IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA CATTLEMEN'S ASSOCIATION, et al., Plaintiffs, v. DIRK KEMPTHORNE, et al., Defendants.	Civ. No. 08-1689 EGS **FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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INTRODUCTION

Plaintiffs are three organizations representing the interests of ranchers and beef producers, participants in the forest products industry, and individuals seeking to fight discrimination. Plaintiffs challenge in this action the final rule issued by the United States Fish and Wildlife Service ("Service") listing the polar bear as a threatened species under the Endangered Species Act ("ESA"). Plaintiffs do not allege that they or their members have suffered any injury to date as a result of Federal Defendants' actions, but rely on speculative allegations of possible regulatory burdens, agency enforcement actions, and lawsuits by private citizens that may arise in the future. Plaintiffs' claims must be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(1) for lack of subject matter jurisdiction because Plaintiffs lack standing or, alternatively, their claims are not ripe for review. The Plaintiff associations lack standing to raise their claims because they have failed to allege sufficient facts demonstrating that they or their members have suffered any injury-in-fact that is fairly traceable to the Final Rule. Alternatively, Plaintiffs' claims are not ripe for review because delayed review would cause them no hardship, and the Court would clearly benefit from further factual development here, where Plaintiffs rely on speculative allegations of future harm that may never come to pass.

BACKGROUND

I. STATUTORY BACKGROUND

A. The Endangered Species Act

The ESA, 16 U.S.C. §§ 1531 et seq., was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and

threatened species . . .” 16 U.S.C. § 1531(b). Once a species is listed as endangered or threatened, statutory prohibitions help ensure the survival and recovery of the species. See, e.g., 16 U.S.C. § 1536 (federal agencies’ duty to avoid jeopardizing listed species); § 1538 (prohibitions against take of listed species). An endangered species is “in danger of extinction throughout all or a significant portion of its range” while a threatened species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6), (20).

The ESA delegates authority to determine whether to list a species as endangered or threatened to the Secretaries of Commerce and Interior.[1/] Pursuant to Section 4(a)(1) of the ESA, the Secretary must determine whether a species is threatened or endangered due to one or more of five factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1). The Secretary must make his decision whether to list a species

> solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

[1/] Depending on the species in question, the “Secretary” referred to in the language of the Act may be the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The Secretary of the Interior has jurisdiction over the polar bear. The Service is the agency within the Department of the Interior with delegated responsibility for administering the ESA with respect to those species within Interior’s jurisdiction.

16 U.S.C. § 1533(b)(1)(A).

The Secretary may make this determination on his own initiative through the "candidate process" or in response to a petition from an interested person. See 16 U.S.C. § 1533(a)(1), (b)(3)(A). A petition to list or delist triggers a series of statutory deadlines for making findings as to whether the species warrants listing. 16 U.S.C. § 1533(b). Within 90 days after receiving a petition to list or delist a species, the Secretary is required, "to the maximum extent practicable," to make a finding as to whether the petition presents substantial scientific or commercial information indicating that the listing may be warranted ("90-day finding"). 16 U.S.C. § 1533(b)(3)(A). The Secretary is required to publish this finding in the Federal Register. Id. If the Secretary finds that substantial information indicates that listing or delisting may be warranted, he then has one year from the receipt of the petition to undertake a status review to determine if a listing or delisting action is warranted ("12-month finding"). 16 U.S.C. § 1533(b)(3)(B). If the Secretary determines that the listing or delisting is warranted, he must publish a notice in the Federal Register that includes the complete text of a proposed rule to implement the action. 16 U.S.C. § 1533(b)(3)(B)(ii). The Secretary must act on a proposed rule within one year of the date of its publication. 16 U.S.C. § 1533(b)(6)(A). At that point, he may promulgate a final rule, withdraw the proposed rule if he finds that there is not sufficient evidence to justify the proposed rule, or extend the one-year period for consideration by not more than six months if he finds that there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned . . . ." 16 U.S.C. § 1533(b)(6)(B)(I).

B. The Administrative Procedure Act

The Administrative Procedure Act ("APA") sets forth the standards governing federal agencies in issuing proposed and final rules and regulations. A "rule" is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). Federal agencies must provide public notice of a proposed rule making through publication in the Federal Register and permit an opportunity for public comment on the proposal. See id. at § 553.

The APA provides a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . ." 5 U.S.C. § 702. Review is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." Id. at § 704. The reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be. . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . .," or "without observance of procedure required by law. . . ." Id. at § 706(2)(A), (D).

II. FACTUAL BACKGROUND

On May 15, 2008, the Service issued a final rule listing the polar bear as a threatened species throughout its range. See 73 Fed. Reg. 28,212 (May 15, 2008) ("Final Rule"). The Final Rule examines in detail the threats to the polar bear and its habitat based on the best available scientific information. See id. at 28,253-28,293. Based on this analysis, the Service concluded "that polar bear habitat – principally sea ice – is declining throughout the species' range, that this

decline is expected to continue for the foreseeable future, and that this loss threatens the species throughout all of its range." Id. at 28,212. Upon publication of the Final Rule, the polar bear received all the protections under the ESA as a threatened species, including the benefits of the consultation provisions under ESA Section 7. See id.

On May 15, 2008, the Service also issued an interim final rule under ESA Section 4(d) providing measures for the conservation of the polar bear. 73 Fed. Reg. 28,306 (May 15, 2008) ("4(d) Rule"). The 4(d) Rule provides, inter alia, that if an activity is authorized or exempted under the Marine Mammal Protection Act ("MMPA") and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), no additional authorization is required to conduct the activity. Id. The 4(d) Rule also sets forth the Service's determination that, for purposes of consultation under Section 7 of the ESA, there is currently no way to determine how greenhouse gas emissions from a specific Federal action may affect listed species, including the polar bear. Id. at 28,313.

There are presently four other actions challenging the Final Rule and/or 4(d) Rule. On July 16, 2008, the Center for Biological Diversity and other plaintiffs filed an amended complaint in a case pending in the U.S. District Court for the Northern District of California to challenge the Final Rule and the 4(d) Rule under the ESA, the APA, and the National Environmental Policy Act ("NEPA"). See Center for Biological Diversity et al. v. Kempthorne, et al., Case No. 08-1339 CW (N.D. Cal.). Plaintiffs in that case seek, inter alia, an order remanding the Final Rule (leaving the threatened listing in place pending promulgation of a new rule), and vacating and remanding the 4(d) rule.

On August 4, 2008, the State of Alaska filed a lawsuit in this District challenging the

Final Rule on other grounds. See State of Alaska v. Kempthorne et al., Case No. 08-1352 EGS (D.D.C.). The State of Alaska alleges that Federal Defendants violated the ESA and APA in listing the polar bear as a threatened species, and violated the MMPA by failing to provide for notice and comment on the designation of the polar bear as a depleted species. Alaska seeks, inter alia, injunctive relief setting aside the Final Rule and enjoining Federal Defendants from enforcing the threatened status determination for the polar bear.

On August 27, 2008, several associations filed a separate action against Federal Defendants in this District challenging the 4(d) Rule. See American Petroleum Inst. v. Kempthorne, Case No. 08-1496 EGS (D.D.C.). Plaintiffs in that case argue that paragraph (q)(4) of the 4(d) Rule – providing that none of the prohibitions in 50 C.F.R. § 17.31 apply to incidental takings of polar bears in any area subject to the jurisdiction of the United States, with the exception of Alaska – is arbitrary and capricious because it subjects activities in Alaska to more onerous regulations without a scientific basis. The plaintiffs ask the district court to uphold the listing rule and the 4(d) Rule, with the exception of paragraph q(4).

On September 8, 2008, Safari Club International and Safari Club International Foundation filed a lawsuit in this District challenging the Final Rule under the ESA and APA. See Safari Club Int'l v. Kempthorne, Case No. 08-1550 EGS (D.D.C.). Plaintiffs in that case seek, inter alia, injunctive relief setting aside and remanding the Final Rule and enjoining Federal Defendants from enforcing the threatened status determination for the polar bear.[2/]

[2/]Another action pending in the District of Columbia relates to the Final Rule, but does not challenge the threatened determination. In Safari Club Int'l v. Kempthorne, Case No. 08-881 EGS (D.D.C.), the plaintiffs seek to set aside the portion of the Final Rule concluding that "'authorization for the import of sport-hunted trophies would no longer be available under section 104(c)(5) of the [Marine Mammal Protection Act ("MMPA")].'" Complaint for

On October 2, 2008, Plaintiffs filed this lawsuit alleging that the Final Rule violates the ESA and APA because: (a) current regulatory mechanisms are adequate to protect the polar bear; (b) the Final Rule does not set forth an objective standard for determining threatened status; (c) the Final Rule does not articulate a clear basis for the Service's determination that the species is threatened; (d) the Service failed to use the best scientific and commercial data available; and (e) the Service adopted an arbitrary definition of "foreseeable future." See Complaint for Declaratory and Injunctive Relief, Dkt. No. 1 ("Complaint") at 11-17. Plaintiffs ask the Court to vacate the Final Rule and enjoin Federal Defendants from enforcing the rule. Id. at 18-19.

The foregoing actions are the subject of a motion to transfer and consolidate pending before the U.S. Judicial Panel on Multidistrict Litigation, In Re: Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, MDL No. 1993. The Panel heard oral argument on the motion to transfer and consolidate on November 20, 2008, and took the motion under submission.

STANDARD OF REVIEW

Federal Defendants bring this motion to dismiss under Fed. R. Civ. Proc. 12(b)(1) for lack of subject matter jurisdiction. See Fed. R. Civ. Proc. 12(b)(1); see also Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) (Rule 12(b)(1) governs motions to dismiss for lack of standing). On a motion to dismiss under Fed. R. Civ. P. 12(b)(1), even though a defendant moves to dismiss the complaint, the plaintiff bears the burden of proving that the Court has

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Declarative and Injunctive Relief, Case No. 08-881, Dkt. No. 1, at ¶ 1, quoting 73 Fed. Reg. 28,242.

jurisdiction to decide the case. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction . . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction") (internal citations omitted). See also Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) ("Under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction."). In considering a motion to dismiss under Rule 12(b)(1), the court may consider not only the allegations in the complaint, but also facts outside the pleadings. See Herbert v. National Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE FINAL RULE.

Plaintiffs have not met their burden of proving that they have standing to bring their claims because they have not alleged facts showing that they or their members have suffered any injury-in-fact that is fairly traceable to the challenged agency action. Plaintiffs fail to clearly articulate any concrete, particularized harm to them or their members, relying instead on speculative allegations of future harm that do not suffice to demonstrate standing.

Because the United States Constitution limits the jurisdiction of federal courts to actual cases and controversies, plaintiffs bear the burden of proving that they have standing to sue, see Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 661 (D.C. Cir. 1996), and standing must exist as of the date an action is filed. See U.S. Airwaves, Inc. v. FCC, 232 F.3d 227, 232 (D.C. Cir. 2000). To meet their burden, Plaintiffs must allege facts demonstrating that: (1) they have "suffered an 'injury-in-fact'" to a legally protected interest that is both "concrete and

particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical;" (2) there is a "causal connection between the injury and the conduct complained of;" and (3) it is "likely" – not merely "speculative" – "that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Further, an association has standing to sue on behalf of its members only if: (1) "at least one of its members would have standing to sue in his own right;" (2) "the interests the association seeks to protect are germane to its purpose;" and (3) "neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002).

Although the level of specificity required at the pleading stage is less than that required to avoid summary judgment, See Lujan, 504 U.S. at 561, it is the obligation of a federal court to assure itself of its jurisdiction at every stage in the proceedings. See Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Even at the pleading stage, a plaintiff must allege a legally cognizable injury-in-fact that can support standing. Plaintiffs have failed to make the required showing here.

A. Plaintiffs Lack Standing Because They Fail To Demonstrate That They Or Their Members Have Suffered An Injury-In-Fact.

A plaintiff must show that he or she has suffered a "concrete and particularized injury" in order to demonstrate that he or she has "a defined and personal stake in the outcome of the litigation. . . ." Florida Audubon Soc'y, 94 F.3d at 663. Plaintiffs' Complaint does not set forth sufficient allegations to demonstrate that any of the associations or their members have suffered concrete injury as a result of the polar bear listing. Rather, Plaintiffs rely on generalized allegations of increased costs of doing business and conjecture regarding the potential for

increased future litigation, neither of which suffices to meet Plaintiffs' burden of proving that they have standing to challenge the Final Rule.

The Plaintiff organizations have failed to allege that they have suffered an injury-in-fact. Plaintiffs' general allegation that they and their members have a "vital interest in knowing whether the Final Rule listing the polar bear is statutorily valid," Complaint at ¶ 48, is insufficient to give rise to standing. While "an organization whose members are injured may represent those members in a proceeding for judicial review . . . a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved.'" Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (internal citation omitted). Generalized allegations of wrongdoing, absent a showing of concrete injury to the organization's activities stemming from the defendant's conduct, are insufficient to establish standing. See Spann v. Colonial Vill., Inc, 899 F.2d 24, 27 (D.C. Cir. 1990) ("Just as an individual lacks standing to assert 'generalized grievances' about the conduct of Government, so an 'organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.'") (citations omitted). Plaintiffs make no such showing of concrete injury here. For example, Plaintiffs do not allege that the organizations will have to devote increased resources to any of their programs (other than the instant litigation) as a result of the Final Rule. See id.

Nor have Plaintiffs sufficiently alleged that their members have suffered injury-in-fact. Plaintiffs rely solely on conjectural allegations of future harm which are insufficient to meet their burden of demonstrating standing. For example, Plaintiffs allege with respect to each

association that "[t]he regulatory burdens and costs of doing business for association members . . . will increase because of the polar bear's listing as a 'threatened' species." Complaint at ¶ 5. See also id. at ¶¶ 6, 7. Plaintiffs further allege that the polar bear listing will subject members to "increased citizen suits and agency enforcement actions," increasing their costs of doing business. Id. at ¶¶ 5, 6, 7. These allegations fail to demonstrate that injury is "'certainly impending,'" as required where a party relies on the threat of future injury. See Northwest Airlines v. FAA, 795 F.2d 195, 201 (D.C. Cir. 1986), quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

Plaintiffs fail to articulate what regulatory burdens will be imposed on their members, or what types of enforcement actions they anticipate. Thus, Plaintiffs fail to demonstrate particularized injury. Moreover, even assuming that their generalized allegations ". . .embrace those specific facts that are necessary to support the claim," Lujan, 504 U.S. at 561, Plaintiffs fail to demonstrate that any such injury is imminent, as they must to demonstrate standing. See Florida Audubon Soc'y, 94 F.3d at 663 ("A plaintiff must also show that the particularized injury is at least imminent in order to reduce the possibility that a court might unconstitutionally render an advisory opinion by 'deciding a case in which no injury would have occurred at all.'") (quoting Lujan, 504 U.S. at 564 n.2). Plaintiffs' generalized allegations that their members' costs of doing business may increase in the future is insufficient to show that injury is imminent. See, e.g., Complaint at ¶ 5. Plaintiffs' allegations of increased citizen suits are even less concrete, as they rely on "future actions to be taken by third parties." See United Transp. Union v. ICC, 891 F.2d 908, 912 (D.C. Cir. 1989). Where, as here, allegations of injury depend on third parties taking specific actions, such injury is ". . . neither actual nor imminent but wholly

conjectural." Grassroots Recycling Network v. EPA, 429 F.3d 1109, 1112 (D.C. Cir. 2005).

Plaintiffs' allegations of injury are far too speculative to demonstrate standing, and the Court need not give any weight to these allegations. See United Transp. Union, 891 F.2d at 912 (court may "reject as speculative allegations of future injuries. . ."). Here, Plaintiffs' allegations are too remote to establish imminent, concrete injury because they will not be injured without the occurrence of a subsequent chain of events that may never come to pass. See Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379, 1382-84 (D.C. Cir. 1996). "Where there is no current injury, and a party relies wholly on the threat of future injury, the fact that the party (and the court) can 'imagine circumstances in which [the party] could be affected by the agency's action' is not enough." Northwest Airlines, 795 F.2d at 201. Thus, Plaintiffs have failed to demonstrate that they or their members have suffered any injury-in-fact, and the Court need not reach the causation and redressability factors. However, Plaintiffs have similarly failed to demonstrate a causal connection between their alleged injury and the Final Rule, as discussed below.[3/]

B. Plaintiffs Lack Standing Because They Fail To Demonstrate That Their Alleged Injury Is Fairly Traceable To Defendants' Conduct.

To establish standing, Plaintiffs must allege "a fairly traceable connection between [their] injury and the complained-of conduct of the defendant[s]." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998). Here, Plaintiffs cannot show that their alleged injury "is

[3/] Assuming, *arguendo*, that Plaintiffs could meet the first two prongs of the standing inquiry, Defendants do not dispute the likelihood that their alleged injuries would be redressed by a favorable decision. If the Court were to grant Plaintiffs' requested relief, invalidating the Final Rule and enjoining Federal Defendants from enforcing the threatened determination, there would be no basis for ESA consultations, enforcement actions or citizen suits in connection with the polar bear.

dependent upon" the Final Rule. Wilderness Soc'y v. Griles, 824 F.2d 4, 18 (D.C. Cir. 1987).

Plaintiffs fail to articulate how the listing of the polar bear will lead to increased regulatory burdens and costs of doing business, and thus fail to demonstrate the requisite causal connection. Plaintiffs' Complaint does not even specify what alleged "regulatory burdens" their members anticipate, let alone link such burdens to actions by Federal Defendants. Plaintiffs do not allege that their members do business in areas where polar bears are found. Nor do Plaintiffs allege in their Complaint that their members generate greenhouse gases that may one day be regulated to avoid further decline of polar bear habitat.[4/] To the extent that the alleged "regulatory burdens" relate to consultation under Section 7 of the ESA in connection with greenhouse gas emissions, Plaintiffs have not identified any activities by their members that would require the initiation of Section 7 consultation.

It is also unlikely that Plaintiffs or their members would be subject to any enforcement actions as a result of the Final Rule, since Plaintiffs have failed to allege any nexus between the activities of Plaintiffs' members and the polar bear or its habitat. The California Cattlemen's Association ("CCA") is an "organization comprised of cattle-producing families who have been providing beef for generations. . . ." Complaint at ¶ 5. Plaintiffs do not allege that any CCA members operate in polar bear habitat or otherwise may come into contact with polar bears. The California Forestry Association ("CFA") is a nonprofit association comprised of members involved in the "forest products profession," including biomass energy producers, professional

[4/] Plaintiffs did, however, cite global warming and greenhouse gas emissions as concerns in their July 23, 2008 notice of intent to sue. See Complaint, Exhibit 1 at 1 ("The EPA has identified livestock grazing as a major source of greenhouse gas emissions in the United States."); id. at 2 ("Forest management has been predicted both to affect and to be affected by global warming trends.").

foresters, and wood products manufacturers. Id. at ¶ 6. Plaintiffs do not allege that any CFA members carry out their activities in areas occupied by polar bears. The Congress of Racial Equality ("CORE") is "a philanthropic human rights organization established to fight discrimination and encourage the economic and social independence of the poor and minorities." Id. at ¶ 7. Plaintiffs have failed to articulate any activities by CORE members that would give rise to ESA enforcement actions. Moreover, even accepting as true Plaintiffs' allegations that their members will be subject to increased agency enforcement actions, any alleged harm would arise not from the Final Rule itself, but from a future decision by the Service to take enforcement action.

With respect to Plaintiffs' allegations regarding potential citizen suits, Plaintiffs cannot show that the injury is "traceable to the action of the defendant[s]," and not "from the independent action of some third party not before the court." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42, 46 (1976). The element of causation regarding lawsuits by third parties "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" Lujan, 504 U.S. at 562 (quoting Allen v. Wright, 468 U.S. 737, 758 (1984)). Because Plaintiffs' allegations of harm hinge on speculation regarding the future actions of the Service and private citizens, they have failed to allege a sufficient causal connection to show that they have standing to challenge the Final Rule.

II. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW.

Alternatively, the Court lacks subject matter jurisdiction because Plaintiffs' claims are not ripe for review. The essential purposes of the ripeness doctrine are "to prevent the courts,

through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). In Ohio Forestry Ass'n v. Sierra Club, the Supreme Court enunciated three ripeness factors:

> (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

523 U.S. 726, 733 (1998). See also National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808 (2003). Although review of the Final Rule would not interfere with any ongoing agency proceedings, applying the first and third factors here demonstrates that Plaintiffs' claims are unripe.

First, Plaintiffs cannot credibly claim that delayed review would cause them hardship. To meet this prong of the inquiry, "postponing review must impose a hardship on the complaining party that is immediate, direct, and significant." Cronin v. FAA, 73 F.3d 1126, 1133 (D.C. Cir. 1996) (emphasis added). The Final Rule does not impose any obligations on Plaintiffs. Nor do Plaintiffs claim that they or their members have actually incurred any increased costs or regulatory burdens to date as a result of the Final Rule. See Complaint at ¶ 5 ("The regulatory burdens and costs of doing business for association members . . . will increase because of the polar bear's listing as a 'threatened' species.") (emphasis added); ¶ 6 (same); ¶ 7 (same). The fear that the Final Rule might be used some day in a future enforcement action or ESA citizen suit certainly cannot be deemed hardship that is "immediate, direct, and significant." "The burden of participating in future proceedings does not 'constitute sufficient hardship for the

purposes of ripeness.'" Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1205-1206 (D.C. Cir. 1998). Moreover, Plaintiffs would have ample opportunity to challenge the Final Rule in the context of any future enforcement action. See Cronin, 73 F.3d at 1133 (case not ripe because complaining party would be free to challenge the agency action at issue in a specific enforcement action); see also National Park Hospitality, 538 U.S. at 808-11 (finding policy statement to be unripe because, among other things, the impact of the action was not felt immediately and no irremediable adverse consequences flowed from requiring a later challenge).

Here, the Court would clearly benefit from further factual development. Since Plaintiffs rely wholly on speculative allegations of future harm, it is possible that the alleged harms will never come to pass and judicial review will be unnecessary. See Cronin, 73 F.3d at 1131 ("The court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting . . . militate in favor of postponing review if, for example, the court finds that resolution of the dispute is likely to prove unnecessary.") (internal quotations and citations omitted). Deferral of review is appropriate here because it is entirely speculative whether Plaintiffs will be subject to increased regulatory burdens, enforcement actions, or citizen suits. As discussed supra at Section I.B., Plaintiffs have not alleged any connection between the polar bear or its habitat and the operations of Plaintiffs' members that would give rise to an enforcement action or citizen suit, nor have Plaintiffs identified any activities that would give rise to consultation obligations under ESA Section 7. Thus, review should be postponed until Plaintiffs can identify concrete impacts to their members stemming from the Final Rule.

CONCLUSION

For the foregoing reasons, the Court lacks subject matter jurisdiction because Plaintiffs

lack standing to bring their claims. Alternatively, Plaintiffs' claims are not ripe for review. Thus, Plaintiffs' Complaint must be dismissed with prejudice.

Respectfully submitted this 25th day of November, 2008.

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