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11
 12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA (Oakland)

14 CENTER FOR BIOLOGICAL DIVERSITY,
 15 et al.,

Plaintiffs,

vs.

18 DAVID BERNHARDT, et al.,

Federal Defendants.

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

**REPLY IN SUPPORT OF FEDERAL
 DEFENDANTS' MOTION TO DISMISS
 AND MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: February 26, 2020

Time: 2:00 pm PST

Place: Courtroom 6, 2nd Floor

Judge: The Honorable Jon S. Tigar

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INTRODUCTION

1
2 Federal Defendants, the Secretaries of the Departments of the Interior and Commerce
3 (“Secretaries”), as well as the U.S. Fish and Wildlife Service (“FWS”) and the National Marine
4 Fisheries Service (“NMFS”) (collectively “Services”), have moved to dismiss three separate
5 challenges to their revised Endangered Species Act (“ESA”) regulations under Federal Rule of
6 Civil Procedure 12(b)(1) on standing and ripeness grounds.¹ The revised regulations clarify,
7 interpret, and implement portions of Sections 4, 4(d), and 7(a)(2) of the ESA. *See* 84 Fed. Reg.
8 45020 (Aug. 27, 2019) (Section 4 revisions); 84 Fed. Reg. 44753 (Aug. 27, 2019) (Section 4(d)
9 revisions); 84 Fed. Reg. 44976 (Aug. 27, 2019) (Section 7(a)(2) revisions). They apply to the
10 Services in the course of their administration of the ESA, and none of the revised regulations
11 apply retroactively to any threatened species or endangered species.

12 Seventeen States, the District of Columbia and the City of New York (“State Plaintiffs”),
13 the Center for Biological Diversity and other non-governmental organizations (“CBD
14 Plaintiffs”), and the Animal Legal Defense Fund (“ALDF”) (collectively “Plaintiffs”), oppose
15 Federal Defendants’ motions to dismiss. ECF 74, 19-cv-6013 (State Plaintiffs’ Opposition);
16 ECF 48, 19-cv-5206 (CBD Plaintiffs’ Opposition); ECF 39, 19-cv-6812 (ALDF’s Opposition).
17 For their part, the State Plaintiffs argue that the factual allegations in their complaint are
18 sufficient alone to establish standing largely because they are entitled to “special solicitude”
19 under *Massachusetts v. EPA*, 549 U.S. 497 (2007). In contrast, the CBD Plaintiffs and ALDF
20 attached dozens of standing declarations in an attempt to establish injury-in-fact. ECF 41-1, 48-
21 24, 19-cv-5206 (CBD’s Declarations); ECF 39-1, 39-5, 19-cv-6812 (ALDF’s Declarations).

22 The common theme that emerges from Plaintiffs’ briefing is that the three revised
23 regulations, standing alone, injure Plaintiffs’ interests in threatened and endangered species and

24 ¹ This Court related the three cases: *Center for Biological Diversity v. Bernhardt*, 19-cv-5206
25 (N.D. Cal. Aug. 21, 2019); *California v. Bernhardt*, 19-cv-6013 (N.D. Cal., Sept. 25, 2019);
26 *Animal Legal Def. Fund v. Bernhardt*, 19-cv-06812 (N.D. Cal., Oct. 21, 2019). Under a
27 stipulated scheduling order, Federal Defendants filed three identical motions to dismiss in each
28 case. ECF 46 (*California* Motion); ECF 33 (*Center* Motion); ECF 21 (*Animal Legal Def. Fund*
Motion). Federal Defendants have consolidated their replies into one brief and are filing that
identical brief in each of the three cases pursuant to a stipulation with the parties.

1 their critical habitat. Yet, while Plaintiffs’ responses are long in describing their various interests
2 in species writ-large, they are demonstrably short in identifying any present or certainly
3 impending injury to those interests arising from the mere promulgation of the regulations. The
4 revised regulations, standing alone, do not require or prohibit any action on the part of Plaintiffs.
5 And any tangible effect will not occur until after the revised regulations are applied to a species
6 or habitat in a subsequent administrative process. The reason Plaintiffs struggle so hard and
7 ultimately fail to articulate any injury-in-fact flowing from the revised regulations is that the
8 revised regulations do not govern Plaintiffs and will not be applied retroactively—a point
9 Plaintiffs readily concede. *See, e.g.*, ECF 74 at 22 n.6, ECF 48 at 9. Nor do Plaintiffs present the
10 Court with a live dispute over a concrete application of the revised regulations. As a result,
11 Plaintiffs rely on little more than probabilities and chance to assert a cognizable harm. There
12 must be that “personal stake in the outcome” of the litigation and here we have none. Regardless
13 of whether the claims are labeled as procedural or substantive, Plaintiffs’ showing is insufficient
14 under Article III.

15 Federal Defendants are not proposing a “new legal test for standing,” and we are not
16 arguing that the revised regulations “may one day be challengeable.” ECF 74 at 8; ECF 48 at 11.
17 The revised regulations can be challenged today, but they cannot be challenged in the *abstract* as
18 Plaintiffs are trying to do here. Nor are Federal Defendants asking the Court to break new
19 ground. The circumstances presented here are materially identical to the fact pattern the
20 Supreme Court held was inadequate to support standing in *Summers v. Earth Island Institute*,
21 555 U.S. 488 (2009). Plaintiffs have failed to show an injury-in-fact and the Court lacks subject-
22 matter jurisdiction. It therefore should grant Federal Defendants’ motions to dismiss.

23 ARGUMENT

24 We find ourselves in materially the same spot the Supreme Court found itself in
25 *Summers*. Plaintiffs there raised a claim against a specific timber sale, the Burnt Ridge Project,
26 as well as direct challenges to certain Forest Service regulations. 555 U.S. at 492. The plaintiffs
27 relied on factual allegations and a declaration (Marderosian Declaration) describing the harm that
28 would occur as a result of application of the regulations to the Burnt Ridge Project. *Id.* at 494.

1 The government conceded standing for the Burnt Ridge Project claim based on the Marderosian
2 Declaration, but the regulations, standing alone, did not injure those plaintiffs and the
3 government challenged plaintiffs' standing for the facial challenges. *Id.*

4 Following a preliminary injunction, the government settled the timber sale claim, leaving
5 only a facial challenge to two regulations. *Summers*, 555 U.S. at 491; *see also Earth Island Inst.*
6 *v. Ruthenbeck*, 490 F.3d 687, 696 (9th Cir. 2007) (dismissing the remaining facial challenges
7 against other regulations not at issue with the Project as unripe). When the timber sale claim was
8 dropped from the lawsuit, the Supreme Court recognized that those plaintiffs were now
9 challenging only the Forest Service's regulations "in the abstract." *Summers*, 555 U.S. at 494.
10 Without concrete application of the regulations to some specific agency action, like the Burnt
11 Ridge Project, the plaintiffs' injuries were too speculative and probabilistic to establish injury-in-
12 fact. *Id.* at 495 ("It is a failure to allege that *any* particular timber sale or other project claimed to
13 be unlawfully subject to the regulations will impede a specific and concrete plan ... to enjoy the
14 national forests.") (emphasis in original). And the Supreme Court found that those plaintiffs
15 lacked standing, even though the Marderosian Declaration was in the judicial record and had
16 articulated injury-in-fact flowing from application of the regulations to the Burnt Ridge Project.
17 *Id.* at 497 ("Respondents alleged such injury in their challenge to the Burnt Ridge Project,
18 claiming that but for the allegedly unlawful abridged procedures they would have been able to
19 oppose the project that threatened to impinge on their concrete plans to observe nature in that
20 specific area. *But Burnt Ridge is now off the table.*") (emphasis added).

21 Plaintiffs' challenges here present the same legal situation, albeit arrived at through
22 different procedural pathways. Plaintiffs submit declarations alleging harm based on subsequent
23 administrative processes (much like the Burnt Ridge Project, Marderosian Declaration). *See,*
24 *e.g.*, ECF 48-1 at 4, Whitehurst Decl. ¶ 12; ECF 48-5 at 4; Nagano Decl. ¶ 11. But there is no
25 claim or live dispute in any of the three cases challenging any specific administrative processes.
26 Indeed, Plaintiffs repeatedly and emphatically deny that they are bringing a live dispute with a
27 concrete application of the revised regulations. ECF 74 at 8; ECF 48 at 10 ("Neither the
28 conservation group plaintiffs nor the plaintiffs in the related cases bring a challenge to the future

1 implementation of the Final Regulations.”).

2 In both *Summers* and the present cases, Plaintiffs are asking to proceed with facial
3 challenges to regulations that do not apply to them, a point the Supreme Court found compelling.
4 *Summers*, 555 U.S. at 493 (“The regulations under challenge here neither require nor forbid any
5 action on the part of respondents. The standards and procedures that they prescribe for Forest
6 Service appeals govern only the conduct of Forest Service officials engaged in project
7 planning.”); ECF 74 at 26 (“This is not a case challenging final regulations that may be enforced
8 against State Plaintiffs as regulated parties in the future.”). Plaintiffs argue that they may
9 proceed without a live claim or dispute related to an agency action that allegedly harms their
10 concrete interests. ECF 48 at 10. Whether Plaintiffs failed to bring the claim or dispute in the
11 first instance, as they chose to do here, or whether it was resolved through settlement like the
12 timber sale in *Summers*, there is no legal difference between the two for standing purposes. This
13 Court is still being asked, just as the Supreme Court was asked in *Summers*, to evaluate whether
14 Plaintiffs “have standing to challenge the regulations in the absence of a live dispute over a
15 concrete application of those regulations.” 555 U.S. at 490.

16 Even in the context of procedural challenges, where the standards for redressability are
17 relaxed, the Supreme Court answered this question decidedly in the negative, finding there was
18 no injury-in-fact. *Id.* at 497 (“the requirement of injury in fact is a hard floor of Article III
19 jurisdiction . . .”). The Supreme Court required a concrete application to a live dispute because
20 the lack of any live dispute requires speculation and probabilistic inquiries on harms, which are
21 too far removed from the litigants. *Id.* at 497 (rejecting injury-in-fact based on “a statistical
22 probability that some of those members are threatened with concrete injury”); *id.* at 496
23 (rejecting reliance on the secondary Bensman Declaration because “we are asked to assume not
24 only that Bensman will stumble across a project tract unlawfully subject to the regulations, but
25 also that the tract is about to be developed by the Forest Service in a way that harms his
26 recreational interests, and that he would have commented on the project but for the regulation”).
27 That is, there must be “such a *personal stake in the outcome* of the controversy’ as to warrant
28 [plaintiff’s] invocation of federal-court jurisdiction.” *Id.* at 493 (quoting *Warth*) (emphasis

1 added). Without a live dispute and concrete application of a regulation presented in the case,
2 there is no personal stake in the outcome and, therefore, no injury-in-fact sufficient to confer
3 Article III standing.

4 Contrary to Plaintiffs' arguments, the government is not arguing that litigants can never
5 bring a facial-only challenge to regulations. That occurs under certain circumstances. For
6 example, when regulations apply directly to an entity, or are self-effectuating in a manner that
7 causes harm, a facial challenge may be permissible. *See, e.g., W. Watersheds Project v.*
8 *Kraayenbrink*, 632 F.3d 472, 481, 483 (9th Cir. 2011) (regulations ceding ownership rights and
9 court finding injury-in-fact where it prevented the litigant from "obtaining title and ownership")
10 (citation omitted); *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009)
11 (finding standing when regulations authorizing incidental take "threaten imminent, concrete
12 harm to [plaintiffs'] interests by destroying polar bears and walrus in the Beaufort Sea"). But
13 when, as here, the revised regulations do not apply to the Plaintiffs, there must be some claim or
14 dispute in the case challenging a concrete application of a contested regulation that allegedly
15 causes harm. Otherwise, the challenge is, by definition, "abstract." *Summers*, 555 U.S. at 494.

16 Nor is the government arguing that Plaintiffs can never challenge these revised
17 regulations. Plaintiffs' declarations demonstrate how the Services may, through subsequent
18 administrative processes, apply the revised regulations in a way that allegedly would cause their
19 members to suffer injury-in-fact. *See, e.g.,* ECF 48 at 32, citing Whitehurst Decl. ¶ 12, Donnelly
20 Decl. ¶¶ 5-7 (referencing the biological opinion for the One Lake Project that used the revised
21 Section 7(a)(2) regulation). If Plaintiffs want to challenge the revised Section 7(a)(2) regulation,
22 they can file suit challenging that particular biological opinion. As part of that challenge,
23 Plaintiffs can pursue challenges to aspects of the regulations that the Services applied in a way
24 that allegedly injures their members. *See, e.g.,* 5 U.S.C. § 704 ("A preliminary, procedural, or
25 intermediate agency action or ruling not directly reviewable is subject to review on the review of
26 the final agency action."). But Plaintiffs do not challenge that biological opinion or any other
27 administrative process applying the regulations. ECF 74 at 31 n.9 (arguing that FWS' stonefly
28 "not prudent" finding is unlawful, but declining to bring a claim challenging that determination).

1 There is no reason why this Court must guess at the Services' application of the revised
2 regulations in the abstract and theorize whether there is any set of circumstances under which the
3 regulation would be lawful, as it must with a facial challenge. *Reno v. Flores*, 507 U.S. 292, 301
4 (1993) ("To prevail in such a facial challenge, respondents 'must establish that no set of
5 circumstances exists under which the [regulation] would be valid.'") (alteration in original).
6 Plaintiffs can bring a lawsuit over a concrete application of the regulation, where a court can then
7 examine how the specific revised regulation is applied in a specific factual and legal context.
8 Inexplicably, they have not done so.

9 True, bringing live disputes may cause Plaintiffs frustration and inconvenience. ECF 74
10 at 8 (complaining that they would have to "file dozens of legal challenges ..."). But these are
11 sophisticated entities with substantial resources and, as they contend, are "the principal non-
12 governmental movers of ESA policy and practice." ECF 48 at 9. In any event, inconvenience is
13 not injury-in-fact. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) ("The case-by-case
14 approach that this requires is understandably frustrating to an organization such as respondent,
15 which has as its objective across-the-board protection of our Nation's wildlife and the streams
16 and forests that support it. But this is the traditional, and remains the normal, mode of operation
17 of the courts.").

18 Regardless of whether a claim is labeled procedural or substantive, injury-in-fact is a
19 constitutional hard floor. To rise above the floor, the Supreme Court requires a live dispute with
20 concrete application of the contested regulations. *Summers*, 555 U.S. at 497. To require less
21 would ignore controlling precedent. *Id.* Under the circumstances where the revised regulations
22 (1) do not apply to Plaintiffs directly, (2) do not apply retroactively, (3) must be carried out
23 through subsequent administrative processes to have an effect, and (4) are being challenged only
24 in the abstract, Plaintiffs have failed to establish an injury-in-fact. Whether viewed under the
25 standing or ripeness doctrines, this Court lacks jurisdiction.

26 **A. State Plaintiffs Fail to Allege Facts in their Complaint Sufficient to Establish**
27 **Standing.**

28 Unlike the organizational Plaintiffs, State Plaintiffs rely on the allegations in their

1 complaint for standing purposes. ECF 74 at 8. They argue that their interests in species and
2 habitat are sufficient when considering the “special solicitude” the Supreme Court discussed in
3 *Massachusetts v. EPA*, 549 U.S. 497. State Plaintiffs have considerable interests in species and
4 habitats within their borders, but an interest, even deeply held, is not enough to establish
5 standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454
6 U.S. 464, 486 (1982) (“standing is not measured by the intensity of the litigant's interest or the
7 fervor of his advocacy”). Even in the context of “special solicitude,” there still must be injury-
8 in-fact to those States’ interests that are fairly traceable to the revised regulations, and State
9 Plaintiffs’ factual allegations here are deficient.

10 In *Massachusetts v. EPA*, the State of Massachusetts asserted a sovereign interest in
11 protecting its coastline territory. 549 U.S. at 519. The State argued that greenhouse gas
12 emissions would incrementally cause sea levels to rise, thereby eroding the State’s coastline. *Id.*
13 at 522 (“According to petitioners’ unchallenged affidavits, global sea levels rose somewhere
14 between 10 and 20 centimeters over the 20th century as a result of global warming . . . These
15 rising seas have already begun to swallow Massachusetts’ coastal land.”). The State further
16 argued that EPA’s failure to regulate greenhouse gas emissions would exacerbate this erosion of
17 its coastline causing concrete harm to its sovereign territorial interest. *Id.* at 521 (“EPA’s
18 steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts
19 that is both ‘actual’ and ‘imminent.’”) (citation omitted). The Supreme Court found that there
20 was a fairly traceable connection between the interest (preserving the coastline), the challenged
21 agency action (the denial of the petition for rulemaking), and the injury-in-fact (sea-level rise).
22 *Id.* at 526 (“[T]he rise in sea levels associated with global warming has already harmed and will
23 continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless
24 real. That risk would be reduced to some extent if petitioners received the relief they seek.”).
25 The connection was readily apparent and clear—if EPA regulated greenhouse gas emissions, sea
26 level rise would incrementally slow, and the State’s interest in its coastline would be redressed.
27 EPA did not even contest the connection. *Id.* at 523 (“EPA does not dispute the existence of a
28 causal connection between manmade greenhouse gas emissions and global warming. At a

1 minimum, therefore, EPA’s refusal to regulate such emissions ‘contributes’ to Massachusetts’
2 injuries.’”).

3 No such connections exist here. Unlike the denial of the petition for rulemaking, which
4 no party disputed would exacerbate shoreline loss to the State, the revised ESA regulations do
5 not directly affect the State Plaintiffs’ interests in the species or habitat within their borders. For
6 example, State Plaintiffs contend that the Section 4 revised regulation (what they term the
7 “Listing Rule”) will make it “more difficult to list species as threatened . . . [while] easing the
8 process for delisting species” ECF 74 at 14. But this is merely a legal conclusion. They
9 never assert *facts* as to how the Section 4 revised regulation, standing alone, injures their
10 interests. The reason the State Plaintiffs struggle with this connection is that they cannot possibly
11 know how the Services will apply this regulation to species within their borders. Any listing or
12 delisting action will be done through a separate administrative process. It is that agency action,
13 not the revised regulations, that theoretically could cause them harm. And, even with a future
14 application, the State Plaintiffs cannot credibly maintain that *every* application of the regulations
15 will harm them.

16 Many of these State Plaintiffs, for example, have fought against listing species under the
17 ESA. The State of Oregon vigorously and repeatedly argued against NMFS listing the Oregon
18 Coast coho and expended considerable resources in doing so. *Trout Unlimited v. Lohn*, 645 F.
19 Supp. 2d 929, 964 (D. Or. 2007) (“NMFS’s finding of uncertainty whether current habitat
20 conditions are sufficient to support viability is not based on reasonable competing inferences, but
21 is instead based on Oregon’s plagued conclusions.”). In *Desert Survivors v. Interior*, No. 3:16-
22 cv-01165-JCS (N.D. Cal.), the State of Nevada did the same with the Greater Sage Grouse. In
23 *Center for Biological Diversity v. Jewell*, Civ. No. 16-cv-1932-MSK-STV (D. Co.), the States of
24 Colorado and New Mexico both joined litigation unsuccessfully defending FWS’ decision not to
25 list the Rio Grande Cutthroat. The list goes on. *See also Colo. by and through Colo. Dep’t of*
26 *Nat. Res. v. FWS*, 362 F. Supp. 3d 951 (D. Colo. 2018) (Colorado’s and Utah’s unsuccessful
27 challenge to FWS’ listing of the Gunnison sage grouse). Our point here is that it is far from clear
28 how the State interests will even align, much less how they will view the application of the

1 revised regulations to particular factual circumstances in any subsequent administrative
2 processes.²

3 Similarly, State Plaintiffs' complaint with the Section 7(a)(2) revised regulations is
4 contingent on application in a future consultation (formal or informal). ECF 74 at 15. Whether a
5 consultation reaches a different conclusion because of the application of the revised regulation,
6 rather than the myriad other factors the Services take into account during a consultation, is
7 complete speculation. State Plaintiffs could not possibly know how these consultations will turn
8 out. And, here again, State Plaintiffs' interests may even align with Services' conclusions, as has
9 occurred many times before. *See, e.g., Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117,
10 1122 (D. Or. 2011) (State of Washington supporting NMFS' no jeopardy conclusion); *Golden*
11 *Gate Salmon Assoc. v. Ross*, 17-cv-01172 (E.D. Cal.) (California supporting NMFS' no jeopardy
12 conclusions), ECF 78 (brief in opposition to plaintiffs' motion for summary judgment).

13 The allegations about the Section 4(d) revision are even more conclusory. ECF 74 at 15.
14 State Plaintiffs contend that the 4(d) revision will be implemented in the future, and nothing
15 more. *Id.* But the 4(d) revision does not change any existing protection for species, and FWS
16 has conveyed that it intends to issue a species-specific 4(d) rule concurrently with any future
17 listing decision. 84 Fed. Reg. 44753.³ It is entirely unclear how a State would be harmed
18 (assuming they actually want the species listed in the first place). The historical variations in
19 State positions beg for concrete application in a live dispute.

20 State Plaintiffs also contend that the revised regulations harm them financially. ECF 74

21 _____
22 ² Even accepting the States' assertions that they want all species to be listed in the future, the
23 only cited example of an application of the revised regulations refutes their sweeping assertions
24 of harm. ECF 46 at 29, 19-cv-6013 (FWS applying the revised Section 4 regulations and listing
25 the two species of stonefly as threatened species); *see also* 84 Fed. Reg. 64210 (Nov. 21, 2019).

26 ³ *See also* 84 Fed. Reg. 65080 (Nov. 26, 2019) (proposed rule to reclassify June sucker from an
27 endangered to threatened species and 4(d) rule); 84 Fed. Reg. 67060 (Dec. 6, 2019) (proposed
28 rule to list Bartram's stonecrop as a threatened species and 4(d) rule); 84 Fed. Reg. 69918 (Dec.
19, 2019) (final rule reclassifying Hawaiian goose from an endangered to threatened species and
4(d) rule); 84 Fed. Reg. 69712 (Dec. 19, 2019) (proposed rule to list West Coast distinct
population segment of fisher as a threatened species and 4(d) rule); 85 Fed. Reg. 1018 (Jan. 8,
2020) (proposed rule to list Hermes copper butterfly as a threatened species and 4(d) rule).

1 at 15. They argue that the “responsibility for, and the costs and burden of, protecting imperiled
2 species and their habitats . . . falls more heavily on State Plaintiffs.” *Id.* This argument, again, is
3 speculative and conjectural. Currently, all non-ESA listed species are subject to State
4 jurisdiction, which means the States already bear the “responsibility for, and the costs and burden
5 of” these species. *Id.* Because the revised regulations are not retroactive, the States’ existing
6 financial responsibility for non-ESA listed species is not altered (and thus the States are not
7 harmed by the regulations). *See Wyoming v. U.S. Dep’t of the Interior*, 674 F.3d 1220, 1234
8 (10th Cir. 2012) (rejecting standing where the state would incur costs regardless of the federal
9 policy). Moreover, the States’ example of a *future* listing rule that may or may not have a
10 species-specific 4(d) rule, with which they may or may not agree, ECF 74 at 16, only reinforces
11 the point that it is the subsequent administrative process that may cause them additional financial
12 burden, not the revisions themselves.

13 Perhaps recognizing the weakness in their factual assertions, State Plaintiffs, as well as
14 the other Plaintiffs, argue that their burden should be lessened because they have specific claims
15 alleging procedural violations and injuries. ECF 74 at 16. This argument fails for three main
16 reasons.

17 First, not every claim in this case, or the other two cases, are procedural claims. In
18 reviewing challenges to an ESA regulation like the ones at issue here, the Supreme Court did not
19 view those claims as procedural and thus did not lower the standing bar. *Lujan v. Defenders of*
20 *Wildlife*, 504 U.S. 555, 562, 572 (1992) (rejecting the circuit’s characterization that the
21 challenges to ESA regulations were procedural). The Supreme Court instead *heightened* the
22 standing inquiry because the regulation applied only to the Services. *Id.* at 562 (“[W]hen the
23 plaintiff is not himself the object of the government action or inaction he challenges, standing is
24 not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”). And the Supreme
25 Court rejected Plaintiffs’ position that they can establish standing under the guise of procedural
26 injury alone, *i.e.*, without a concrete and particularized injury-in-fact. *Id.* at 573 n.8 (“If we
27 understand [the dissent] correctly, it means that the Government’s violation of a certain
28 (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without

1 any showing that the procedural violation endangers a concrete interest of the plaintiff (apart
2 from his interest in having the procedure observed). We cannot agree.”).

3 Second, Plaintiffs confuse the distinct prongs of the standing inquiry. It is correct that
4 Congress may relax the standards on the redressability prong of a standing analysis with
5 procedural statutes. But that does not obviate the requirement to demonstrate injury-in-fact. As
6 the Supreme Court held in *Summers*:

7 It makes no difference that the procedural right has been accorded by Congress.

8 That can loosen the strictures of the redressability prong of our standing inquiry --

9 so that standing existed with regard to the Burnt Ridge Project, for example,

10 despite the possibility that Earth Island’s allegedly guaranteed right to comment

11 would not be successful in persuading the Forest Service to avoid impairment of

12 Earth Island’s concrete interests Unlike redressability, however, the

13 requirement of injury in fact is a hard floor of Article III jurisdiction that cannot

14 be removed by statute.

15 *Summers*, 555 U.S. at 497. No matter how hard Plaintiffs try to cloak their claims in procedural
16 injury, it does not change the reality that they fail to demonstrate injury-in-fact from the
17 regulations themselves.

18 Both *Summers* and *Defenders*, the two most analogous cases to the circumstances here,
19 drive at the same point. It is not enough to have an interest in the government complying with a
20 particular procedure; the failure to comply must be able to impact a concrete interest. *Summers*,
21 555 U.S. at 496 (“[D]eprivation of a procedural right without some concrete interest . . . is
22 insufficient to create Article III standing.”). Here, even assuming Plaintiffs’ allegations that the
23 Services’ regulations or decisionmaking processes were somehow procedurally deficient, as we
24 must in light of their allegations at the motion to dismiss stage, there is no resulting risk to
25 species or Plaintiffs because the revised regulations are not self-effectuating. Without that
26 tangible effect from the regulations themselves, there simply is no injury-in-fact traceable to the
27 revisions.

28 Finally, relying on this Court’s dicta in *City and County of San Francisco v. Whitaker*,

1 357 F. Supp. 3d 931, 942 (N.D. Cal. 2018), Plaintiffs argue in passing that their substantive
2 challenges to the regulations are in fact “procedural” claims. ECF 74 at 9; ECF 48 at 6-7. As in
3 *Whitaker*, the Court need not decide the issue because, as explained above, Plaintiffs lack
4 “standing under even the more lenient procedural standing approach.” 357 F. Supp. 3d at 942.

5 Even if the Court reaches this issue, Plaintiffs’ Administrative Procedure Act (“APA”)
6 challenges to the regulations are not “procedural” claims subject to a procedural rights standing
7 inquiry. In *Whitaker*, the Court suggested that APA “arbitrary and capricious” claims are
8 procedural rights cases because the Court in *Massachusetts v. EPA* applied a procedural rights
9 standing inquiry in a case where the Court reviewed the merits under an “arbitrary and
10 capricious” standard of review. 357 F. Supp. 3d at 941-42. But the “arbitrary and capricious”
11 standard of review was not central to the Court’s standing inquiry. The Court performed a
12 procedural rights inquiry because Congress, through the Clean Air Act’s citizen-suit provision,
13 conferred a procedural right to the plaintiffs to challenge an agency’s failure to initiate
14 rulemaking. *Massachusetts v. EPA*, 549 U.S. at 517-18 (finding “Congress has ‘accorded a
15 procedural right’ ... to challenge agency action unlawfully withheld”) (citation omitted); *id.* at
16 520 (“Congress has moreover recognized a concomitant procedural right to challenge the
17 rejection of its rulemaking petition as arbitrary and capricious.”) (citation omitted). That is,
18 Congress relaxed the redressability requirements.

19 Here, Plaintiffs’ substantive APA challenges are to regulations promulgated pursuant to
20 the rulemaking procedures set forth in APA Section 553, the claims arise under APA Section
21 704, and the Court reviews the claims under APA Section 706(2). *See* 5 U.S.C. §§ 553, 704,
22 706(2). Most of Plaintiffs’ claims allege that the Services’ revisions are “arbitrary and
23 capricious, an abuse of discretion, or otherwise not in accordance with the law,” *i.e.*, substantive
24 challenges to the revisions.⁴ 5 U.S.C. § 706(2)(A). None of the substantive claims allege any
25 omitted procedure set forth in APA Section 553, nor do any of the substantive claims allege that

26
27 ⁴ The substantive claims for relief in the complaints are: CBD Plaintiffs Am. Compl., ECF 28,
28 (3rd Claim, ¶ 114; 4th Claim, ¶ 119; 5th Claim, ¶ 124); State Plaintiffs Am. Compl., ECF 28, (1st
Claim, ¶ 130; 2nd Claim ¶ 139); ALDF Compl., ECF 1, ¶ 91.

1 the Services acted “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).
2 And neither APA Section 704 nor APA Section 706(2) grant Plaintiffs a procedural right to
3 challenge the withholding of agency action. For good reason. These are not procedural claims.
4 Construing every arbitrary and capricious challenge as a procedural violation would render
5 Congress’ distinction between APA Section 706(2)(A) and 706(2)(D) superfluous.

6 Indeed, the Supreme Court’s seminal standing decision in *Defenders*—where the Court
7 first broached procedural standing—itself involved a facial challenge to the promulgation of
8 regulations implementing ESA Section 7. The Court did not suggest, much less analyze, standing
9 through a procedural injury lens. The result must be the same here. *See also Motor Vehicle Mfrs.*
10 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50–51 (1983) (remanding
11 revocation of a regulation because it lacked a reasoned explanation under § 706(2) and rejecting
12 that this is procedural: “Specifically, it is submitted that to require an agency to consider an
13 airbags-only alternative is, in essence, to dictate to the agency the procedures it is to follow.
14 Petitioners both misread *Vermont Yankee* and misconstrue the nature of the remand that is in
15 order. In *Vermont Yankee*, we held that a court may not impose additional procedural
16 requirements upon an agency. We do not require today any specific procedures which [the
17 agency] must follow”). Nor can *Massachusetts v. EPA* be read to have implicitly overruled
18 *Defenders* on this issue or to have effected a sea change in the law on this point. Since
19 *Massachusetts v. EPA*, courts in this Circuit and the Supreme Court have continued to apply the
20 traditional Article III standing inquiry to claims arising under the APA and reviewed under APA
21 Section 706(2).⁵ *See, e.g., Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2565-66, 2567-69
22 (2019); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699-704 (9th Cir.
23 2012). Thus, unlike in *Whitaker* when the Court suggested a procedural rights inquiry applies to

24
25 ⁵ Nor would applying a procedural rights inquiry to the APA claims make sense. Courts relax the
26 redressability and imminence requirements in a procedural rights standing inquiry because of the
27 difficulty in determining whether “the substantive result would have been altered” where the
28 agency performed the omitted procedure. *Mass. v. EPA*, 549 U.S. at 518 (quoting *Sugar Cane
Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)). That question does
not exist here, where Plaintiffs’ APA claims do not claim the agencies omitted any procedure.

1 a true procedural omission, like the failure to provide “any reasoned explanation whatsoever,”
2 357 F. Supp. 3d at 942, the Services here promulgated regulations and provided hundreds of
3 pages of contemporaneous, detailed explanations and responses to comments. And Plaintiffs’
4 APA claims challenge the substance of those regulations. Plaintiffs’ APA claims are thus
5 prototypical challenges to agency actions and the Court should evaluate Plaintiffs’ standing
6 under the traditional Article III standing inquiry.

7 For all claims pled in these cases, Plaintiffs cannot rely merely on alleged procedural
8 injury alone; they must establish a cognizable injury-in-fact, which they cannot do based on the
9 nature of the ESA regulations challenged in this case and their failure to bring a live claim. But
10 even if a procedural injury alone sufficed, it would not establish that this Court has jurisdiction
11 for all claims raised in the three cases.

12 **B. CBD Plaintiffs and ALDF Fail to Establish Standing.**

13 Unlike the State Plaintiffs, CBD Plaintiffs and ALDF filed dozens of declarations to
14 establish injury-in-fact. In doing so, they effectively concede that the allegations in their
15 complaints were deficient. In any event, the declarations do not cure Plaintiffs’ standing
16 problems.

17 Nearly all of Plaintiffs’ declarations allege harm, not from the revised regulations
18 themselves, but from administrative processes that have yet to occur, may not occur in the
19 manner they presuppose, or may never happen at all. The examples from CBD Plaintiffs alone
20 are numerous. *See, e.g.*, ECF 48-3 at 6, Clark Decl. ¶ 20 (“I am concerned that the 2019 changes
21 to the ESA regulations will make it easier for FWS *to delist* the Canada lynx”) (emphasis
22 added); ECF 48-23 at 6, Beck Decl. ¶ 18 (“*If Key deer are delisted*, or are downlisted and left
23 without adequate protection from harm, my work here will be for naught.”) (emphasis added);
24 ECF 48-22 at 4, Curry Decl. ¶ 6 (referencing a *proposed rule* and relying on a future rule for
25 Nashville crayfish); ECF 48-21 at 7, Jones Decl. ¶ 21 (relying on only a petition to list the
26 Lesser prairie chicken); ECF 48-19 at 5, Trageser Decl. ¶ 13 (relying on only a petition to list the
27 Dunes sagebrush lizard); ECF 48-24 at 8, Keefover Decl. ¶ 28 (asserting only an interest in
28 Yellowstone grizzly bears, which are currently listed). None of these interests are harmed by the

1 regulations themselves, as the Plaintiffs and declarants admit by pointing to proposed
2 applications of the regulations (in ways that may, or may not, injure their members).

3 CBD Plaintiffs also rely on a number of judicial opinions to support their position. ECF
4 48 at 15-16. Some characterizations are outright misleading, and none are analogous to the facts
5 presented here. Plaintiffs rely on *Washington Toxics Coalition v. U.S. Dep't. of Interior*, 457 F.
6 Supp. 2d 1158 (W.D. Wash. 2006), asserting the opinion was issued in 2014 and thus properly
7 applies the law in this Circuit. But the case was decided in 2006, well before the Supreme Court
8 in *Summers* undercut *Washington Toxics* reasoning that a facial challenge can proceed in absence
9 of a live dispute.⁶ ECF 48 at 15. *Washington Toxics* is factually distinguishable for another
10 reason. The Court there found the facial challenge was permissible in large part because the
11 litigants would never get the chance to challenge the Services' counterpart regulations because
12 the Services would not be a part of future decisionmaking. *Id.* at 1171 (“[S]hould Plaintiffs wish
13 to challenge an [not likely to adversely affect] determination in the future, they may only assert
14 this claim against EPA because the Services will have no role in making this determination.”).
15 Those unique facts are not present here. Plaintiffs can challenge the Services' application of the
16 revised regulations in future decisions if they are harmed by that application.

17 CBD Plaintiffs' citations to post-*Summers* decisions also fail to support their argument
18 because they neglect to recognize that the regulations at issue in those cases were self-
19 effectuating and had direct, immediate effects. ECF 48 at 15. In *Kraayenbrink*, the regulations
20 ceded ownership and “effectively require[d] the BLM to take prompt corrective action against
21 [the declarant] rather than phasing in any reduction of grazing 632 F.3d at 484 (citation
22 omitted). For the other plaintiffs in *Kraayenbrink*, the regulations had the immediate effect of
23 _____

24 ⁶ CBD Plaintiffs' heavy reliance on *Citizens for Better Forestry v. U.S. Department of*
25 *Agriculture*, 341 F.3d 961 (9th Cir. 2003), ECF 48 at 18-19, as well as *California ex rel. Lockyer*
26 *v. U.S. Department of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006), ECF 48 at 15, are
27 likewise outdated in light of *Summers*, which was decided well after these decisions. Moreover,
28 unlike the situation here, in both those cases, the rule at issue also had immediate tangible
effects. *Id.* at 887 (“as a practical matter, the new rule removed substantive protections of
roadless areas in all states for at least two years ...”); *Citizens for Better Forestry*, 341 F.3d at
972 (the 2000 rule “decreases substantive environmental requirements...”).

1 excluding their declarant “from participating in various management decisions.” *Id.* at 485.

2 There is no similar provision in the revised regulations that would exclude any of the Plaintiffs
3 from an administrative process that they are currently entitled to participate in under the ESA.
4 Plaintiffs will still receive notice in the Federal Register, and they may submit comments under
5 the revised regulations. 50 C.F.R. § 424.16(c). Nothing on that front has changed as a result of
6 the regulatory revisions.

7 Similarly, in *Kemphorne*, the regulations “authorize[d] for a five-year period the non-
8 lethal ‘take’ of polar bears and Pacific walrus by oil and gas activities” 588 F.3d at 705.
9 The court found injury because “[i]f the plaintiffs’ allegations are true, the Service’s incidental
10 take regulations threaten imminent, concrete harm to these interests by destroying polar bears
11 and walrus in the Beaufort Sea.” *Id.* at 708. Like sea-level rise in *Massachusetts v. EPA*, the
12 injury asserted (take of polar bears and walrus) was fairly traceable to the regulation because the
13 “Service’s regulation *authorizes incidental take* that is contrary to the Center’s interest.” *Id.*
14 (emphasis added). Here, the revised regulations authorize no specific actions, let alone the
15 “take” of endangered or threatened species.

16 Finally, CBD Plaintiffs’ arguments on imminence miss the point. ECF 48 at 16-17. The
17 government does not deny that the regulations are being applied. Indeed, we highlighted this for
18 the Court with the stonefly listing decision. ECF 46 at 29 (explaining how FWS listed these
19 species as threatened species, accompanied with a species-specific 4(d) rule); 84 Fed. Reg.
20 64210. The issue is not whether the regulations have been or will be applied. The issue is
21 whether a concrete application gives rise to a live dispute over the regulations themselves.
22 *Summers*, 555 U.S. at 490. Here, we have no challenge to a concrete application and no live
23 dispute over any specific portion of the regulations.⁷ And, even assuming that Plaintiffs had

24
25 ⁷ CBD Plaintiffs provided a declaration alleging harm from FWS’ stonefly decision because
26 FWS listed species as threatened rather than endangered and made a “not prudent” critical
27 habitat finding. ECF 48-5 at 6, Nagano Decl. ¶ 20. Yet Plaintiffs have not brought a claim
28 challenging the stonefly decision and, therefore, provide no way for the Court to examine the
merits of that decision to determine whether the application of the regulations either injures
Plaintiffs’ members or is unlawful. Nor, for that matter, can Plaintiffs rely on these and other
post-complaint events to establish standing, as the elements of standing must exist at the time the

1 standing to challenge one application of the regulations, that would not establish standing to
2 challenge all three regulations *in toto*. Standing for one regulation does not confer standing to
3 challenge other regulations, and Plaintiffs must show they have standing for each claim and form
4 of relief sought. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352-353 (2006). To do
5 otherwise would amount to a “significant revision of our precedent interpreting Article III.” *Id.*
6 Standing, after all, is “is not dispensed in gross.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724,
7 734 (2008) (citation omitted).

8 For its part, ALDF largely raises the same arguments and once again focuses almost
9 entirely on the Section 4 and 4(d) revisions. It first argues that, because FWS will now have to
10 issue species-specific 4(d) rules, there may be a delay in processing listing decisions. ECF 39 at
11 17-18, 19-cv-6812. Yet ALDF must identify factual allegations showing that a particular
12 species, of which it or its members has an interest, will experience harm from a delay in a listing
13 decision because of the 4(d) revision. *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 657
14 (9th Cir. 2002). Generalized, theoretical concerns with delay are not enough. *Defenders*, 504
15 U.S. at 573-77.

16 Here, ALDF members assert, verbatim, the same interest in zoo-captive giraffes, but none
17 of the declarants even mention the word delay. ECF 39-1 at 3, Fetters Decl. ¶ 9 (“I am aware
18 that the FWS is currently considering listing giraffes under the Endangered Species Act. Under
19 the FWS's previous regulations, giraffes would enjoy automatic protections as soon as they are
20 listed as threatened; under the new regulations, they will not be protected until FWS issues
21 species-specific regulations.”); ECF 39-2 at 3, Garner Decl. ¶ 10 (identical language); ECF 39-5
22 at 4, Delmoro Decl. ¶ 13 (identical language). ALDF provides mere conclusory argument, not
23 factual allegations, that the Section 4(d) revision will delay a specific listing decision. This
24

25 complaint was filed. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002).
26 And any concrete and particularized “injury” stemming from the stonefly decision (or later
27 applications of select regulations) could not possibly justify review of those regulations that
28 FWS did not apply in those decisions. Plaintiffs cannot cherry pick select instances where FWS
or NMFS have applied the regulations to justify wholesale review of every regulatory revision in
the abstract. *Summers*, 555 U.S. at 490.

1 diffuse “theory of *future* injury” is too speculative to show that injury is “certainly impending” or
2 a “substantial risk that the harm will occur.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401,
3 414 n.5 (2013); *Bova v. City of Medford*, 564 F.3d 1093, 1096-97 (9th Cir. 2009).

4 Nor is it axiomatic that the Section 4(d) regulation will delay listing decisions. Any
5 future delay in making listing decisions could be attributable to a myriad of factors. But these
6 factors existed before the revised regulation, and Plaintiffs point to no facts (or even include
7 factual allegations) for why the Section 4(d) regulation will cause additional delays. To the
8 contrary, Plaintiffs admit that the Services often issued species-specific 4(d) rules under the old
9 regime, proving that the Services know how to perform this task. *See, e.g.*, ECF 28, ¶ 36 (CBD
10 Amended Compl.); ECF 48-8, ¶ 12 (Greenwald Decl.); ECF 39 at 4 (ALDF Opp.). It is a leap
11 too far to presume, without evidence, that the Services will delay listings solely because of the
12 revised Section 4(d) regulation. *Del Norte County v. United States*, 732 F.2d 1462, 1468 (9th
13 Cir. 1984) (“In the absence of clear evidence to the contrary, courts presume that public officers
14 properly discharge their duties ...”). And, if the captive giraffe listing decision is delayed,
15 ALDF can file a lawsuit at the appropriate time.

16 **C. Neither CBD Plaintiffs nor ALDF Establish Organizational Standing.**

17 CBD Plaintiffs also argue they have standing apart from any injury to their members.
18 ECF 48 at 16-19.⁸ An organization may “seek judicial relief from injury to itself,” *Warth v.*
19 *Seldin*, 422 U.S. 490, 511 (1975), where the organization satisfies “the requirement for
20 individual standing: a demonstration of concrete and particularized injury.” *Smith v. Pac. Props.*
21 *& Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004); *City of Lake Forest*, 624 F.3d at 1088 n.4
22 (“[A]n organization may sue only if it was forced to choose between suffering an injury and
23 diverting resources to counteracting the injury.”). The organizational Plaintiffs fail to establish
24

25 ⁸ ALDF does not raise a similar argument, relying instead on harm to its members as the basis
26 for the organization’s standing. ALDF, in fact, failed to allege any specific facts of
27 organizational standing in its complaint. ECF 1, 19-cv-6812; *see La Asociacion de Trabajadores*
28 *de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088-89 (9th Cir. 2010) (organizational
complaint that asserted “standing on behalf of its members rather than on behalf of itself as an
organization” cannot be cured with *after-the-fact* affidavits at summary judgment).

1 the regulations injure them, for three reasons.

2 First, the organizations argue that the regulations conflict with the organizations'
3 missions. ECF 48 at 17. These arguments fail for the same reasons discussed above—the
4 regulations themselves cause no harm to the organizations, and any future harm to the
5 organizations would be fairly traceable to a site-specific application not before the Court. In any
6 event, while an organization may have standing with “*both* a diversion of its resources and
7 frustration of its mission,” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013)
8 (emphasis added, citation omitted), a mere “setback to the organization’s abstract social
9 interests” alone does not suffice, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982);
10 *Fed. Election Comm. v. Akins*, 524 U.S. 11, 24 (1998) (“abstract” harm, such as “injury to the
11 interest in seeing that the law is obeyed,” lacks “the concrete specificity” necessary for standing).
12 As shown below, Plaintiffs rest on harms to their abstract social interests, not cognizable harms
13 to the organizations themselves.

14 Second, the organizations do not identify a cognizable injury to themselves. An
15 organizational harm relates to “the organization’s ability to function as an organization,” which
16 can occur through government actions or policies that affect the organization’s ability to secure
17 funds, obtain members, or perform its core functions. *E. Bay Sanctuary Covenant v. Trump*, 349
18 F. Supp. 3d 838, 850 (N.D. Cal.), *appeal docketed*, No. 18-17274 (9th Cir. Nov. 27, 2018)
19 (quoting *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216,
20 1225 (9th Cir. 2012) (Ikuta, J., concurring)). Here, the organizations assert that their core
21 functions include education, advocacy, litigation, and associated activities, where they
22 “routinely” file petitions to list species, comment on agency actions, and sue federal agencies.
23 *See, e.g.*, ECF 48-8 ¶¶ 4, 8-9; ECF 48-17 ¶¶ 5-6. But they identify no aspect of the regulations
24 that interferes with these functions. Quite the contrary. The organizations assert they will
25 continue to prepare petitions, comment on rulemakings, file litigation, and engage in other
26 typical organization activities. ECF 48-8 ¶¶ 14-28; ECF 48-17 ¶¶ 15-24; ECF 48-15 ¶¶ 16-21.
27 An organization that is “merely going about its business as usual” does not establish a cognizable
28 organizational harm. *Am. Diabetes Ass’n v. U.S. Dep’t of Army*, 938 F.3d 1147, 1155 (9th Cir.

1 2019).

2 Third, the organizations do not show that the regulations require them to do anything, let
3 alone *force* them to divert resources from core organizational functions. *Comite de Jornaleros*
4 *de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)
5 (relevant inquiry whether the action there “forced” the organizations to divert resources); *El*
6 *Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992)
7 (challenged policy “*require[d]* the organizations to expend resources ... they otherwise would
8 spend in other ways”) (emphasis added). The organizations, for example, state that they
9 “routinely” file petitions to list species under the ESA. ECF 48 at 18; ECF 48-8 ¶¶ 9, 11. The
10 ESA provides that interested parties may petition the agencies to list species, 16 U.S.C. §
11 1533(b)(3)(A), and the implementing regulations specify the required contents of a petition, 50
12 C.F.R. § 424.14. Neither the Section 4 nor Section 4(d) regulations revised the required contents
13 of a petition. As a result, while the organizations complain that the Section 4(d) regulation
14 requires them to address “take” protections in petitions, ECF 48-8 ¶¶ 15-17; ECF 48-17 ¶¶ 14-
15 15, the regulations require no such thing. Whether or how the organizations choose to address
16 “take” protection is their choice; it is not an action the regulations force upon them, such that
17 resources diverted to this task are harms attributable to the regulations.⁹ *Blunt v. Lower Merion*
18 *Sch. Dist.*, 767 F.3d 247, 286 (3d Cir. 2014) (organization cannot show standing based on
19 “alleged additional expenditures ... consistent with [its] typical activities”). Moreover, FWS
20 always had the authority to issue species-specific 4(d) rules before the revision, 16 U.S.C. §

21 _____
22 ⁹ Nor are the organizations’ self-serving statements they did not need to address “take”
23 protections prior to the Section 4(d) regulation persuasive. Defenders of Wildlife, for example,
24 complains of having to spend more resources addressing “take” in its petitions for the Lesser
25 prairie chicken and the Dunes sagebrush lizard. ECF 48-17 ¶ 16. But those petitions, filed
26 before FWS promulgated the revised regulation, addressed “take” protections for the species.
27 See Lesser Prairie Chicken Petition at 101 (addressing Section 4(d) rules and adequacy of “take”
28 protections), available at <https://ecos.fws.gov/docs/petitions/92000//903.pdf> (last visited Jan. 23,
2020); Dunes Sagebrush Lizard Petition at 24, 27-28, 32 (discussing adequacy of incidental take
provisions), available at <https://ecos.fws.gov/docs/petitions/92210//1040.pdf> (last visited Jan. 23,
2020); see also ECF 48 at 18 (arguing FWS had provided take protections to threatened species
“as a matter of course”); but see ECF 48-8 ¶ 12 (admitting that FWS had promulgated species-
specific 4(d) rules).

1 1533(d), and like before, any future rulemaking will provide an opportunity for public notice and
2 comment. 16 U.S.C. § 1533(b)(4).

3 The organizations' assertions that they are harmed by the Services' consideration of
4 economic factors in listing decisions fare no better. ECF 48 at 18-19. They argue that the
5 Section 4 regulations "will require the Center to spend time and resources where it never did
6 before." *Id.* at 19 (quoting ECF 38 ¶ 15, 19-cv-5206-JST). But the Section 4 regulations *prohibit*
7 the Services from considering economic factors when making listing decisions. 84 Fed. Reg. at
8 45052 ("The Secretary shall make any determination" list, delist, or reclassify a species "*solely*
9 on the basis of the best available scientific and commercial information regarding a species'
10 status") (quoting 50 C.F.R. § 424.11) (emphasis added); *id.* at 45024 (explaining that the
11 Services may compile and publish economic information "as long as the information does not
12 influence the listing determination"). The regulations thus refute Plaintiffs' position that they are
13 forced to address economic factors, and Plaintiffs cannot "manufacture standing" merely by
14 "making an expenditure" in response to the regulations. *Clapper*, 568 U.S. at 416.¹⁰ Seemingly
15 aware of this problem, Plaintiffs now ask the Court to ignore the regulatory prohibition on
16 considering economic factors as a "merits" question. ECF 48 at 19. But a "federal court is
17 powerless to create its own jurisdiction by embellishing otherwise deficient allegations of
18 standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990). And this Court should not
19 accept Plaintiffs' erroneous legal interpretations when addressing standing. *Doe v. Holy See*, 557
20 F.3d 1066, 1073 (9th Cir. 2009) (per curiam) ("We do not, however, accept the 'truth of legal
21 conclusions merely because they are cast in the form of factual allegations.'") (quoting *Warren v.*
22 *Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)).

23 As these examples show, this case is unlike those cases in which an organization is

24 ¹⁰ Plaintiffs' other examples are similar—they identify possible, volitional changes to their
25 advocacy and participation when performing organizational functions. *See, e.g.*, ECF 48-8 ¶ 23
26 (arguing that the organization spends money to address a delisting proposal or advocates against
27 specific projects, not that the regulations require it to do so); ECF 48-15 ¶ 16 (organizations
28 intend to address the regulations in commenting on future regulations). As above, these
arguments do not establish that the *regulations* compel the organizations to expend funds to
avoid an injury to themselves. *City of Lake Forest*, 624 F.3d at 1088 n.4.

1 injured for purposes of Article III standing. In *East Bay Sanctuary Covenant*, for example, this
2 Court recently determined that an organization representing individuals had standing because the
3 government policy impaired the organization’s ability to pursue asylum cases, which also
4 jeopardized its funding. 349 F. Supp. 3d at 851. And the Court found that the organization
5 diverted resources outside of core functions to address these harms. *Id.* at 851-52. Here, by
6 contrast, the organizations identify no way the regulations themselves impede their core
7 functions, much less force them to divert resources to counteract a cognizable harm. They
8 instead assert standing because they oppose and will advocate against the regulations
9 applications in the future. That argument, if accepted, would confer standing to any organization
10 with a “special interest” in the matter, in direct contravention of established Article III precedent.
11 *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

12 **D. Plaintiffs’ Claims Are Also Not Ripe.**

13 Plaintiffs start from the erroneous premise that facial challenges are presumptively ripe
14 and reviewable. ECF 48 at 32; ECF 74 at 24; ECF 39 at 27. That is not the law. *Nat’l Park*
15 *Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003) (a “regulation is not ordinarily
16 considered the type of agency action ‘ripe’ for judicial review under the [APA] until the scope of
17 the controversy has been reduced to more manageable proportions, and its factual components
18 fleshed out, by some concrete action applying the regulation to the claimant’s situation in a
19 fashion that harms or threatens to harm him.”) (alteration in original) (quoting *Lujan*, 497 U.S. at
20 891). A facial challenge is presumptively *not* reviewable unless Congress creates an exception.
21 *Id.* Plaintiffs compound this false premise by claiming that, as long as they establish standing,
22 their claims are automatically ripe for review. ECF 74 at 24 (“a plaintiff’s injury in fact signals
23 that a case and controversy exists in satisfaction of Article III, the constitutional requirement of
24 ripeness is also satisfied.”). Here again, this is not the law. *Habeas Corpus Res. Ctr. v. U.S.*
25 *Dep’t of Justice*, 816 F.3d 1241, 1247 (9th Cir. 2016). While “[s]orting out where standing ends
26 and ripeness begins is not an easy task,” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d
27 1134, 1138 (9th Cir. 2000) (en banc), they are not one in the same. If this were the case, there
28 would be no such thing as a constitutional ripeness inquiry since Article III standing is an

1 indispensable requirement for Federal court jurisdiction in every case. In any event, whether
2 labeled as constitutional or prudential ripeness here, the result is the same: these challenges are
3 unripe.

4 The distinctions between standing and ripeness matter because Plaintiffs try to bundle all
5 their claims to seek wholesale judicial review of all three regulations in this action. For example,
6 ALDF asserts an interest in captive giraffes, and contends that *if* the giraffe is listed, FWS *may*
7 *not* issue a specific-specific 4(d) rule at the same time. ECF 39-1 at 3, Fetters Decl. ¶ 9 (“I am
8 aware that the FWS is currently *considering* listing giraffes under the Endangered Species Act.”)
9 (emphasis added). There are at least two future contingencies that must come to pass before
10 ALDF would be allegedly injured. And even assuming both occur, the alleged injury is not even
11 remotely connected to the Sections 4 or 7(a)(2) revisions. There is simply too much uncertainty
12 in how the Services will apply the regulation in the future to this species. That is precisely the
13 reason the Ninth Circuit has concluded other facial challenges to regulations were not ripe.
14 *Habeas Corpus*, 816 F.3d at 1254; *see also Safer Chems., Healthy Families v. EPA*, 943 F.3d
15 397, 415-16 (9th Cir. 2019).

16 There is another aspect of the problem here too. Some of the challenged regulatory
17 provisions have not even been applied yet. For example, the Services are not currently aware
18 that the expedited consultation regulation, 50 C.F.R. § 402.14(l), or the reinitiation regulation for
19 land management plans, 50 C.F.R. § 402.16(b), have been invoked.¹¹ Thus, without an instance
20 in which these regulations have been applied, a claim against them cannot possibly be ripe.¹² *See*

21 _____
22 ¹¹ Plaintiffs’ bundling further underscores the jurisdictional deficiency of their cases. Within
23 each of the final rules, 84 Fed. Reg. 45020 (Section 4 revisions); 84 Fed. Reg. 44753 (Section
24 4(d) revisions); 84 Fed. Reg. 44976 (Section 7(a)(2) revisions), the Services revised many
25 different *regulations*. Standing to challenge one regulation—for example, the Services’ revised
26 definition of “destruction or adverse modification” in 50 C.F.R. § 402.02—does not confer
27 standing to challenge 50 C.F.R. § 402.14(l), much less all the regulations revised in the Section
28 4, 4(d), and 7(a)(2) final rules.

¹² The standard of review for facial challenges to an agency’s regulation highlights why there
must be a concrete application for a court to review. *See Reno*, 507 U.S. at 301 (“To prevail in
such a facial challenge, respondents ‘must establish that no set of circumstances exists under
which the [regulation] would be valid.’”) (alteration in original). Plaintiffs do not contest the
new expedited consultation provision in 50 C.F.R. § 402.14(l). In the absence of any challenge

1 *Ecology Ctr. v U.S. Forest Serv.*, 192 F.3d 922, 925-26 & n.6 (9th Cir. 1999) (holding challenge
2 to the Forest Service’s compliance with forest-wide monitoring duties was unripe where the
3 challenge was not tied to a specific project); *Neighbors of Cuddy Mountain v. Alexander*, 303
4 F.3d 1059, 1067 (9th Cir. 2002) (to “win scrutiny of the Forest Service’s forest-wide
5 management practices, [plaintiffs] must challenge a specific, final agency action, the lawfulness
6 of which hinges on these practices”). Just because certain aspects of certain regulations have
7 been applied, that does not mean every regulation, and every claim for relief, is ripe.

8 For those aspects of the revised regulations that allegedly have been applied in certain
9 contexts, like the definition of “adverse modification” in the One Lake biological opinion
10 referenced in Plaintiffs’ papers, ECF 48-1 at 4, Whitehurst Decl. ¶ 12, such an application could
11 give rise to a ripe, live claim.¹³ But *Plaintiffs did not bring that claim*. The ripeness doctrine
12 addresses not only the *time* at which judicial review may take place, but the “agency action” that
13 is the proper *subject* of that review. The agency action that is the proper focus of judicial review
14 is the live dispute in which a regulation was applied in a concrete manner.

15 In contrast, Plaintiffs insist on generic, facial challenges to all aspects of all the revised
16 regulations that are presumptively not reviewable without concrete application. *Nat’l Park*
17 *Hosp.*, 538 U.S. at 808, 810 (“We concluded the case was not ripe for judicial review because the
18 impact of the regulation could not ‘be said to be felt immediately by those subject to it in
19 conducting their day to day affairs’ and ‘no irremediabl[y] adverse consequences flowed from
20 requiring a later challenge.’”) (quoting *Toilet Goods Ass’n. v. Gardner*, 387 U.S. 164 (1967)).
21 And, while pointing to concrete applications of specific regulations, they do not direct their
22 challenge to those applications. This can be construed only as a concession that there is no
23 hardship in waiting. *Habeas Corpus*, 816 F.3d at 1253.

24
25 _____
26 or complaint, the Court would need to conclude that there are indeed circumstances in which this
27 regulatory provision is valid. This illustrates why there must be concrete application in a live
28 dispute to give rise to a ripe claim. Without concrete application in a live dispute there is too
much uncertainty.

¹³ Even then, at most a challenge to the ESA Section 7 regulations could be ripe.

1 At bottom, Plaintiffs can challenge any application of the regulations that injures them
2 (and thereby seek redress for that injury). This approach adheres to the ripeness doctrine—it
3 challenges the correct agency actions (the ones injuring Plaintiffs) at the correct time (upon
4 application of the regulations). And this approach does not harm Plaintiffs. If or when one of
5 the challenged regulations are applied in a way that injures Plaintiffs, they can challenge those
6 actions and seek redress for their injury. In accord, Plaintiffs present no basis for this Court to
7 sidestep the ripeness doctrine to engage in a facial challenge to the ESA regulations.

8 CONCLUSION

9 Whether viewed under the standing or ripeness doctrines, or under the labels of
10 procedural or substantive, Plaintiffs ask this Court to review the revised regulations in the
11 abstract. As the Supreme Court noted, however, review should not occur “in the rarified
12 atmosphere of a debating society, but in a concrete factual context conducive to a realistic
13 appreciation of the consequences of judicial action.” *Valley Forge Christian Coll.*, 454 U.S. at
14 472. We have neither the appropriate factual context nor appreciation of the consequences in the
15 present cases. Plaintiffs chose not to bring a live dispute over a concrete application of one of
16 the challenged regulations. They instead want wholesale review and relief divorced from any
17 actual, concrete application. Article III demands more. The Court should grant Federal
18 Defendants’ motions and dismiss Plaintiffs’ complaints.

19
20 DATED: January 24, 2020.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA (Oakland)

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

vs.

DAVID BERNHARDT, et al.,

Federal Defendants.

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

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, et al.,

Plaintiffs,

vs.

DAVID BERNHARDT, et al.,

Federal Defendants.

Case. No. 4:19-cv-06013-JST

CERTIFICATE OF SERVICE

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

vs.

DAVID BERNHARDT, et al.,

Federal Defendants.

Case. No. 4:19-cv-06812-JST

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Michael R. Eitel

MICHAEL R. EITEL, Senior Attorney