APA (Second Claim for Relief); and rational explanations for revisions in the Final Regulations (Third, Fourth, and Fifth Claims for Relief). These procedures protect plaintiffs' concrete interests in protecting and recovering imperiled species and their habitat.

Citizens for Better Forestry involved an analogous situation. The plaintiffs brought a NEPA challenge to a nationwide forest management rule that had not yet been applied in developing any forest plans or site-specific projects. The Ninth Circuit held that environmental plaintiffs had standing to challenge the rule on its face and had no obligation to "assert that any specific injury will occur in any specific national forest." *Citizens for Better Forestry*, 341 F.3d at 971. The Ninth Circuit explicitly rejected the assertion that the rule was too many steps removed from on-the-ground harm to plaintiffs, noting that the Ninth Circuit has repeatedly rejected this contention and heard challenges to programmatic authorizations that constituted the first step in the chain of causation. *Id.* at 973. As in *Citizens for Better Forestry*, the conservation groups here have a sufficient likelihood of injury without waiting for the Services to issue species-specific decisions under its new authority.

Under the concrete interest test, an environmental plaintiff need not assert that any specific injury will occur in any specific species or habitat; rather, "the asserted injury is that environmental consequences might be overlooked as a result of deficiencies in the government's

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analysis under environmental statutes." *Citizens for Better Forestry*, 341 F.3d at 971 (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir.1994)); *see also Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264, 1274 (D. Mont. 2019) (plaintiffs had standing to bring NEPA and APA challenge to Secretarial Order lifting moratorium on federal land coal leasing).

Nor should use of the term procedural injury be taken to mean a minimized type of harm. Plaintiffs' NEPA and other procedural claims remain based on harm to species and the environment. As explained in *Sierra Club v. Marsh*:

> [W]e would add one further word of explanation. We did not (and would not) characterize the harm described as a "procedural" harm, as if it were a harm to procedure …. Rather, the harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize that risk….

872 F.2d 497, 500 (1st Cir. 1989) (emphasis in original).

Finally, plaintiffs asserting procedural injury "need not show that the substantive environmental harm is imminent." *Cantrell v. City of Long Beach*, 241 F.3d at 679 n.3; *see Lujan v. Defenders of Wildlife*, 504 U.S. at 573 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). With respect to the ESA consultation claim, the Ninth Circuit has explained, "[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). "It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not

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been followed." *Id*. at 765. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (connecting statutory procedural safeguards to subsequent agency decisions).

Here, plaintiffs satisfy the concrete interest test through species-driven missions of the conservation group plaintiffs, participation in the comment period for the Final Regulations, and injuries to both the plaintiffs' members and the organizations themselves. First Amended Complaint ¶¶ 12-16. The affidavits submitted with this opposition further document members' use and enjoyment of imperiled species and their habitat throughout the country—interests that are harmed by the Final Regulations. Declarants attest to their longstanding actions to protect and recover imperiled species. *See, e.g.*, Beck Decl. ¶ 8 ("My husband and I dedicated six months of our life to help these deer. Throughout this period of time, we made sure of that at least one of us was available every weekend to medicate the deer."); Corn Decl. ¶ 9 ("Wolverines in particular are a special interest for me. For the past five winters I have participated in a large citizen science project in the Bitterroot Valley to collect information on them to gauge their long-term viability as a species."); Pauli Decl. ¶ 11 ("I am also a certified "master tracker" and enjoy looking for animal tracks and other sign, especially in snowy landscapes."); Giessel Decl. ¶15 ("As a seasonal park naturalist at Ernie Miller Nature Center in Olathe, KS … I educate visitors on the value of native grasslands and help restore prairies in the area, including seed collection."); Keefover Decl. ¶ 16 ("The same deep sense of connection that has motivated my advocacy and professional work on behalf of native carnivores also drives me to recreate in the areas where they exist during my free time."); Melton Decl. ¶ 26 ("I would be harmed personally if in my travels to and through Yellowstone the whitebark pine population was less healthy or the tree no longer existed in the park as it does today.").

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Declarants also describe the numerous geographical areas and habitats they regularly visit to see wildlife. *See, e.g.,* Pengelley Decl. ¶ 7 ("A third favorite is the Cape Perpetua Scenic Area ... which I visit several times every year and have definite plans to return to next year. This area is unique because it's one of the few places where the old-growth forest extends all the way down to the coast."); Ritzman Decl. ¶ 25 ("I have traveled to the Coastal Plain of the Arctic Refuge at least once each summer for the last seventeen years ... . I would estimate my total number of trips ... to be fifty-one."); Clark Decl. ¶ 10 ("Over the last 26 years, I have logged hundreds of miles on and off trail in occupied or potentially occupied lynx habitat surrounding Missoula, Montana, in western Montana, Eastern Idaho, and Northwest Wyoming."); Pauli Decl. ¶ 12 ("I intend to continue travelling to Lamar Valley and hiking through Yellowstone National Park with my spotting scope and binoculars, hoping to spot a wolverine on each visit."); Melton Decl. ¶ 18 ("[W]hen I travel to the Smokies in the fall of 2020 to view the monarch's migration, I hope to bring my young nieces to the park to see the migration in action."); Wimmer Decl. ¶ 6 ("for over 25 years I have led natural history hikes for the public in key habitat areas for the Red-cockaded woodpeckers including within the remaining largest populations on public land, the Apalachicola National Forest and St. Marks Wildlife Refuge ... ."); Rylander Decl. ¶ 13 ("My favorite spot to look for piping plovers is Nauset Beach in Orleans, Massachusetts, which I last visited in July 2019; I have definite plans to return to Nauset Beach in the summer of 2020.").[1]

[1] *See also Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002) (conservation groups had standing to challenge nationwide regulation where plaintiffs' "staff and members hunt, hike, fish and camp in roadless areas"); *Citizens for Better Forestry*, 341 F.3d at 971 (finding concrete interest where plaintiffs proffered "numerous affidavits covering a vast range of national forests around the country" establishing "that their members use and enjoy national forests, where they observe nature and wildlife").

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Federal defendants misrepresent the U.S. Supreme Court decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). Fed. Br. at 23. In *Summers*, conservation groups settled the part of their case that presented as-applied harm and then continued to challenge the "regulation in the abstract" based on standing declarations that failed to identify any connection between areas that plaintiffs used and the nationwide application of the regulations. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d at 707 (citing *Summers*, 555 U.S. at 494). The *Summers* plaintiffs alleged that application of the challenged forestry regulations meant they would have no opportunity to file comments on particular projects, which resulted in procedural injury. 555 U.S. at 496. In short, their procedural injury was the inability to comment on later projects, not a procedural injury from federal defendants' promulgation of the challenged regulations. *Id.* at 496-97. Not so here, where the procedural injuries under NEPA, the ESA, and the APA happened the moment the federal defendants issued the Final Regulations in violation of the law.

Plaintiffs have demonstrated with specificity their use and enjoyment of areas and species affected by the Final Regulations, their concrete plans to return to these areas and continue these activities, and the link between their harm and upcoming or ongoing agency action that relies on the new regulations. *See, e.g.*, Whitehurst Decl. ¶ 12; Donnelly Decl. ¶ 11; Clark Decl. ¶ 20 ("I am concerned that the 2019 changes to the ESA regulations will make it easier for FWS to delist the Canada lynx improperly, despite the threat to the species from climate change and other impacts."); Stratton Decl. ¶ 18 (linking interests in California spotted owl to FWS National Listing 5-Year Workplan); Greenwald Decl. ¶ 25 (FWS used Final Regulations to reverse proposed rule and find designation of critical habitat for stoneflies "not prudent"); *id.* at ¶¶ 15-16 (listing species planned for downlisting from endangered to threatened); Nagano Decl. ¶¶ 10 -11,

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16. ("[a]s an entomologist and former FWS endangered species biologist, there is absolutely no question in my mind that critical habitat can quickly and easily be determined for the two listed stoneflies"). *See also Cottonwood*, 789 F.3d at 1080 (finding that plaintiff's similarly detailed declarations presented a "clear contrast" to the affidavit in *Summers*). Plaintiffs do not allege a "procedural right *in vacuo*," *Summers*, 555 U.S. at 496, but instead identify procedural injuries that have already occurred that affect concrete interests of their members in specific regions and to specific species throughout the country.

D. Plaintiffs Satisfy the Causation and Redressability Components of Standing.

Federal defendants do not even bother to advance causation and redressability arguments, and for good reason. The Final Regulations cause plaintiffs' injuries, and those injuries would be redressed by vacatur. Additionally, in *Lujan*, the Supreme Court noted that causation and redressability requirements are relaxed where Congress has established procedures to protect the plaintiffs' interests:

> under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

504 U.S. at 573 n.7. Plaintiffs' injuries would be redressed by vacating the unlawful revised regulations. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1156 (9th Cir. 2015). That connection between "the procedural step" and the "substantive result" is "[a]ll that is necessary for standing." *Envtl. Def. Fund v. Envtl. Prot. Agency*, 922 F.3d 446, 453 (D.C. Cir. 2019) (internal quotation marks omitted).

E. Plaintiffs Also Have Organizational Standing.

Plaintiff organizations have standing to sue in a representational capacity on behalf of their members; they also have standing to sue in their own right if they can show that defendants'

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actions cause a "concrete and demonstrable injury to the organization's activities" that is "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). In the Ninth Circuit, an organization can establish the requisite injury "when it suffer[s] both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quotation and citation omitted). In *Animal Legal Defense Fund v. Great Bull Run*, a court in this district found that allegations from the non-profit group that defendants' actions frustrated its "charitable missions and force[d] them to divert organizational resources" met the requirements for organizational standing. 2014 WL 2568685, at *4 (N.D. Cal. June 6, 2014); *see also People for the Ethical Treatment of Animals v. Whole Foods Mkt.*, 2016 WL 362229, at *3 (N.D. Cal. Jan. 29, 2016) (on motion to dismiss, taking as true allegations in complaint, plaintiff sufficiently pled injury for organizational standing when it alleged "a frustration of its mission of a well-informed public and has had to divert resources from other [plaintiff] projects in order to urge [defendant] to stop its misleading advertising and to educate the public about the inadequacy of [defendant's] standards.").

Conservation group plaintiffs have alleged injuries sufficient to meet the standard for organizational standing. For example, the Center for Biological Diversity's core mission is "to obtain critically important legal and practical protections for species at grave risk of extinction." First Amended Complaint ¶ 14. The regulations frustrate that core mission by "erecting barriers to new listings and critical habitat designations, substantially delaying the listing process, and greatly weakening the statutory protections for species that are listed." *Id.*; Greenwald Decl. ¶ 9 (over 700 species and nearly half a billion acres of critical habitat protected as a result of the Center's work). The statutory structure of the ESA specifically calls for the involvement of

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citizen groups like plaintiffs in the petition process and through citizen suits to enforce the Act. The Center provides services to its members in the form of petitions for ESA protections; the Center has settled lawsuits against the Services in exchange for deadlines for ESA actions, *id.* ¶ 11 ("as a result of settlement agreements reached by the Center, FWS and NMFS will have to determine whether eleven species warrant listing under the ESA, propose critical habitat for six species, and finalize critical habitat for five species by the end of the year 2021"); *see also* ¶¶ 15-16 (detailing planned FWS downlisting actions); Horning Decl. ¶¶ 10-12 (explaining litigation to address backlog of petitions).

The Final Regulations have forced expenditure and diversion of resources as well. First Amended Complaint ¶ 15 ("For example, by unlawfully requiring that economic analyses be prepared before any species may be listed, the regulations require the Center and other plaintiffs to spend resources addressing economic considerations that under the prior regulatory regime and the statute itself have no role in the Service's listing process."). *See* Greenwald Decl. ¶ 23 (FWS action already costing significant time and resources), ¶ 27 (use of Final Regulations in One Lake Project "undermines the work the Center has done to protect Gulf Sturgeon" and "will require the Center to expend significant staff time and resources"); *see also id.* ¶¶ 15-17 (explaining how elimination of the "Blanket 4(d)" rule requires the Center to expend time and resources to accomplish protection for threatened species that was previously extended as a matter of course); *see also* Senatore Decl. ¶¶ 14-18 (explaining impacts to Defenders' work and resources); Horning Decl. ¶¶ 16-18 (new regulations require additional comments and petitions, shifting the burden of scientific support for protections to the public).

Federal defendants concede that the Center has made a specific factual allegation that the preparation of economic analyses in connection with species listings—for the first time in the

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history of ESA implementation—will require the Center to spend time and resources where it never did before. Fed. Br. at 21. Although that recognition alone is sufficient for standing at this juncture, federal defendants then disagree with conservation group plaintiffs' argument on the merits of the challenge to the regulation, *see id*., and yet the merits are plainly not a basis for ruling on standing at the motion to dismiss stage. *See Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 56 (1st Cir. 2001).

Federal defendants' only other argument is that conservation group plaintiffs cannot be injured unless economic information is collected and "actually influenced or changed the outcome so that a species was not listed under the ESA." Fed. Br. at 21. But that argument simply misreads the Center's organizational standing injury. As explained in the First Amended Complaint and declarations, the Center, Defenders, and other plaintiffs must now, for the first time ever, spend their time and resources commenting on and refuting the purported economic impacts of listing. Greenwald Dec. ¶¶ 20–21; Senatore Decl. ¶ 18. The frustration of core missions and the necessary expenditure of resources establishes standing under Ninth Circuit precedent and differentiates the conservation group plaintiffs here from cases such as *Washington Wilderness Coal. v. Walla Walla Cnty.*, 1996 WL 21668 (9th Cir. 1996), in which a plaintiff offered only "a setback to its abstract social interests" and no evidence of previously engaging in activities it claimed it would have to begin. In addition to representational standing on behalf of their members, conservation group plaintiffs have organizational standing.

II. PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW.

The ripeness doctrine serves as a limitation on the timing of judicial review, not a retraction of the broad rights to obtain judicial review established in the APA. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Conservation group plaintiffs' challenges to the Final Regulations are constitutionally and prudentially ripe.

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Plaintiffs' claims are ripe under Article III because, as discussed above, they have demonstrated injury-in-fact. *See Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153-54 (9th Cir. 2017). "Constitutional ripeness … coincides squarely with standing's injury in fact prong." *Id.* at 1153 (internal quotation marks omitted); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014).

Although this Court has "discretion[]" to consider whether plaintiffs' claims are also prudentially ripe, *Bishop Paiute Tribe*, 863 F.3d at 1154, the Ninth Circuit has called prudential ripeness a "disfavored judge-made doctrine that 'is in some tension with [the Supreme Court's] recent reaffirmation … that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.'" *Fowler v. Guerin*, 899 F.3d 1112, 1116 n.1 (9th Cir. 2018) (quoting *Susan B. Anthony List*, 573 U.S. at 167) (alteration in original); *see also Clark v. City of Seattle*, 899 F.3d 802, 809 n.4 (9th Cir. 2018) (similar).

If the Court does reach prudential ripeness, however, conservation group plaintiffs satisfy the three factors set forth in *Abbott Laboratories v. Gardner* and *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 733 (1998): whether judicial intervention would inappropriately interfere with further administrative action; whether the courts would benefit from further factual development of the issues presented; and whether delayed review would cause hardship to the plaintiffs. The first two factors are sometimes combined into a single inquiry, termed the "fitness of the issues for judicial decision." *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs*, 387 U.S. at 149). Courts have also held that if claims are found to be "fit for review," the ripeness inquiry is at an end. *See General Elec. Co v. EPA*, 290 F.3d 377, 381 (D.C. Cir. 2002) ("no purpose is served" by analyzing hardship once court determines that issue is fit for review).

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A party may complain of a procedural injury "at the time the failure takes place, for the claim can never get riper." *Cottonwood*, 789 F.3d at 1084 (citing *Ohio Forestry*, 523 U.S. at 737). Moreover, the imminence of project-specific implementation "is irrelevant to the ripeness of an action raising a procedural injury." *Cottonwood*, 789 F.3d at 1084.

A. Plaintiffs' Claims Are Fit for Judicial Decision.

There is no question that the three regulatory packages, labeled "Final Rules," are "final agency actions." 5 U.S.C. § 551 (definition of final agency action includes rules). With respect to the claims seeking to enforce procedural safeguards embodied in NEPA, the ESA consultation requirements, and the APA's requirement of rational, fully-noticed decisionmaking, the ripeness doctrine is inapplicable. In *Ohio Forestry*, the Supreme Court articulated a distinction making ripeness obstacles inapplicable to procedural as opposed to substantive challenges. The Court explained that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737. The Ninth Circuit has adopted the rule that a NEPA claim is ripe when the violation occurs and that site-specific action is "irrelevant to the ripeness of an action raising a procedural injury." *Citizens for Better Forestry*, 341 F.3d at 977; *Laub v. Dep't of Interior*, 342 F.3d 1080, 1088-89 (9th Cir. 2003); *Kern v. BLM*, 284 F.3d 1162, 1070-71 (9th Cir. 2002) ("[i]f there was an injury under NEPA, it occurred when the allegedly inadequate EIS was promulgated"). While *Ohio Forestry* articulated this distinction in the NEPA context, the Ninth Circuit has adopted the same analysis to find alleged violations of the ESA's procedural consultation requirements ripe for review. *Citizens for Better Forestry*, 341 F.3d at 971 n.6, 977.

Plaintiffs' additional claims—that the revised regulations contravene the ESA as a matter of law—involve questions of statutory interpretation and are based only on the now-closed

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administrative record. These claims will not be further informed by future factual developments. Where a party challenges a regulation's conformity with its authorizing statute, "[t]he question before [the Court] is purely one of statutory interpretation that would not benefit from further factual development of the issues presented." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001); *see also State of California ex rel. Water Resources Bd. v. FERC*, 966 F.2d 1541, 1562 (9th Cir. 1992) ("It is difficult to postulate an issue more proper for judicial decision than that of the statutory authority of an administrative agency."); *Cement Kiln Recyling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007) ("It is well established that claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues.").

The purely legal nature of this case distinguishes it from *Habeas Corpus Resource Center v. U.S. Department of Justice*, 816 F.3d 1241, 1247 (9th Cir. 2016), relied on by federal defendants. In *Habeas Corpus*, petitioners alleged that "vagueness" in the challenged regulations prevented them "from making reasonable predictions as to whether and how the Attorney General" would conduct the certification process at issue. 816 F.3d at 1246. Here, by contrast, the revised regulations on their face violate the ESA in several ways, including by eliminating recovery criteria from delisting factors, expanding critical habitat exemptions, and limiting the effects and activities considered during consultation. First Amended Complaint ¶¶ 44-89. These errors, among others, are "complete" because the Services have "rendered [their] last word on the matter." *Cottonwood*, 789 F.3d at 1084 (internal quotation marks omitted).[2]

[2] The Court in *Ohio Forestry* applied the prudential ripeness test from *Abbott Laboratories*, 523 U.S. at 732-33; *see Bishop Paiute Tribe*, 863 F.3d at 1154 (test in *Abbott Laboratories* concerns prudential ripeness). The Ninth Circuit applied the same test in *Habeas Corpus*, 816 F.3d at 1252. A court in this district has "previously declined to reach prudential ripeness when constitutional ripeness is satisfied." *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031 (N.D. Cal. 2018).

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While the Services will apply and use the new regulations now and in the future, such future factual developments have no bearing on the claims in this case. This is a textbook instance where "further factual development will not render more concrete" the issues presented for judicial resolution. *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 808 (9th Cir. 1980) (challenge to EPA regulation ripe because it was EPA's "last word" on subject); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (facial challenge to election procedures justiciable where application would not assist judicial inquiry); *Nat'l Ass'n of Homebuilders v. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (arbitrary and capricious challenge to regulations presents ripe legal issues).

Nor will this Court's review "inappropriately interfere with future administrative action." *Ohio Forestry*, 523 U.S. at 733. Federal defendants take a stab at arguing that judicial review would interfere with application of the revised regulations, stating that they need time "to determine precisely how the regulations will be applied." Fed. Br. at 26. In *Cottonwood*, the court rejected a similar argument. In that case, the Ninth Circuit found the failure to reinitiate consultation claim ripe because there was no further process to occur for the challenged action. Here, similarly, the procedural failures, including an identical failure to consult claim, are ripe because there can be no further process. The regulations are "at an administrative resting place," *Citizens for Better Forestry*, 341 F.3d at 977, and ripe for review.

The Services also characterize the conservation group challenge as "pre-enforcement review." Fed. Br. at 25-26. That framework is simply inapplicable. As the *Habeas Corpus* court explained, "pre-enforcement review" applies only where the challenge is to "regulations anticipating that an administrative agency will … apply those regulations in a manner that will harm [a party's] interests," and the party "may have to choose between complying with the

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regulations immediately or facing penalties." *Habeas Corpus*, 816 F.3d at 1252. This is not a case where plaintiffs must choose between compliance and risking penalties. Nor is it a case challenging final regulations that may or may not be enforced in any particular matter; this case challenges the regulations themselves.

In short, the conservation group claims are final, purely legal, and fully reviewable based on the existing administrative record. Nothing would be gained by viewing these issues through the lens of a specific application of the Final Regulations since they must stand or fall on their own merit, without regard to the nuances of future actions of the Services. Each claim is fit for judicial decision and ripe for review.

B. Plaintiffs Will Suffer Hardship If Review Is Delayed.

Since the issues are fit for review and no further factual developments are needed to resolve the claims, hardship is irrelevant as it operates only to tip the balance in favor of judicial review when some interests favor delay. *See Nat'l Ass'n of Homebuilders v. Army Corps of Eng'rs*, 2006 WL 250234 at *4 (D.C. Cir. 2006); *Municipality of Anchorage v. U.S.*, 980 F.2d 1320, 1325-26 (9th Cir. 1992).

Yet conservation plaintiffs will suffer hardship if the Court delays review. If plaintiffs cannot challenge the revised regulations until aspects of them are applied, species subject to those applications, as well as conservation group members' interests in those species, will be harmed before any legal review is possible. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d at 709 ("[h]ardship may result from past or imminent harm caused by the agency's adoption to the regulations."). The Final Regulations will increase the backlog of agency actions to be taken, further delaying protections for species that warrant it, but have been precluded from listing for lack of money and resources. *See* FWS, Listing and Critical Habitat Petition Process, www.fws.gov/endangered/what-we-do/listing-petition-process.html (last visited Dec. 30, 2019);

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First Amended Complaint ¶ 117. And, as explained above, the Final Regulations already frustrate the missions of the conservation group plaintiffs, who are compelled to divert scarce time and resources as a direct consequence of the new regulations. *See* Greenwald Decl. ¶¶ 14, 17, 21-24, 28; Senatore Decl. ¶¶ 16, 18; Horning Decl. ¶¶ 15-18. This is existing and ongoing harm that reinforces the need for judicial resolution now, not in some indeterminate future.

Finally, the challenged regulations are being used by the Services. The Biological Opinion for the One Lake Project has already used the Final Regulations definition of destruction or adverse modification of critical habitat. Whitehurst Decl. ¶ 12; Donnelly Decl. ¶¶ 5-7. Other analyses relying on the Final Regulations are underway, and the harm from their specific application will have begun long before any final species-specific decisions. Review now could forestall a parade of individual challenges in various courts that might result in inconsistent rulings and certainly waste judicial resources. Here, plaintiffs "are taking advantage of … their only opportunity to challenge [the revised regulations] on a nationwide … basis," rendering the dispute "ripe for adjudication." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009); *see also W. Watersheds Project*, 632 F.3d at 486 (challenges to final regulations implementing Taylor Grazing Act ripe upon publication of the rules).

CONCLUSION

For the reasons discussed above, conservation group plaintiffs meet the injury-in-fact requirement for both representational and organizational standing and the standards for ripeness in this challenge to the Final Regulations themselves. Conservation group plaintiffs respectfully ask the Court to deny federal defendants' Motion to Dismiss and proceed to schedule filing of the administrative record and summary judgment briefing.

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DATED this 7th day of January, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Kristen L. Boyles
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