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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL
DIVERSITY, INC., et al.,

Plaintiffs,

v.

DEBRA HAALAND, et al.,

Defendants.

Case No. [21-cv-01182-JCS](#)

**ORDER REGARDING MOTION TO
DISMISS**

Re: Dkt. No. 17

I. INTRODUCTION

Plaintiffs Center for Biological Diversity (“CBD”) and Turtles Island Restoration Network (“TIRN”) bring this case against Defendants the Secretary of the U.S. Department of Interior, Debra Haaland,¹ in her official capacity and the U.S. Fish and Wildlife Service (the “Service”), asserting that Defendants failed to revise the Stock Assessment Reports (“SARs”) for nine stocks of protected mammals—certain populations of sea otters, polar bears, walruses, and manatees—as required by the Marine Mammals Protection Act (“MMPA”) and the Administrative Procedure Act (“APA”). Compl. (dkt. 1) ¶ 1. Defendants move to dismiss for lack of Article III standing and failure to state a claim on which relief may be granted, citing only Rule 12(b)(6) of the Federal Rules of Civil Procedure in their motion, but also addressing Rule 12(b)(1) in their reply.

The Court held a hearing on July 23, 2021, where the parties agreed that the case is moot as to three of the stocks at issue (the southern sea otter, Chukchi/Bering Seas polar bear, and Southern Beaufort Sea polar bear) because Defendants have now published revised SARs for

¹ Haaland has been confirmed as Secretary of the Interior since this case was filed, and is therefore automatically substituted for former Acting Secretary Scott de la Vega under Rule 25(d) of the Federal Rules of Civil Procedure.

1 those stocks. Defendants’ motion to dismiss is therefore GRANTED to the extent Plaintiffs’ claim
 2 is based on those stocks. As for the other stocks at issue, while Plaintiffs have sufficiently alleged
 3 constitutional standing, Defendants’ motion is GRANTED under Rule 12(b)(6) for the reasons
 4 discussed below, and Plaintiffs’ claims are DISMISSED with leave to amend.²

5 **II. BACKGROUND**

6 **A. Statutory Framework**

7 Under the MMPA’s framework, the Service has a nondiscretionary duty to review SARs
 8 for strategic stocks on an annual basis and for non-strategic stocks on a triennial basis. 16 U.S.C.
 9 § 1386(c)(1)(A)–(B). To conduct these internal reviews, the Service must utilize the “best
 10 scientific information available” to assess whether a SAR should be revised for each stock. *Id.*
 11 § 1386(a), (c)(2); *see* Mot. (dkt. 17) at 5 (acknowledging that the “best scientific information”
 12 standard applies to internal reviews). If the Service’s review indicates that “the status of the stock
 13 has changed or can be more accurately determined,” the Service must issue a revised stock
 14 assessment report. 16 U.S.C. § 1386(c)(2). In doing so, the Service must publish “a notice of
 15 availability”—which “include[s] a summary of the assessment and a list of the sources of
 16 information or published reports upon which the assessment is based”—“of a draft stock
 17 assessment report or any revision thereof and provide an opportunity for public review and
 18 comment during a period of 90 days.” *Id.* § 1386(b)(1). The Service shall then publish in the
 19 Federal Register “a notice of availability and a summary of the final stock assessment or any
 20 revision thereof, not later than 90 days after . . . the close of the public comment period on a draft
 21 stock assessment or revision thereof.” *Id.* § 1386(b)(3).

22 Under the APA, a “person suffering legal wrong because of agency action, or adversely
 23 affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to
 24 judicial review thereof,” meaning that an underlying statutory claim must be sufficiently pleaded
 25 to give rise to a cause of action. 5 U.S.C. § 702. For the purpose of an APA claim, an agency
 26 action includes the “failure to act,” and the court is vested with the authority to remedy such a

27
 28 ² The parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C.
 § 636(c).

1 failure by “compel[ling] agency action unlawfully withheld or unreasonably delayed.” *Id.* §§
 2 551(13), 706(1). Under 5 U.S.C. § 706(1), “federal courts may order agencies to act only where
 3 the agency fails to carry out a mandatory, nondiscretionary duty.” *Norton v. S. Utah Wilderness*
 4 *Alliance*, 542 U.S. 55, 61 (2004) (citation and internal quotation marks omitted). Judicial review
 5 of an agency’s failure to carry out a non-discretionary duty is limited to specific statutory
 6 requirements, because enforcing compliance with broad statutory terms would amount to the
 7 court’s overseeing an agency’s “day-to-day” management. *Id.* at 66–67. A court may also remedy
 8 an APA claim by “hold[ing] unlawful and set[ting] aside agency action, findings, and conclusions
 9 found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
 10 law,” among other potential defects that can warrant such relief. 5 U.S.C. § 706(2).

11 **B. Plaintiffs’ Complaint**

12 **1. Claim Asserted**

13 Plaintiffs allege that Defendants: (1) did not complete timely reviews for six of the nine
 14 stocks at issue (the northern sea otters of southwest, southcentral, and southeast Alaska, Florida
 15 manatee, Antillean manatee of Puerto Rico, and Pacific walrus); and (2) did not produce a timely
 16 final draft for three of the nine stocks at issue (the southern sea otter, Chukchi/Bering Sea polar
 17 bear, and Southern Beaufort Sea polar bear). *Compl.* at 10–13. Because the parties agree that
 18 Plaintiffs’ claim as to the latter three stocks is now moot, this order does not address them in
 19 detail. Four of the six stocks that remain at issue (the northern sea otter of southwest Alaska,
 20 Florida manatee, Antillean manatee, and Pacific walrus) are designated by the MMPA as strategic
 21 and must be reviewed on an annual basis, while the other two stocks that remain at issue (the
 22 northern sea otters of both southcentral Alaska and southeast Alaska) are designated as non-
 23 strategic and must be reviewed every three years. *Id.* at 9–10.

24 Plaintiffs allege that this failure constitutes agency action which is unlawfully withheld or
 25 unreasonably delayed, which has caused them and their members informational and procedural
 26 injuries, and which ought to be compelled by this Court. *Id.* at 14. In the alternative, Plaintiffs
 27 also allege that the Service’s failure to act is “arbitrary and capricious and not in accordance with
 28 procedures required by law.” *Id.*

2. Marine Mammal Stocks at Issue

The Service has not published a revised SAR for the northern sea otters of southwest Alaska (a strategic stock), southeast Alaska, and southcentral Alaska (non-strategic stocks) since 2014. *Id.* at 10 (citing 79 Fed. Reg. 22,154 (Apr. 21, 2014)). Plaintiffs allege the stocks of each of these species has changed in the interim, and provide as examples that “the Secretary of the Interior has issued offshore oil and gas leases and approved seismic surveys in Alaska that negatively affect northern sea otter stocks,” and that “new information has become available regarding climate-induced changes to sea otter habitat and food availability as well as the impacts of the fishing industry on food availability and sea otter mortality.” *Id.* at 11.

The Service has not published a revised SAR for the Pacific walrus (a strategic stock) since 2014. *Id.* at 11. Plaintiffs allege that new population estimates suggest this stock’s population is declining due to the loss of sea ice upon which the walruses depend, and that studies also indicate “melting sea ice will continue to have increasingly detrimental consequences to the Pacific walrus.” *Id.* at 12. Plaintiffs add that researchers report observing female walruses “spending more time in the southwestern region of the Chukchi Sea due to changes in sea ice availability, resulting in less time resting and foraging, and likely resulting in reduced female walrus body condition,” a trend which will likely continue as sea ice retreats to higher latitudes. *Id.* Lastly, Plaintiffs allege “new information regarding the impacts of ocean acidification on Pacific walrus populations has been published by the scientific community,” and that oceanic “acidification is driving changes in prey availability for walruses and therefore negatively impacting walrus populations.” *Id.* at 13.

The Service has not published a revised SAR for the Florida manatee and Antillean manatee (both strategic stocks) since 2014. *Id.* at 11. Plaintiffs allege that “[m]anatees face increasing threats to their existence, including from watercraft-collision-related deaths,” which resulted in at least 637 manatee deaths in Florida’s waterways in 2020 and “one of the deadliest years for manatees” in 2019. *Id.* at 13. Plaintiffs add that “[m]anatees in both the southeastern United States and Puerto Rico also face increasing threats from habitat loss and climate change” which negatively impacts the manatees and their surrounding habitat, the loss of the manatee’s

1 warm water refuge is being worsened by climate-change-induced cold fronts, harmful algal
 2 blooms are being worsened by increased precipitation and temperature, and tropical storms in
 3 increasing frequency and intensity may cause stranding and calf separation as well as the
 4 destruction of their seagrass feeding grounds. *Id.*

5 **3. Allegations Regarding Standing**

6 a. Representational and Organizational Injury

7 Plaintiffs allege that their interests and those of their members are harmed by the Service's
 8 failure to publish revised SARs.

9 CBD is a nonprofit conservation organization headquartered in Oakland, California which
 10 is "dedicated to the preservation of biodiversity, native species, and ecosystems," and which has
 11 84,000 members, many of whom "reside in and/or visit the coastal areas of California, Florida,
 12 Puerto Rico, and Alaska and adjoining marine waters where the marine mammals in this case
 13 occur," and all of whom "use the ocean and coastal areas for research, aesthetic enjoyment,
 14 observation, and other recreational scientific, and educational activities." *Id.* at 3. Plaintiffs allege
 15 that CBD and its staff and members review scientific information about "marine mammals and
 16 regularly comment on actions affecting marine mammals, including draft stock assessment
 17 reports." *Id.* Regarding the specific marine mammal stocks at issue, Plaintiffs allege:

18 [CBD] members and staff have researched, observed, photographed,
 19 enjoyed the habitat of, and sought protection for the polar bear,
 20 walrus, and sea otter in Alaska. [CBD] members and staff have also
 21 regularly visited the shores and waters of California to observe, study,
 22 and enjoy California sea otters. [CBD] members and staff have visited
 23 the habitat of the Antillean and Florida manatees, sought to observe
 24 manatees, and enjoyed manatees in their marine environment. [CBD]
 25 members will continue to visit those areas in the future to appreciate
 26 these marine mammals and their ocean and coastal environment.
 27 [CBD] members and staff derive scientific, recreational,
 28 conservation, and aesthetic benefits from the existence of these
 marine mammals in the wild. [CBD] and its members also derive
 benefits from information about and opportunities for public
 participation concerning marine mammals.

Id.

TIRN is a Marin County, California-based non-profit corporation with a similar
 commitment to the "study, protection, enhancement, conservation, and preservation of the world's

1 marine and terrestrial ecosystems and the wildlife that inhabit the oceans, including marine
2 mammals.” *Id.* TIRN has 114,000 supporters globally, including “research biologists, eco-tour
3 operators, and professional photographers and videographers, all of whom rely on healthy
4 populations of marine mammals to conduct their business.” *Id.* Regarding the regions where the
5 specific marine mammal stocks at issue occur, Plaintiffs allege that “TIRN’s members and staff
6 regularly use the coastal waters of the western United States, Alaska, Florida, and Puerto Rico for
7 observation, research, aesthetic enjoyment, and other recreational, scientific, and educational
8 activities,” and that many members and staff “spend time on the shores or in the waters of these
9 areas engaging in a number of wildlife-viewing activities, including swimming, snorkeling,
10 kayaking, scuba diving, and wildlife watching.” *Id.* at 3–4. Lastly, Plaintiffs allege that “TIRN’s
11 members and staff intend to continue to study, visit, and observe—or attempt to study, visit, and
12 observe—these species in the future.” *Id.* at 4.

13 b. Procedural and Informational Injury

14 Plaintiffs also allege they are suffering procedural and informational injuries due to the
15 Service’s failure to review and publish revised SARs because the MMPA’s requirements for such
16 revisions are intended to “ensure that marine mammals are not adversely affected by decisions
17 based on obsolete information” and, since “Plaintiffs have concrete interests in ensuring up-to-date
18 stock assessments, Plaintiffs’ interests are adversely affected by the Service’s failure to fulfill its
19 procedural duties under the MMPA to timely update the stock assessment reports.” *Id.* at 4–5.
20 Plaintiffs allege that “the Service’s failure to prepare these stock assessment reports [renders
21 Plaintiffs] unable to use the information contained in the report and . . . unable to participate in the
22 public comment process.” *Id.* at 5. Plaintiffs assert injury on the basis that the MMPA’s
23 requirements for SAR revision “were designed to promote public participation and information, as
24 demonstrated by the public comment requirement [and because] Plaintiffs and their members
25 research and promote conservation of marine mammals, this information and participation is
26 useful to Plaintiffs to carry out their organizational missions.” *Id.*

27 c. Causation

28 Plaintiffs allege they are adversely affected by the Service’s failure to review and revise

1 SARs for the species within their jurisdiction because “outdated stock assessments result in
2 management decisions that are less informed and often less protective of these marine mammal
3 populations than they would [otherwise] be [and] because many of these stocks have either
4 declined since their most recent stock assessment or are now subject to newly identified and often
5 greater threats, the lack of updated stock assessments increases the risks to these species.” *Id.* at
6 4. This lack of updated information, Plaintiffs allege, “result[s] in activities being permitted that
7 adversely affect the survival and recovery of these species and increase the chances that
8 population declines and other adverse impacts to these animals will occur but will go unnoticed
9 and/or unaddressed.” *Id.* The resulting harm to stocks in which Plaintiffs have an interest creates
10 injury to Plaintiffs and their members “by reducing the likelihood that [they] will be able to
11 continue to observe, research, and enjoy these marine mammals in their natural environment.” *Id.*

12 d. Redressability

13 Plaintiffs allege that their injuries are redressable through declaratory and injunctive relief
14 because “[a]n order compelling the stock assessment reports by a date certain will reduce the
15 likelihood that excessive take of marine mammals will be authorized.” *Id.* at 5. If such an order is
16 granted, Plaintiffs allege that the resulting revised SARs will provide Plaintiffs with access to the
17 SARs’ information and the opportunity to participate in commenting, and result in taking
18 authorizations which “better reflect the limits that the stocks can sustain at this time” and make it
19 “less likely that the marine mammals at issue will be adversely affected.” *Id.*

20 **C. Defendants’ Motion to Dismiss**

21 Defendants argue that Plaintiffs’ complaint should be dismissed for failure to establish
22 standing as to all of the SARs at issue and for failure to state a claim upon which relief can be
23 granted under Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure. Mot. at 1–4.

24 **1. Arguments Regarding Standing**

25 Defendants argue that Plaintiffs have failed to adequately allege the three elements
26 required for standing: injury in fact, causation, and redressability.

27 a. Injury in Fact

28 Defendants argue that neither CBD nor TIRN has presented sufficient allegations to

1 establish either representational or organization injury. *Id.* at 7–8. As to representational injury,
2 Defendants argue that both Plaintiffs only make “vague and generalized” allegations as to how
3 their members and staff interact with the nine species at issue. *Id.* at 8. First, Defendants argue
4 that Plaintiffs fail to identify any specific individual members with “concrete plans to study, teach
5 about, view, or visit any of the nine species at-issue,” and refer only to categories of people such
6 as researchers, tour operators, and videographers. *Id.* at 8. Defendants suggest that without
7 “stating how these people . . . will be ‘directly affected [by the challenged inaction] apart from
8 their special interests in the subject,’” Plaintiffs have not sufficiently alleged standing. *Id.* at 9
9 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992)) (brackets in original). Next,
10 Defendants argue that Plaintiffs’ alleged injuries are not “actual or imminent,” and that Plaintiffs
11 “have not given, and cannot give, an example of how their members are currently suffering” a lack
12 of access to the marine mammals at issue. *Id.* Citing *Lujan*, Defendants contend that Plaintiffs
13 have not alleged the sort of specific “imminent” harm necessary to substitute for actual harm. *Id.*

14 Defendants also argue Plaintiffs fail to establish organizational injury, which requires that
15 “[a]n organization . . . suffered both a diversion of its resources and a frustration of its mission,”
16 rather than “simply a setback to the organization’s abstract social interests.” *Id.* at 10 (quoting *La*
17 *Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir.
18 2010); *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1138 (N.D. Cal.
19 1999)) (internal quotation marks omitted). Defendants contend that both CBD and TIRN’s stated
20 conservational and protective objectives “purport to establish a connection to the species at-issue,
21 but do nothing to establish a concrete and demonstrable injury to either organization’s activities,”
22 and fail to allege any “diver[sion of] resources, how a specific program has been affected, or how
23 the overall social missions have been or will imminently be impacted in any way” by the alleged
24 failures of Defendants. *Id.* at 10–11.

25 Turning to a theory of procedural injury, Defendants argue that Plaintiffs misconstrue the
26 MMPA’s procedural requirements to include a procedural right to timely update SARs, while in
27 fact, the MMPA “creates a right to public comment only for draft revised SARs,” and that the
28 Service is only required to publish those drafts “when it has determined during review that a

1 stock's status has changed or can be more accurately determined.” *Id.* at 12 (citing Compl. ¶ 16;
2 16 U.S.C. § 1386(b)(1)). Here, Defendants argue, Defendants argue that “because the Service has
3 not issued draft revised SARs [for the six stocks that remain at issue], Plaintiffs do not yet have
4 any procedural rights to them under section 117, and therefore cannot allege that they have been
5 deprived of these procedural rights.” *Id.*

6 Similarly, Defendants argue that Plaintiffs fail to allege informational injury because
7 Plaintiffs were not denied access to any information to which they had a right under the MMPA.
8 In Defendants’ view, the only information to which Plaintiffs have a right is the content of the
9 draft revised and finalized SARs as well as a notice of availability and a summary of the final
10 revised SAR, and because the Service has determined that for six of the nine stocks, a draft revised
11 SAR is not yet due, Plaintiffs do not yet have any informational rights to them under the MMPA.
12 *Id.* at 13–14 (citing 16 U.S.C. § 1386(b)–(b)(3)). Defendants respond to what they regard as
13 Plaintiffs’ “faulty premise that updated or new information is available for review, and therefore,
14 the Service should have already determined to revise all nine SARs, which would have entitled
15 Plaintiffs to procedural and informational rights for the draft and final revised SARs,” by arguing
16 that this premise relies on an assumption that updated or new information exists, and that any
17 information that does exist is the “best scientific information available” per the MMPA’s
18 requirements. *Id.* (citing 16 U.S.C. § 1386(b)(3)). Lastly, Defendants cite *Friends of Animals v.*
19 *Jewell*, 828 F.3d 989 (D.C. Cir. 2016), in support of the premise that a plaintiff, like those here,
20 does “not suffer informational injury where [the] challenged statutory provision [does] not yet
21 entitle [that] plaintiff to information until certain further findings [are] made by the agency, even
22 though plaintiff alleged those findings should have been made already.” *Id.* at 14–15.

23 b. Causation

24 Defendants argue that Plaintiffs fail to establish causation, the second element of standing,
25 because the causal chain Plaintiffs have alleged between outdated stock assessments and their
26 members’ reduced ability to interact with marine mammals is “too speculative” and “extremely
27 lengthy and entirely vague and hypothetical.” *Id.* at 15. Defendants further contend that Plaintiffs
28 fail to isolate either particular management decisions which rely on information in the SAR or

1 particular activities which would adversely impact these species if permitted, and instead rely on
 2 “pessimistic assumptions about vague ‘management decisions’ and future discretionary permitting
 3 decisions that are not challenged and cannot be addressed by this lawsuit.” *Id.*

4 c. Redressability

5 With respect to the element of redressability, Defendants argue that Plaintiffs have not
 6 alleged sufficiently that their requested relief—an order compelling the SARs by a certain date—is
 7 *likely* to redress the injuries alleged, because the injuries alleged directly flow from management
 8 decisions which ought to be challenged separately at the time of their occurrence. *Id.* at 16.
 9 Defendants argue that challenging the actual management decisions would be “much more ‘likely
 10 to redress’ [Plaintiffs’] alleged injuries.” *Id.* Defendants further argue Plaintiffs have not shown
 11 and cannot show that the court has the power to grant the relief being sought—an order
 12 compelling the SARs by a certain date—because “the MMPA requires revised stock assessment
 13 reports only where a review has found that the stock’s status ‘has changed or can be more
 14 accurately described.’” *Id.* Defendants contend that “the Court cannot order the Service to revise
 15 these six SARs where the Service has not determined that revisions are warranted based on the
 16 best scientific information available.” *Id.* at 17. Defendants acknowledge that the Court could
 17 order the Service to perform a mandated review (as opposed to revision) of these six stocks within
 18 the statutorily established annual time frame, but argue that the Service will be doing such reviews
 19 regardless and the Plaintiffs have not requested such relief. *Id.*

20 **2. Arguments Regarding Failure to State a Claim**

21 Along the same lines as their arguments regarding the Court’s power in the context of
 22 redressability, Defendants contend that Plaintiffs have failed to state a claim upon which relief can
 23 be granted because “Defendants have not determined revision is required and so no duty to revise
 24 has arisen under the MMPA,” which only requires the Service to revise stock assessment reports if
 25 and whenever the review indicates that a stocks status “‘has changed or can be more accurately
 26 determined.’” *Id.* at 1, 17 (quoting 16 U.S.C. § 1386(c)(2)). Defendants emphasize that revisions
 27 to SARs under the MMPA take place on an as-needed basis, while internal reviews to determine
 28 whether revisions are needed take place within the one- and three-year timeframes for strategic

1 and non-strategic stocks. *Id.* at 18. Defendants argue Plaintiffs have failed to state a claim for
2 which relief can be granted because their reviews are on schedule to be completed this year for the
3 northern sea otter of southwest, southcentral, and southeast Alaska, Florida manatee, Antillean
4 manatee of Puerto Rico, and Pacific walrus stocks. *Id.* at 5 (citing 16 U.S.C. § 1386(c)(2)).
5 Defendants further contend that the APA cannot provide the basis of a freestanding claim in the
6 absence of any violation of the MMPA. *Id.* at 18.

7 **D. Plaintiffs' Opposition**

8 **1. Arguments Regarding Standing**

9 In their opposition, Plaintiffs state they have fulfilled the three elements of Article III
10 standing. Opp'n (dkt. 20) at 1.

11 **a. Injury in Fact**

12 Plaintiffs argue that they have representational standing based on injuries to their
13 members' interests in and concrete future plans to enjoy the marine mammal stocks at issue, which
14 Plaintiffs have alleged could be harmed by uninformed management decisions. *Id.* at 5–8 (citing
15 *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009), in which CBD's
16 members established standing based on their observational and aesthetic enjoyment of the polar
17 bears threatened by a challenged regulation). Plaintiffs contend that they therefore meet the test
18 for representational standing in that their members having standing to sue in their own right, the
19 interests in question are germane to the organizations' purposes, and the lawsuit does not require
20 participation by individual members. *Id.* at 5. Plaintiffs argue the complaint sufficiently details
21 the risk that outdated assessments would result in less protective management decisions that
22 imminently harm the stocks' sustainability. *Id.* at 8.

23 In the alternative, Plaintiffs contend that they have suffered informational injury because
24 the MMPA mandates the publication of timely SARs in the event of occurrences including new
25 population estimates and threats to stocks which Plaintiffs have alleged to have taken place. *Id.* at
26 9–10. Plaintiffs argue that the MMPA's SAR disclosure requirements reflect Congressional intent
27 "to give the public a right to . . . information" including the marine mammal's range, population,
28 and trend; a description of the commercial fisheries that interact with the stock; the annual

1 mortality and serious injury caused by commercial fisheries and other impacts; and the potential
2 biological removal level. *Id.* at 9.

3 Plaintiffs also argue that the Service’s failure to follow the required procedure to review
4 the SARs annually or triennially and make revised SARs available for public comment amounts to
5 a procedural injury which impairs Plaintiff’s rights and interested in protecting the stocks at issue
6 in “two major ways: (1) it prevents Plaintiffs’ input or participation in developing new SARs and
7 (2) it forecloses the chance for current, sufficient SARs to guide management decision that will
8 better protect the species, which affects Plaintiff’s concrete interests in studying, viewing them,
9 and otherwise appreciating them in the wild.” *Id.* at 11. Plaintiffs contend that they need not
10 prove any downstream effect on marine mammals in order to assert these procedural interests. *Id.*
11 at 8–9, 11 (citing *Mendoza v. Perez*, 754 F.3d 1002, 1012–13 (D.C. Cir. 2014) (holding that a
12 plaintiff asserting injury to procedural rights need not prove that a different outcome would have
13 occurred if the procedure had been completed)).

14 Plaintiffs ask the Court to reject Defendants’ view that no procedural or informational
15 rights arise until Defendant publish a draft revised SAR, arguing that it would create a perverse
16 incentive to never begin the process of revision. *Id.* at 10. Plaintiffs contend that Defendants’
17 argument “asks this Court to impermissibly disregard Plaintiff’s factual allegations and improperly
18 prejudge the merits of this case.” *Id.*

19 Plaintiffs argue that they have suffered three specific informational and procedural injuries:
20 (1) Plaintiffs and their members are deprived of the information in updated SARs to comment on
21 and advocate for wildlife protections in the context of other government action, like the ongoing
22 open comment period on Arctic drilling activities; (2) Plaintiffs and their members are deprived of
23 the chance “to participate in the public comment process” for SARs themselves, where they
24 regularly provide comment when SAR are actually published; and (3) Plaintiffs’ work towards the
25 protection of marine mammals from bycatch in fisheries is hampered because accurate SARs serve
26 as a basis for plans to reduce bycatch. *Id.* at 12–13.

27 b. Causation

28 Plaintiffs assert that their theory of “causation is simple: outdated SARs mean that

1 management decisions for those marine mammals are misinformed and may lead to population
2 declines, thereby harming Plaintiffs’ interests in” the species at issue. *Id.* at 13. Plaintiffs contend
3 that they have alleged several concrete examples of such reliance, including the use of SARs to
4 guide management of fisheries, oil and gas extraction, military activities, and the like. *Id.* at
5 14. Plaintiffs contend that “although the causal chain is much shorter than Defendants assert,
6 causation may be found even if there are multiple links in the chain,” provided that those links are
7 “‘not hypothetical or tenuous’ and remain ‘plausible,’” and even if defendant was not “‘the sole
8 source’” of the injury, with the test for Article III standing being “‘less rigorous than proximate
9 causation.’” *Id.* at 14–15 (quoting *Nat’l Audubon Soc., Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir.
10 2002); *Barnum Timber Co. v. U.S. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Isabel v. Reagan*, 394
11 F. Supp. 3d 966, 973 (D. Ariz. 2019)). Plaintiffs argue that they meet that standard, particularly
12 because a showing of procedural injury reduces their burden to show causation. *Id.* at 15 (citing
13 *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008)).

14 c. Redressability

15 Plaintiffs also argue they sufficiently pleaded the third element of standing, that the alleged
16 injuries are redressable through the relief sought, because compelling Defendants to revise the
17 SARS would reduce the likelihood of future excessive take authorizations and provide Plaintiffs
18 with the information and opportunity to comment they seek. *Id.* at 16. Plaintiffs argue that
19 declaratory relief would have a practical effect similar to an injunction. *See id.* at 17. As with
20 causation, Plaintiffs contend that the standard for pleading redressability is relaxed for procedural
21 injuries. *Id.* at 16–17.

22 **2. Arguments Regarding Failure to State a Claim**

23 Plaintiffs argue they have properly alleged facts establishing a claim under Rule 8(a) of the
24 Federal Rules of Civil Procedure by detailing the Service’s failure to fulfill its nondiscretionary
25 duty to review and revise marine mammal stock assessment reports in light of the alleged changes
26 to the stock and indications that the stock can be more accurately determined. *Id.* at 17. Plaintiffs
27 contend they have identified two discrete actions the Service failed to do in violation of its
28 mandatory duties under the MMPA: the review and revision of the stock assessment reports. *Id.* at

1 17–18 (citing *United States v. Monsanto*, 491 U.S. 600, 607 (1989), for the proposition that the
 2 word “shall” in a statute imposes a mandatory duty).

3 Plaintiffs argue that Defendants’ focus on their obligations to revise the SARs and ignore
 4 that Plaintiffs allege the Service has failed to both periodically *review* the SARs and publish
 5 revised SARs for the stocks at issue. *Id.* Plaintiffs also contend that the Service must have
 6 violated its duty to review the SARs in light of allegations that the status of all the stocks have
 7 changed, specifically that “[n]ew population estimates suggest that the Pacific walrus population
 8 is declining’ and its sea ice habitat is melting”; “[t]he status of southwest, southcentral, and
 9 southwest Alaska northern sea otter stocks has changed since the last [SAR] in 2014” based on
 10 new information about threats to their viability; and “the status of manatee stocks has changed
 11 since 2014’ [given that] hundreds of manatees died in watercraft collisions in 2019 and 2020.” *Id.*
 12 at 18–19 (quoting Compl. ¶¶ 42, 45, 46) (some alterations in original). Plaintiffs assert that the
 13 MMPA need not set a specific deadline for SAR revisions in order to create a nondiscretionary
 14 duty. *Id.* at 19 (citing *In re A Community Voice*, 878 F.3d 779, 784 (9th Cir. 2017); *Earth Island*
 15 *Inst. v. Wheeler*, 464 F. Supp. 3d 1138, 1145–46 (N.D. Cal. 2020).

16 **E. Defendants’ Reply**

17 **1. Arguments Regarding Standing**

18 Defendants assert that “Plaintiffs have misconstrued Defendants’ motion as brought
 19 entirely under [Rule] 12(b)(6),” and contend that even though they “did not explicitly state that
 20 their standing challenge is brought under Rule 12(b)(1), their intent to challenge constitutional
 21 standing as a threshold jurisdictional issue is evident,” and that even if they had not challenged
 22 standing, “this Court has the authority and responsibility to examine jurisdictional issues at any
 23 time.” *Id.* at 2–3 (citing Fed. R. Civ. P. 12(h)(3)). Defendants contend that Plaintiffs have not
 24 established injury in fact sufficient for Article III standing because they fail to allege “such a
 25 personal stake in the outcome of the controversy as to warrant [their] invocation of federal-court
 26 jurisdiction.” *Id.* at 3 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

27 As to representational standing, Defendants argue that Plaintiffs’ allegations regarding the
 28 injury to the interests of their members are “implausible and not factual,” and fail to support the

1 inference of “an actual or imminent harm that is traceable to the challenged failure to act.” *Id.* at
2 4.

3 Turning to informational injury, Defendants acknowledge that a plaintiff can establish such
4 harm “when they are denied information to which they would otherwise be entitled under the
5 pertinent statute,” but argue that “Congress gave the Service wide discretion” as to whether to
6 publish revised SARs, and did not grant any public right to information or comment regarding
7 annual or triennial SAR *reviews*. *Id.* at 1, 6. Defendants note that where the Service
8 “determines. . . that a SAR does not need to be revised,” as it has done here for the six stocks that
9 remain at issue, “no publication requirement is triggered.” *Id.* at 6–7. Defendants argue that the
10 MMPA is distinct from statutes created primarily to ensure public access to information since the
11 provision at issue here is intended primarily “to inform agency management of incidental taking of
12 marine mammals in the course of commercial fishing operations.” *Id.* at 7–8.

13 Defendants argue that “the primary missing element from Plaintiffs’ procedural standing
14 argument is a concrete interest that is affected by the alleged deprivation.” *Id.* Defendants
15 contend that a procedural violation alone, without concrete harm, is insufficient to create Article
16 III standing. *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). Defendants
17 argue that Plaintiffs’ allegation that they suffered injuries “tied to their inability to participate in
18 the public comment process” in which they regularly participate is circular and disallowed by
19 precedent in *Summers*, and that Plaintiffs fail to allege any additional specific or concrete injuries
20 resulting from the challenged agency inaction. *Id.* at 9–10. As with informational injury,
21 Defendants argue that the “procedural right to notice and comment is only triggered if the Service
22 determines revision is warranted and publishes a draft revised SAR in the Federal Register,”
23 which it has not so determined the six stocks still at issue. *Id.* at 10.

24 Additionally, Defendants contend that the MMPA does not require the Service to use the
25 potential biological removal levels gathered through SARs in determining the negligible impacts
26 of permitted activities, which negates the allegation that Plaintiffs suffer a concrete injury in the
27 form of misinformed negligible impact levels. *Id.* at 11–12 & n.6 (citing *Taking Marine*
28 *Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of*

1 Mexico, 86 Fed. Reg. 5322, 5346–47 (Jan. 19, 2021) (explaining in response to a public comment
2 why population abundance estimates in a SAR were not the best available scientific information
3 for the circumstances)). Defendants add that SARs do not set sustainable levels of mortality for
4 marine mammals, nor are they required to serve as “the sole sources of information in any
5 particular application, management decision, or take regulation,” but rather that the SARs’
6 primary use is to “inform agency management of incidental take of marine mammals in the course
7 of commercial fishing operations.” *Id.* at 1 (footnote omitted).

8 2. Arguments Regarding Failure to State a Claim

9 Defendants contend that Plaintiffs fail to state a claim upon which relief can be granted
10 because, with respect to the duty to *review* rather than *revise* SARs, “Plaintiffs have not and
11 cannot allege more than conclusory statements that are unable to survive a motion to dismiss.” *Id.*
12 at 12. With respect to *revision* of the SARs, Defendant argue that Plaintiffs have not stated a
13 claim for the six SARs where Defendants have not conceded changed status. *Id.* Defendants
14 reiterate that the MMPA does not require the Service to publish its annual or triennial SAR
15 reviews with the public, and contend that “Plaintiffs have no way of knowing whether their
16 allegations are true” but rely instead “on pessimistic assumptions with no proof beyond
17 ‘threadbare recitals’ of the MMPA’s requirement.” *Id.* at 13 (quoting *Ashcroft v. Iqbal*, 556 U.S.
18 662, 678 (2009)). Defendants argue that Plaintiffs’ claim that the Service has not conducted
19 mandatory reviews is simply a “legal conclusion couched as a factual allegation” that the Court is
20 not required to accept, and that Plaintiffs’ view that revisions to the SARs are required is based on
21 an assumption that “Plaintiffs’ knowledge of the best available scientific information is superior to
22 the Service’s knowledge.” *Id.* at 13–14. According to Defendants, the only relief the Court could
23 award is requiring “the Service to perform its mandatory reviews of the six SARs and reconsider
24 whether revisions are warranted, which is not the relief that Plaintiffs’ Complaint seeks.” *Id.* at
25 14.

26 III. ANALYSIS

27 A. Legal Standard

28 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure

1 for failure to state a claim on which relief can be granted. “The purpose of a motion to dismiss
2 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*
3 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage
4 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a “pleading which
5 sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing
6 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

7 In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and
8 takes “all allegations of material fact as true and construe[s] them in the light most favorable to the
9 non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.
10 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts
11 that would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
12 1990). A complaint must “contain either direct or inferential allegations respecting all the material
13 elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.*
14 *Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
15 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation
16 of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
17 (quoting *Twombly*, 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion
18 couched as a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S.
19 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of
20 ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)
21 (alteration in original). Rather, the claim must be “‘plausible on its face,’” meaning that the
22 plaintiff must plead sufficient factual allegations to “allow[] the court to draw the reasonable
23 inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S.
24 at 570).

25 Challenges to Article III standing are properly raised as asserting a lack of subject matter
26 jurisdiction under Rule 12(b)(1)—which Defendants failed to cite in their motion—rather than
27 failure to state a claim under Rule 12(b)(6). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).
28 But where a defendant brings a facial challenge to subject matter jurisdiction, meaning a challenge

1 based solely on the allegations in the complaint, courts conduct an inquiry that is “analogous to a
2 12(b)(6) motion.” *Roberts v. Corrothers*, 812 F.2d 1173, 1178 (9th Cir. 1987). Defendants’ error
3 in initially citing the wrong rule for their arguments regarding standing therefore does not
4 meaningfully alter the Court’s analysis.³

5 **B. Constitutional Standing**

6 Establishing Constitutional standing requires “[1] that plaintiff[s] have suffered an injury
7 in fact, which is an invasion of a legally protected interest which is concrete and particularized and
8 actual or imminent rather than conjectural or hypothetical; [2] that there be a causal connection
9 between the injury and conduct complained of so that the injury is fairly traceable to the
10 challenged action of the defendant and not the result of the independent action of some third party
11 who is not before the court; and [3] that it be likely, as opposed to merely speculative, that injury
12 will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561
13 (1992).

14 **1. Injury in Fact**

15 To fulfill the first element, a “plaintiff must show that [they are] under threat of suffering
16 ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not
17 conjectural or hypothetical.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 1149 (2009). At the
18 pleading stage, Plaintiffs may sufficiently allege a future injury if it is certainly impending or there
19 is a substantial risk of its occurrence based on the general factual allegations of injury. *Lujan*, 504
20 U.S. at 561; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). To establish standing
21 on behalf of its members, an organizational plaintiff must allege that “(1) its members would
22 otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane
23 to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires
24

25 ³ While the error is not material to the outcome, Defendants’ assertion in their reply that “Plaintiffs
26 have misconstrued Defendants’ motion as entirely brought under Fed. R. Civ. P. 12(b)(6),” Reply
27 at 3, when the motion explicitly purports to be brought under Rule 12(b)(6) and never cites Rule
28 12(b)(1), is a dubious attempt to shift the blame for Defendants’ error to Plaintiffs. Moreover,
Defendants’ accusation, *see id.*, that Plaintiffs have improperly sought to limit the scope of the
Court’s review by focusing on Rule 12(b)(6)—the only rule cited in Defendants’ motion—rings
hollow when Defendants have not identified any meaningful difference in the standard of review
for a facial challenge to subject matter jurisdiction under Rule 12(b)(1).

1 the participation in the lawsuit of each of the individual members.” *Hunt v. Wash. State Apple*
 2 *Advert. Comm’n*, 432 U.S. 333, 333 (1977).

3 In *Summers*, the Supreme Court found that—after the parties settled their dispute as to the
 4 only specific project at issue—the plaintiffs did not have standing based on their alleged
 5 procedural injuries resulting from their inability to file comments on the Forest Service’s action
 6 exempting certain projects from environmental impact statement (“EIS”) requirements, despite
 7 having the right to by statute, because the “deprivation of a procedural right without some concrete
 8 interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create
 9 Article III standing.” *Summers*, 555 U.S. at 496 (citing *Lujan*, 504 U.S. at 572). In *Citizens for*
 10 *Better Forestry*, however, the Ninth Circuit held that “an environmental plaintiff was ‘surely . . .
 11 harmed [when agency action] precluded the kind of public comment and participation [that the
 12 National Environmental Protection Act] requires in the EIS process,’” because EIS findings
 13 informed the regulation of national forests in which the plaintiffs had alleged sufficient interests in
 14 through their use and enjoyment. *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d
 15 961, 971 (9th Cir. 2003) (quoting *West v. Sec’y of Dep’t of Transp.*, 206 F.3d 920 n.14 (9th Cir.
 16 2000)).⁴ The *Citizens* court further held “that this type of ‘procedural’ injury is tied to a
 17 substantive ‘harm to the environment’—‘the harm consists of added risk to the environment that
 18 takes place when governmental decisionmakers make up their minds [about the permissibility of a
 19 forest management plan] without having before them an analysis (with public comment) of the
 20 likely effects of their decision on the environment,’” undermining the statutes purpose to
 21 “minimize . . . the risk of uninformed choice.” *Id.* (quoting *West*, 206 F.3d at 930 n.14). The
 22 Ninth Circuit held that the plaintiffs did not need to assert that any specific injury *would* occur in
 23 the future because the “‘asserted injury is that environmental consequences *might* be overlooked’
 24 as a result of deficiencies in the government’s analysis under environmental statutes.” *Id.* at 971–
 25 972 (citation omitted) (emphasis added). Unlike in *Summers*, the parties in the *Citizens* case had
 26 not settled any disputes regarding particular projects or areas where the plaintiffs had an interest.

27 _____
 28 ⁴ *Citizens* remains good law. See, e.g., *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1013 (9th Cir. 2021).

1 The *Ecological Rights* court rejected the district court’s strict injury in fact rule, which was
2 based on the proximity of plaintiffs’ places of residence to the affected waterway and the
3 frequency of plaintiffs’ use of the waterway, and instead emphasized that the “‘injury in fact’
4 requirement in environmental cases is not . . . reducible to inflexible, judicially mandated time or
5 distance guidelines, as *Laidlaw* makes clear.” *Ecological Rights Foundation v. Pacific Lumber*
6 *Co.*, 230 F.3d 1141, 1148 (9th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Env’tl. Serv.*,
7 528 U.S. 167 (2000)). Indeed, the *Laidlaw* court simply states that “environmental plaintiffs
8 adequately allege injury in fact when they aver that they use the affected area and are persons ‘for
9 whom the aesthetic and recreational values of the area will be lessened’ by the challenged
10 activity.” *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

11 Here, Plaintiffs have sufficiently alleged that they have representational standing based on
12 their lack of information, lack of opportunity to comment, and potential downstream effects
13 Defendants’ failure to revise SARs for the remaining species at issue. Compl. at 10–12. This
14 mirrors the procedural violation which established plaintiff’s standing in *Citizens*, wherein
15 plaintiffs were deprived of the opportunity to be informed of and comment on environmental
16 assessments despite their right to do so under NEPA’s implementing regulation. *Citizens*, 341
17 F.3d at 970. Plaintiffs have sufficiently pleaded that they suffered concrete injuries, and will
18 continue to suffer future injuries, as a result of the Service’s failure to comply with mandated
19 procedure when they allege that without up to date stock reports, Plaintiffs and their members
20 cannot use information that would have been in the reports in furtherance of their organizational
21 and professional interests; participate in the public comment process; or comment on and advocate
22 for conservation measures—an activity central to their organizational missions—to the extent they
23 otherwise would; and management decisions critical to a healthy environment will be misinformed
24 and/or less protective. Compl. at 4–5. Plaintiffs’ injuries are unlike those alleged by the plaintiffs
25 in *Summers*, which were insufficiently concrete to establish standing because they were based on a
26 threat of injury which no longer existed since the plaintiffs had voluntarily settled a separate
27 lawsuit contesting the development of the affected forest region, and because plaintiffs “failed to
28 establish that any member has concrete plans to visit a site where challenged regulations are being

1 applied in a manner that will harm that member’s concrete interests.” *Summers*, 555 U.S. at 1149.
 2 In contrast, Plaintiffs here face an ongoing threat of injury because they have alleged their intent to
 3 continue the recreational and professional activities which rely on the health of the stocks at issue.
 4 Plaintiffs’ injuries are more akin to those in *Citizens*, which were based on the plaintiffs’ use of
 5 the affected forest areas in which they held aesthetic and recreational value, and the risk that those
 6 forest areas would be harmed by misinformed forest management decisions. *Citizens*, 341 F.3d at
 7 971. Here, Plaintiffs’ injuries are based in similar interests in the marine mammals and habitats at
 8 issue, and the risk that the Service’s failure to review or revise SARs might influence the
 9 management decisions intended to protect those marine mammals. Opp’n at 16.

10 Whether Defendants were required by statute to revise these SARs is a separate question
 11 going to the merits. For the purpose of constitutional standing, Plaintiffs have sufficiently alleged
 12 injury in fact.

13 2. Causation

14 Plaintiffs also sufficiently allege the causation element of Constitutional standing with
 15 regard to these stocks. Defendants argue that the Plaintiffs do not adequately allege causation
 16 because they “fail to identify any specific management decision that relies on information in
 17 SARs, nor any specific activity, that, if permitted, may adversely affect the survival and recovery
 18 of the species.” Mot. at 15. Additionally, Defendants argue that the injuries Plaintiffs allege are
 19 dependent upon future, discretionary management “decisions which are not challenged and cannot
 20 be addressed by this lawsuit.” *Id.* The Court disagrees.

21 To sufficiently allege causation, plaintiffs must show that their injury is “fairly traceable to
 22 the challenged action of the defendant.” *Summers*, 555 U.S. at 1149. Plaintiffs are not required to
 23 “establish causation with the degree of certainty that would be required . . . to succeed on the
 24 merits, say, of a tort claim,” but instead must establish the “reasonable probability” that the
 25 challenged actions pose a threat to Plaintiffs’ concrete interests. *Hall v. Norton*, 266 F.3d 969, 977
 26 (9th Cir. 2001). That said, causation cannot rest on an overly “attenuated chain of conjecture” or
 27 “be too speculative, or rely on conjecture about the behavior of other parties.” *See id.*; *Ecological*
 28 *Rts.*, 230 F.3d at 1152. “The issue in the causation inquiry is whether the alleged injury can be

1 traced to the defendant’s challenged conduct, rather than to that of some other actor not before the
2 court.” *Ecological Rts.*, 230 F.3d at 1152.

3 Here, Plaintiffs allege that the failure to timely review and revise stock assessment reports
4 directly causes Plaintiffs’ information and procedural injury because without an updated,
5 published SAR, Plaintiffs are unable to view and comment on information to which they would
6 otherwise be entitled to view and comment, related to marine mammals and habitats in which they
7 have specific interests and with which their members regularly interact. Compl. at 5. Plaintiffs
8 also allege that the Service’s failure to keep stock assessment reports up to date directly increases
9 the likelihood that management decisions such as the authorization of take levels, will be
10 misinformed and as a result, less protective of the marine mammals in which they have
11 recreational, conservational, and professional interests. *Id.* at 4–5. Viewing these allegations in
12 the light most favorable to Plaintiffs, it is reasonably probable that the Service’s alleged failure to
13 comply with its reporting requirements will cause fairly traceable harm to Plaintiffs’ interests
14 because those reporting requirements are intended to aid efforts to conserve and protect the marine
15 mammal stocks at issue under 16 U.S.C. Chapter 31, Subchapter II—Conservation and Protection
16 of Marine Mammals. This link between Defendants’ alleged failure to act and Plaintiffs’ injuries
17 is akin to the link sufficiently alleged in *Ecological Rights*, where plaintiffs alleged that their
18 recreational waterway use and enjoyment would be impaired due to the risk of pollutant runoff
19 from the challenged upstream development. 230 F.3d at 1151. Plaintiffs’ theory of causation
20 passes the *Ecological Rights* test insofar as it is the inaction and subsequent management decisions
21 of the named Defendants which would allegedly produce Plaintiffs’ injuries, rather than the
22 speculative actions of a third party. *Id.* at 1152. This causal chain is unlike that alleged in
23 *American Petroleum*, in which the plaintiffs failed to show causation because their injury “relied
24 on speculation that particular facilities [who were not parties to the lawsuit] would actually
25 introduce the pollutants into the air.” *Id.* (citing *Am. Petroleum Inst. v. U.S. EPA*, 216 F.3d 50,
26 66–68 (D.C. Cir. 2000)). While the causal chain between the failure to revise SARs and actual
27 harm to marine mammals is somewhat more attenuated than causation of Plaintiffs’ inability to
28 review and comment on updated SARs, “the causal connection put forward for standing purposes

1 . . . need not be so airtight at this stage of the litigation.” *Id.*

2 Thus, Plaintiffs sufficiently establish a reasonably traceable, plausible link between the
3 Service’s failure to revise SARs for the stocks at issue and Plaintiffs’ resulting representational,
4 procedural, informational injuries.

5 3. Redressability

6 As to redressability, Defendants argue that “Plaintiffs have not sufficiently alleged that the
7 relief they request is ‘likely, as opposed to merely speculative’ to redress any of their alleged
8 injuries” or that “that the Court has the legal ability to grant the requested remedy to compel
9 revised SARs by a date certain for six of the nine stocks.” Mot. at 6.

10 To do sufficiently allege redressability, plaintiffs must allege that their injuries are likely
11 redressable by a favorable judicial decision. *Juliana v. United States*, 947 F.3d 1159, 1168 (9th
12 Cir. 2020) (citing *Laidlaw*, 528 U.S. at 180–81). For cases in which procedural injuries are at
13 issue, the redressability element is relaxed. *WildEarth Guardians v. USDA*, 795 F.3d 1148, 1154
14 (9th Cir. 2015) (citing *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir.
15 2011)). As a result, plaintiffs with procedural injuries do not need to show, for redressability
16 purposes, that compliance with the procedure at issue allowing the plaintiffs to exercise their
17 procedural rights would necessarily protect their concrete interests, but only that it *could* do so.
18 *Id.* (citing *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008));
19 *see also Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). The Ninth Circuit has
20 held, for example, that ordering the Government to “discharge a statutory procedural requirement
21 . . . [where it] has failed to do so . . . can remedy the defect.” *Ctr. for Biological Diversity v.*
22 *Mattis*, 868 F.3d 803, 819 (9th Cir. 2009). The *Mattis* court also found that the issuance of
23 declaratory relief in procedural injury cases can provide redress, as it would “impose a legal
24 obligation on the Government because a procedural requirement would stand unfulfilled,” and
25 distinguishes that factual scenario from one in which plaintiff seeks a declaration stating that
26 particular aspects of a statute are unconstitutional. *Id.* (distinguishing *Mayfield v. United States*,
27 599 F.3d 964, 966 (9th Cir. 2010), on the grounds that the plaintiff there did not assert a
28 procedural claim and had bargained away any right to injunctive relief in a prior settlement, and

1 that the declaratory judgment sought would not have imposed any legal obligation on the
2 defendant).

3 Here, Plaintiffs seek an order to compel the Service to revise stock assessment reports for
4 all of the species at issue. Compl. at 15. Compliance with the order sought by Plaintiffs is fairly
5 likely to redress Plaintiffs' injuries because it would both provide them with the up-to-date
6 information they are currently deprived of and allow them to comment on, participate in, and
7 advocate for particular conservation outcomes using that information; as well as better inform the
8 Service's future management decisions such that the likelihood of excessive takes will be reduced.
9 *Id.* This is similar to the relief sought in *Mattis*, where plaintiffs successfully established
10 redressability by seeking compliance with a statute which requires the Government to account for
11 the environmental effects of the construction of a replacement military based prior to its
12 construction, because such compliance had the potential to influence the outcome of the project
13 and potentially mitigate environmental harms. *Mattis*, 868 F.3d at 818–820. In contrast, the
14 *Salmon Spawning* plaintiffs unsuccessfully sought compliance with a statute aimed at ensuring
15 that the United States does not enter treaties which jeopardize protected species *after* the treaty
16 had already been joined, which meant that even if the court “rule[d] in [the plaintiffs’] favor, they
17 will still suffer injury because [the court] cannot undo the Treaty.” *Salmon Spawning & Recovery*
18 *All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008).

19 Defendants argue, without citation to authority, that such an order falls outside the Court's
20 power to grant because the “Court cannot order the Service to accept Plaintiffs' information as the
21 best available scientific information nor compel the Service to make revisions where the Service
22 has not determined that revisions are warranted.” Reply at 14; *see* Mot. at 16. Unlike unmaking a
23 treaty, which falls outside the scope of a federal court's constitutional authority, ordering a
24 government agency to complete a report is the sort of relief courts frequently award under the
25 APA, and fails squarely within the power of the judiciary. Whether such relief is warranted here
26 under the terms of the MMPA is a different question, but that goes to the merits of Plaintiffs'
27 claim, not their constitutional standing to pursue it.

28 Moreover, contrary to Defendants' arguments, the MMPA imposes a mandatory

1 requirement to issue revised SARs under at least some circumstances. 16 U.S.C. § 1386(c)(2) (“If
 2 the review . . . indicates that the status of the stock has changed or can be more accurately
 3 determined, the Secretary *shall* revise the stock assessment”); *see W. Va. Highlands*
 4 *Conservancy v. Norton*, 190 F. Supp. 2d 859, 866 (S.D.W. Va. 2002) (“When a statute or
 5 regulation uses the word ‘shall,’ a mandatory duty is imposed upon the subject of the command.”
 6 (citing *Monsanto*, 491 U.S. at 607)). Any failure to allege or prove that those circumstances are
 7 satisfied here is, again, a question of the merits, not Article III standing. *See Mattis*, 868 F.3d at
 8 818 (“If the Government has reached its conclusions about effects and mitigation after a sound
 9 NHPA Section 402 process, then it has complied with NHPA Section 402; the claim fails not for
 10 lack of standing but on the merits.”).

11 Plaintiffs also request the issuance of declaratory relief stating “that the Service is in
 12 violation of its non-discretionary duties and that its failure to review and revise the stock
 13 assessment reports . . . within the timeframe the MMPA dictates constitutes agency action that is
 14 unreasonably delayed and/or unlawfully withheld or arbitrary, capricious, or otherwise not in
 15 accordance with the law.” Compl. at 15. As noted above, in cases in which procedural injuries
 16 are at issue and a government actor is the defendant, declaratory relief can be sufficient to redress
 17 Plaintiffs’ injuries. *Mattis*, 868 F.3d at 820. Here, like in *Mattis*, a declaration that Defendants
 18 were required to publish revised SARs “*would* impose a legal obligation on the Government
 19 because a procedural requirement would stand unfulfilled.” *Id.*

20 * * *

21 For the reasons discussed above, Plaintiffs have sufficiently alleged the injury in fact,
 22 causation, and redressability elements of Article III standing.

23 **C. Plaintiffs Have Not Sufficiently Alleged a Violation**

24 Although the Court is satisfied that Plaintiffs have sufficiently alleged standing, they have
 25 not sufficiently alleged a violation of Defendants’ duties under the MMPA. As discussed above,
 26 the MMPA requires the Service to review stock assessments on an annual or triennial basis, and to
 27 revise SARs when those periodic reviews “indicate[] that the status of the stock has changed or
 28 can be more accurately determined.” 16 U.S.C. § 1386(c). It also sets certain requirements for the

1 manner in which those reviews and revisions are conducted, including that they involve “volunteer
2 “scientific review groups” and consider “the best scientific information available.” *See generally*
3 16 U.S.C. § 1386.

4 Plaintiffs assert that Defendants failed to complete the required periodic reviews, but aside
5 from a number of passing references that refer to that failure as an assumed fact—*e.g.*, Compl.
6 ¶ 51 (“The Service’s failure to timely review . . . the stock assessment reports . . . violates section
7 117(c) of the MMPA.”)—the only allegation that Defendants failed to do so appears as a brief,
8 unexplained assertion in the “Parties” section of the complaint, lumped together with the alleged
9 failure to revise the SARs, and not identifying which particular reviews should have been
10 completed but were not. *Id.* ¶ 20 (“The Service has failed to review and revise stock assessment
11 reports for sea otter, polar bear, walrus, and manatee stocks.”). This sort of conclusory assertion,
12 unsupported by factual allegations, does not rise to the level of plausibility required by *Iqbal*,
13 particularly when the reviews at issue are conducted internally and it is not clear how Plaintiffs
14 might have reached the conclusion that Defendants did not conduct them. To the extent Plaintiffs’
15 claim rests on a theory that Defendants failed to conduct annual or triennial reviews for any of the
16 stocks at issue, it is therefore DISMISSED with leave to amend.⁵

17 Plaintiffs more clearly allege that Defendants have not recently *revised* the SARs for the
18 six stocks that remain at issue, an issue Defendants do not dispute. Plaintiffs have not, however,
19 clearly alleged that the statutory conditions imposing a duty to revise those SARs were met.
20 Instead, Plaintiffs allege that the status of the stocks has in fact changed. Complaint at 10–13.
21 These alleged changes range from threats to the animals’ habitat—credited to the issuance of oil
22 and gas leases and seismic surveys in all at-issue sea otters’ habitats; the impacts of fishing on sea
23 otter mortality and food availability; and climate-change induced changes to the sea otters’, Pacific
24 walrus’, and manatees’ habitat and food availability—to changes in the population estimates for
25 the Pacific walrus stock and increased mortality of manatees due to watercraft activities. *Id.*

26
27 ⁵ In their briefs and at the hearing, Defendants asserted that the periodic reviews have been
28 completed. Plaintiffs’ counsel did not indicate at the hearing that they intended to pursue a claim
based on failure to complete those reviews. The Court nevertheless grants leave to amend in an
abundance of caution.

1 However, because the Service is only required to create a revised SAR “if [its internal review]
2 indicates that the status of the stock has changed or can be more accurately determined,”—rather
3 than if and whenever the status of any given stock has changed in fact, as Plaintiffs allege—
4 Plaintiffs’ complaint falls short of alleging that the Service has failed to perform a
5 nondiscretionary duty under the MMPA. 16 U.S.C. § 1386(c)(2) (specifying the Service’s non-
6 discretionary duties to review stocks on an annual or triennial basis and to create and publish
7 revised reports as needed). The closest Plaintiffs come to meeting that standard is their allegation
8 that the “Service is aware, or should be aware, that the statuses of these marine mammal stocks
9 have changed or can be more accurately determined,” Compl. ¶ 40, but even if taken as true, that
10 allegation does not establish that Defendants actually determined from their periodic reviews that
11 the status had changed and revisions were required, or that Defendants failed to complete those
12 periodic reviews in the manner required by the statute.

13 It is at least conceivable that Plaintiffs could plausibly allege that Defendants actually
14 concluded either that the status of some or all of these stocks had changed or that the status could
15 more accurately be determined. *See* 16 U.S.C. § 1386(c)(2). It is also conceivable, perhaps in the
16 alternative, that Plaintiffs could allege facts supporting a plausible conclusion that Defendants
17 failed to carry out their periodic reviews in the manner required by the statute, such as by failing to
18 consider the best available science. The current complaint does not do so. Defendants’ motion is
19 therefore GRANTED, and the complaint is DISMISSED with leave to amend.

20 **IV. CONCLUSION**

21 For the reasons above, Defendants’ motion to dismiss is GRANTED. If Plaintiffs believe
22 they can cure the defects addressed above regarding the stocks for which the Service has not
23 published revised SARs, they may file an amended complaint no later than November 5, 2021.

24 **IT IS SO ORDERED.**

25 Dated: October 20, 2021

26 
27 _____
28 JOSEPH C. SPERO
Chief Magistrate Judge