IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA CATTLEMEN'S ASSOCIATION, *et al.*, Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	CASE NO. 1:17-cv-01536-TNM

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In their Complaint for Declaratory and Injunctive Relief ("Complaint"), ECF No. 1, Plaintiffs seek to invalidate, in whole or in part, the designation of critical habitat for three amphibian species that are protected under the Endangered Species Act ("ESA"). Plaintiffs allege that the U.S. Fish and Wildlife Service, the U.S. Department of the Interior, the Secretary of the Interior, and the Acting Director of the Fish and Wildlife Service (collectively, "Defendants" or "FWS") did not satisfy the requirements of the Regulatory Flexibility Act ("RFA") when they issued the critical habitat rule. Even accepting as true all of the factual allegations in the Complaint, Plaintiffs cannot meet their burden to show that this Court has subject matter jurisdiction. Plaintiffs lack standing because they have not alleged a cognizable injury that is traceable to the critical habitat rule and redressable by the Court. Plaintiffs' claims also are not ripe for review, and any hardship from delayed review would be minimal. Plaintiffs have alleged only speculative harms that are not caused by the critical habitat designation, not fit for judicial decision, and not causing any hardship to Plaintiffs at this time.

Alternatively, Plaintiffs' Complaint must be dismissed for failure to state a claim for relief because Plaintiffs are not directly regulated by the critical habitat rule, thus their interests are not within the zone of interests protected by the RFA. For these reasons, as explained more fully below, Plaintiffs' Complaint must be dismissed in its entirety.[1]

[1] As stated in their November 9, 2017 motion seeking relief from the requirements of Local Civil Rule 7(n), Defendants are filing certain agency documents as exhibits to this memorandum for the convenience of the Court and the parties. *See* ECF No. 9 at 3. At Plaintiffs' request, Defendants are including public comments relating to the RFA or impacts on small businesses. However, Defendants believe that the Court can resolve the issues raised in their motion to dismiss without relying on the public comments.

BACKGROUND

I. STATUTORY BACKGROUND

A. The Endangered Species Act

The ESA 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). 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." *Id.* § 1532(6), (20). The Secretaries of the Interior and Commerce are responsible for implementing the ESA, and they have delegated their respective responsibilities to FWS and the National Marine Fisheries Service ("NMFS"). In general, FWS has responsibility for terrestrial and freshwater species such as those at issue in this case, and NMFS has responsibility for marine species and anadromous fish. *See* 50 C.F.R. § 402.01(b); *see also id.* §§ 17.11, 224.101. The Secretary with responsibility for a species must determine whether the species is threatened or endangered because of one or more of five statutory factors, 16 U.S.C. § 1533(a)(1), solely on the basis of the best scientific and commercial data available. *Id.* § 1533(b)(1)(A). When the Secretary determines that a species is endangered or threatened, the species is added to the list of threatened and endangered species ("listed") and is protected under the ESA.

To promote conservation, the ESA also requires FWS to designate, to the maximum extent prudent and determinable, certain geographical areas as "critical habitat" for listed species. 16 U.S.C. § 1533(a)(3)(A). Critical habitat may include both "occupied" and "unoccupied" habitat. *Id.* § 1532(5)(A). The statute defines "occupied habitat" as "the specific

areas within the geographical area occupied by the species, at the time it is listed. . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.* § 1532(5)(A)(i). Unoccupied habitat includes the "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). FWS must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). The Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless exclusion will result in extinction of the species. *Id.*

Designating an area as critical habitat does not automatically restrict land use or prohibit activities in that area. Any such restrictions arise, if at all, through operation of ESA Section 7, which applies only to actions involving "discretionary Federal involvement or control." 50 C.F.R. § 402.03. ESA Section 7(a)(2) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2).

Under the ESA implementing regulations, the federal agency proposing the action ("action agency") determines whether the action "may affect" a listed species or a listed species' critical habitat. 50 C.F.R. § 402.14(a). If the action agency determines that its action will have no

effect, no consultation is required. *Id.* If the action agency determines that its action "may affect" listed species or critical habitat, it must pursue either informal or formal consultation with FWS and/or NMFS (the "consulting agency"). *Id.* §§ 402.13, 402.14. If the action agency or the consulting agency determines that the proposed action is "likely to adversely affect" listed species or critical habitat, the agencies must engage in formal consultation. *Id.* §§ 402.13(a), 402.14(a), (b)(1).

Following formal consultation, the consulting agency issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species or to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If the consulting agency concludes in a biological opinion that the proposed action will result in destruction or adverse modification of critical habitat, it must identify any "reasonable and prudent alternatives" available to the action agency. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g), (h).

B. The Administrative Procedure Act

The APA authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The APA defines agency action to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). 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." *Id.* § 706(2)(A).

C. Regulatory Flexibility Act

The RFA requires federal agencies to consider the likely impacts of their rules on small entities, including small businesses and organizations. 5 U.S.C. § 601(3), (6). Under the RFA, an agency promulgating a rule that will have a "significant impact" on "small entities" must "prepare and make available for public comment an initial regulatory flexibility analysis . . . [that] describe[s] the impact of the proposed rule" on those entities and publish a "final regulatory analysis" with the final rule. *Id.* §§ 605, 603, 604. The RFA "does not require rules that are less burdensome for small businesses"; it merely requires agencies to consider a rule's costs, benefits, and alternatives. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 226 (D.C. Cir. 2015). Congress limited judicial review to claims regarding "agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610. . . ." 5 U.S.C. § 611(a)(1); *see also id.* § 611(c). The RFA provides that reviewable claims must be evaluated in accordance with the APA's "arbitrary and capricious" standard. *Id.* § 611(a)(1), (2). "Failure to comply with the RFA 'may be, but does not have to be, grounds for overturning a rule.'" *Cement Kiln Recycling Coal. v. Envtl. Prot. Agency*, 255 F.3d 855, 868 (D.C. Cir. 2001) (*quoting Small Refiner Lead Phase-Down Task Force v. Envtl. Prot. Agency*, 705 F.2d 506, 538 (D.C. Cir.1983)).

II. FACTUAL BACKGROUND

For purposes of this motion only, Defendants assume the truth of the factual allegations in Plaintiffs' Complaint. *See generally* Standard of Review, *infra*. Plaintiffs are nonprofit associations representing farmers and ranchers, including cattle and sheep producers who hold grazing rights on federal and private lands. *See* Complaint ¶¶ 5-7. Plaintiffs have members who rely on certain National Forest lands for livestock grazing. *See* March 7, 2014 comment letter,

ECF No. 1 at 23 (referring to federal grazing permittees on the Sierra National Forest and the Stanislaus National Forest).

Plaintiffs challenge the August 26, 2016 final rule designating critical habitat for the Sierra Nevada yellow-legged frog, the northern distinct population segment ("DPS") of the mountain yellow-legged frog, and the Yosemite toad. *See* 81 Fed. Reg. 59,046 (attached hereto as Exhibit 1). To determine which areas should be included within the critical habitat designation, FWS identified the physical and biological features essential to conservation of the three species, such as food, shelter, breeding sites, and migration routes. *See id.* at 59,062-65. FWS then considered whether those features may require special management considerations or protection. *Id.* at 59,065-66.

To fulfill the requirement to consider economic impacts, *see* 16 U.S.C. § 1533(b)(2), FWS contracted for an economic analysis from an outside consultant, Industrial Economics, Inc. *See* Economic Analysis of Critical Habitat Designation for Three Sierra Nevada California Amphibians (June 5, 2015) (attached hereto as Exhibit 3). Relevant to this case, the economic analysis evaluated the economic impacts anticipated to arise from consultations on grazing activities occurring on National Forest lands. *See id.* at ES-13 (estimating the potential economic impacts from consultations for permitted livestock grazing activities to range from $55,000 to $218,400 over 20 years); *see also id.* at 4-14 – 4-19. However, these costs were expected to be borne by the consulting agencies and not by third parties holding grazing allotments. *See id.* at 4-18 (additional project modifications are unlikely and "the incremental impact of critical habitat designation for the amphibians is expected to be limited to the administrative consultation cost of addressing the adverse modification standard during consultation"); *id.* at A-3 – A-4 (third parties are not expected to participate in consultations for grazing activities, and FWS

consultations are not expected to result in requirements for ranchers to implement project modifications).

Overall, FWS designated 1,082,147 acres for the Sierra Nevada yellow-legged frog (approximately 18% of the historical range of the species), 221,498 acres for the northern DPS of the mountain yellow-legged frog (approximately 19% of the historical range of the species), and 750,926 acres for the Yosemite toad (approximately 28% of the historical range of the species). *Id.* at 59,071-72.

STANDARD OF REVIEW

As set forth below, Plaintiffs' claims are subject to dismissal under Fed. R. Civ. P. 12(b)(1), which authorizes dismissal of a claim that does not fall within the court's subject matter jurisdiction. Where a motion to dismiss under Rule 12(b)(1) makes a facial attack on the complaint, the reviewing court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ord v. Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009), *quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975). While a court "may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone, where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003), *quoting Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Jerome Stevens Pharms. v. U.S. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) ("[T]he district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction."). Plaintiffs bear the burden of proving that the Court has

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") (citations omitted); *see also Ctr. for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85, 89 (D.D.C. 2011) ("On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction.") (*citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

Plaintiffs' claims are also subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief under the APA. *See, e.g., Hormel Foods Corp. v. U.S. Dep't of Agric.*, 808 F. Supp. 2d 234, 242 (D.D.C. 2011). To avoid dismissal under Rule 12(b)(6), a plaintiff must aver "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal* explained that the pleading requirement of Fed. R. Civ. P. 8(a) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 555). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. A pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim under Rule 8. *Id.* (*quoting Twombly*, 550 U.S. at 555). A court need not "accept as true a legal conclusion couched as a factual allegation," or "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Trudeau v. FTC*, 456

F.3d 178, 193 (D.C. Cir. 2006) (citations omitted). The Court may "consider only the facts alleged in the complaint, any documents either attached to or incorporated [by reference] in the complaint and matters of which [the court] may take judicial notice." *Id.* at 183 (*quoting Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)).

ARGUMENT

Even if the allegations in the Complaint are accepted as true for purposes of this motion, Plaintiffs have not established—and cannot establish—subject matter jurisdiction. Plaintiffs lack standing because they have not alleged a cognizable injury that is traceable to Defendants and may be redressed by the Court. Additionally, Plaintiffs' claims are not ripe for judicial review, and any hardship from delayed review would be minimal. Alternatively, Plaintiffs cannot state a claim for relief because their alleged interests do not fall within the zone of interests of the RFA. Under any alternative, Plaintiffs' Complaint must be dismissed.

I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFFS HAVE NOT MET THEIR BURDEN TO ESTABLISH STANDING.

Article III of the U.S. Constitution restricts federal courts to hearing "cases" and "controversies." *Grocery Mfrs. Ass'n v. Envtl. Prot. Agency*, 693 F.3d 169, 174 (D.C. Cir. 2012). "'[T]he law of Art. III standing is built on . . . the idea of separation of powers,'" *id.* (*quoting Allen v. Wright*, 468 U.S. 737, 752 (1984)), and "[s]tanding under Article III is jurisdictional." *Grocery Mfrs.*, 693 F.3d at 174. To establish Article III standing, a party must show: "(1) that the party has suffered an 'injury in fact,' (2) that the injury is 'fairly traceable' to the challenged action of the defendant, and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* (*quoting Lujan*, 504 U.S. at 560-61). Organizations such as Plaintiffs may establish standing by showing that (a) their members have

standing to sue in their own right; (b) the interests they seek to protect are germane to the organizations' purpose; and (c) it is not necessary for individual members to participate in the lawsuit. *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 59, 65 (D.C. Cir. 2016). "While the burden of production to establish standing is more relaxed at the pleading stage than at summary judgment, a plaintiff must nonetheless allege 'general factual allegations of injury resulting from the defendant's conduct. . . .'" *Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 667 F.3d 6, 12 (D.C. Cir. 2011) (*quoting Sierra Club v. Envtl. Prot. Agency*, 292 F.3d 895, 898–99 (D.C. Cir. 2002)). As explained below, Plaintiffs cannot meet their burden based on the facts alleged in their Complaint because they have not shown that they suffered an injury-in-fact that is traceable to the critical habitat designation and redressable by this Court.

A. Plaintiffs Have Not Plausibly Alleged Injury-In-Fact.

Plaintiffs have not met their burden to show that they have suffered an injury-in-fact. "An Article III injury in fact must be '(i) concrete and particularized rather than abstract or generalized, and (ii) actual or imminent rather than remote, speculative, conjectural or hypothetical." *Grocery Mfrs.*, 693 F.3d at 175 (*quoting In re Navy Chaplaincy*, 534 F.3d 756, 759–60 (D.C. Cir. 2008)). Here, Plaintiffs have not plausibly alleged any actual or imminent harm to their interests arising from the challenged rules. Instead they rely on broad, speculative allegations of future injury to their members including the costs of future ESA consultations, permit fees, costs of mitigation and operational changes, and exposure to agency enforcement actions or citizen suits. *See* Complaint ¶¶ 5-7. Plaintiffs rely on "uncertain and unspecific prediction[s] of future harm that [are] inadequate to establish Article III standing." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015).

Economic harm to a business may constitute an injury-in-fact giving rise to standing. *See*

Carpenters Indus. Council v. Zinke, 854 F.3d 1, 5 (D.C. Cir. 2017). However, a plaintiff alleging "that it will suffer future economic harm as the result of a government action" bears the burden of demonstrating "a substantial probability of injury-in-fact, causation, and redressability." *Id.* In *Carpenters Industrial Council*, the D.C. Circuit found that the plaintiff organizations met this burden where they represented lumber manufacturers that directly obtained timber from forest lands, and they alleged that the critical habitat designation for the Northern spotted owl would decrease their supply of lumber. 854 F.3d at 6. Relying on *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), the D.C. Circuit held that plaintiffs suffered injury-in-fact because the critical habitat rule would decrease the supply of raw material for the businesses, and they would be unable to find a replacement without incurring additional cost. *Carpenters Indus. Council*, 854 F.3d at 6. The court explained that a plaintiff must demonstrate: "(1) a substantial probability that the challenged government action will cause a decrease in the supply of raw material from a particular source; (2) a substantial probability that the plaintiff manufacturer obtains raw material from that source; and (3) a substantial probability that the plaintiff will suffer some economic harm as a result of the decrease in the supply of raw material from that source." *Id.* The critical habitat rule identified commercial timber harvest as the primary threat to the spotted owl, and FWS recommended that timber harvest be limited on lands included within the designation. *Id.* Citing declarations attesting that their member companies had already lost sales of their products and were threatened with the future loss of sales due to their inability to obtain enough timber to meet demand, the court held that plaintiffs had satisfied their burden to prove standing. *Id.* at 7.

By contrast, in this case Plaintiffs have not pointed to any lost grazing opportunities that had resulted from the challenged critical habitat rule as of the date they filed their Complaint.

Nor have they plausibly alleged that the rule is "substantially probable to cause a decline in" their access to federal grazing allotments. *See Carpenters Indus. Council*, 854 F.3d at 7. For example, in their comment letter on the proposed rule, Plaintiffs stated that a federal grazing permittee whose allotment falls within the Iron Mountain critical habitat unit "would be forced out of business by the loss of access" to summer pasture provided by the allotment. *See* Complaint, Ex. 1 (March 7, 2014 comment letter), ECF No. 1 at 23. Yet Plaintiffs fail to explain why it is substantially probable that the permittee would lose access to summer pasture or that other significant restrictions would be placed on the allotment. The critical habitat rule identifies not *all* grazing, but only *inappropriate* grazing as one of a number of threats to the species within the Iron Mountain critical habitat unit. *See* Ex. 1 at 59,084 (threats include inappropriate grazing, timber harvest and fuels reduction, recreational activities, disease, predation, and climate change). FWS stated in the final rule that it does not anticipate "the loss of or reduction in grazing activities on Federal lands designated as critical habitat." *Id.* at 59,054; *see also* Ex. 2 at A-3 ("Grazing: We anticipate that the USFS and NPS will participate in section 7 consultation with the Service during the timeframe of this analysis. No third parties are expected to participate in these consultations, and impacts are limited to the administrative costs of undertaking the consultation. In other words, incremental project modifications that would be implemented by ranchers are not expected to result from these consultations."). Plaintiffs offer no allegations to counter FWS' statements that (1) third parties will not participate in Section 7 consultations, and thus will not incur costs, and (2) that there will be no reduction in grazing activities resulting from consultations.

Plaintiffs' fears of future harm from lost grazing opportunities have thus far not been borne out. Rather, grazing allotments have not been affected by consultations occurring since the

critical habitat designation. For example, on June 15, 2017, FWS issued a letter addressing the effects of 56 projects in National Forests, including grazing allotments, on critical habitat for the Sierra Nevada yellow-legged frog and the Yosemite toad. *See* Appendage of 56 Projects in Six Forest Programs in Six National Forests to the Amended Programmatic Biological Opinion for the Endangered Sierra Nevada Yellow-legged Frog, Endangered Northern Distinct Population Segment of Mountain Yellow-legged Frog, and the Threatened Yosemite Toad (attached hereto as Exhibit 5).[2] FWS concluded that the projects are not likely to destroy or adversely modify designated critical habitat for these two species and did not impose any restrictions on grazing allotments beyond conservation measures that were already in place under the existing biological opinion. *See id.* at 10. Likewise, in a June 12, 2017 biological opinion, FWS concluded that continued authorization of livestock grazing on six allotments within the Humboldt-Toiyabe National Forest is not likely to destroy or adversely modify designated critical habitat for the species. *See* Concurrence and Biological Opinion for Continued Rangeland Management on the Carson and Bridgeport Ranger Districts, Alpine and Mono Counties, California, at 70-71 (attached hereto as Exhibit 6).[3]

Although the RFA is a procedural statute, Plaintiffs cannot rely on alleged procedural violations to relax their burden to demonstrate standing in this case. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555

[2] The Court may consider this letter in determining whether Plaintiffs have standing. *See Food & Water Watch v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) ("In determining standing, we may consider materials outside of the complaint.").

[3] The two allotments cited in Plaintiffs' March 7, 2014 comment letter, Iron Creek and Bear Valley (*see* ECF No. 1 at 23), have not yet been included in an update to an existing biological opinion addressing effects on critical habitat designated under the challenged rule.

U.S. 488, 496 (2009); *see also Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009) ("the omission of a procedural requirement does not, by itself, give a party standing to sue") (citation omitted). Plaintiffs cannot establish standing here because they fail to show that the alleged procedural violations injured them. *See N.Y. Reg'l Interconnect, Inc. v. Fed. Energy Regulatory Comm'n*, 634 F.3d 581, 587 (D.C. Cir. 2011) ("Even 'a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.'") (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664–65 (D.C. Cir. 1996)); *see also W. Wood Preservers Inst. v. McHugh*, 925 F. Supp. 2d 63, 72-72 (D.D.C. 2013) ("A plaintiff may establish standing based on a procedural injury only if (1) the government violated a procedural right that was designed to protect their threatened concrete interest, and (2) the violation in fact resulted in injury to that concrete, particularized interest.") (citing *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005)). As explained above, Plaintiffs have not demonstrated that any alleged procedural violation led to an actual or imminent threat to any concrete interest beyond speculative and generalized fears.

Finally, Plaintiffs face an even higher burden to show injury-in-fact here because they seek injunctive relief. *See* Complaint ¶¶ 39-44. Where injunctive relief is sought, the plaintiff has a "significantly more rigorous burden to establish standing." *Swanson*, 790 F.3d at 240 (citation omitted); *see also Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) ("[W]here a plaintiff 'seeks prospective. . . injunctive relief, he must establish an ongoing or future injury that is certainly impending'") (*quoting Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900 (2016)). Plaintiffs have not alleged facts showing that they have suffered

any cognizable injury, much less that they face an "imminent future injury." *Swanson*, 790 F.3d at 240. Plaintiffs fail to satisfy the first prong of the standing analysis, and their Complaint must be dismissed on this basis alone.

B. Plaintiffs Have Not Plausibly Alleged Causation.

Nor can Plaintiffs satisfy the second prong of the standing analysis, because their alleged injury is not fairly traceable to the challenged critical habitat designation. Plaintiffs allege that their members are subject to "direct and indirect regulatory burdens" because they use areas designated as critical habitat. *See* Complaint ¶ 2. However, any regulatory burdens on Plaintiffs' members would result, if at all, from an ESA Section 7 consultation on a federal action that may affect public lands used for livestock grazing. Yet Plaintiffs have not identified a single ESA Section 7 consultation affecting any such lands. Instead, Plaintiffs rely on speculation as to actions that third parties may take in the future. *See* Complaint ¶¶ 5-7 (alleging that members will be subject to "regulatory burdens" that impose costs, agency enforcement actions, and citizen suits). This is insufficient to satisfy the second prong of the standing analysis. *See Arpaio*, 797 F.3d at 19 ("The 'causal connection between the injury and the conduct complained of' must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'") (quoting *Lujan*, 504 U.S. at 561).

Designating an area as critical habitat does not directly impose costs on private parties or prohibit them from using that land. *See* Ex. 1 at 59,056 ("The act of designating critical habitat does not summarily preclude access to any land, whether private, tribal, State, or Federal."); *contra* Complaint ¶¶ 5-7. The Court need not accept Plaintiffs' allegations to the contrary. *See Mountain States Legal Found. v. Bush*, 306 F.3d 1132 1134-35 (D.C. Cir. 2002) (in ruling on motion to dismiss, court need not "'accept legal conclusions cast in the form of factual

allegations'") (*quoting Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). Rather, the direct effect of a critical habitat designation is to trigger the requirement of ESA Section 7(a)(2) for federal agencies to ensure that any action they authorize, fund, or carry out is not likely to "result in the destruction or adverse modification" of the critical habitat. 16 U.S.C. § 1536(a)(2).

Plaintiffs' view that a critical habitat designation directly imposes regulatory burdens is flawed for several reasons. First, Section 7(a)(2) does not apply to *all* federal actions, but only to those in which there is "discretionary Federal involvement or control." 50 C.F.R. § 402.03. Second, formal consultation with FWS is required only where the action agency determines that the proposed action is "likely to adversely affect" a listed species or the designated critical habitat of a listed species. 50 C.F.R. §§ 402.13(a), 402.14(a)–(b); *see also* Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (1998) ("Consultation Handbook") at 3-12—3-13 (*available at* https://www.fws.gov/endangered/esa-library/index.html#consultations, last visited Nov. 17, 2017) (excerpt attached hereto as Exhibit 7). Third, FWS has interpreted Section 7 to prohibit modification or destruction of designated critical habitat only to the extent that the survival or recovery of affected species would be appreciably reduced. *See id.* at 4-35. If FWS issues a biological opinion concluding that the proposed action will result in destruction or adverse modification of critical habitat, the agency is required to identify any "reasonable and prudent alternatives" that the action agency can adopt to avoid violating Section 7. *See* 50 C.F.R. § 402.14(g), (h). Thus, even if formal consultation is required and it results in a finding of destruction or adverse modification of critical habitat, the proposed action may still proceed subject to certain restrictions.

The parties directly regulated by a critical habitat designation are federal action agencies, and it is their future actions that would give rise to any injury suffered by Plaintiffs' members. Where, as here, a plaintiff relies on "the anticipated action of unrelated third parties" it is "considerably harder to show the causation required to support standing." *Arpaio*, 797 F.3d at 20. The Court should reject as speculative Plaintiffs' allegations that future consultations will result in costs to their members or restrictions on grazing rights. *See id.* at 21 ("[w]hen considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)") (*quoting United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C.Cir.1989)). Indeed, as explained above, the outcome of consultations undertaken since the critical habitat rule was issued support the opposite conclusion: that *no* additional restrictions will be imposed on their grazing allotments. *See supra* Section I.A.

Nor do allegations about future agency enforcement actions or citizen suits satisfy Plaintiffs' heightened burden to show causation. Not only are such allegations overly speculative predictions of future actions by third parties, but they are based on incorrect legal conclusions. A critical habitat designation does not expose a private party to an increased risk of enforcement actions by the federal government or third parties under ESA Section 9 because the prohibited acts under that section do not include destruction or adverse modification of critical habitat. *See* 16 U.S.C. § 1538(a)(1) (prohibiting, among other things, "take" of listed wildlife species); *see also id.* § 1532(19) (defining "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"). The obligation to avoid destruction or adverse modification applies only to federal agencies, *see id.* § 1536(a)(2), and as explained above Plaintiffs have not plausibly alleged that the critical habitat designation will change the outcome of any ESA Section 7

consultation regarding public lands that their members use for livestock grazing. A private party could be liable for "take" of a listed species under Section 9, but that risk of liability arises when the listing rule goes into effect. The critical habitat designation does not create an additional source of liability for landowners under Section 9, and the Court need not accept Plaintiffs' contrary legal conclusions. *See Mountain States*, 306 F.3d at 1134-35.

Plaintiffs cannot establish causation in light of the number of intervening events that must occur before the critical habitat designation would result in modifications to grazing rights, administrative costs, or other burdens on their members. *See Fla. Audubon Soc'y*, 94 F.3d at 670 ("Such a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury."). Thus, Plaintiffs also fail to satisfy the second prong of the standing analysis.

C. Plaintiffs' Alleged Injuries Are Not Redressable By the Court.

Finally, Plaintiffs lack standing because their alleged injuries are not redressable by this Court. "The redressability inquiry poses a simple question: '[I]f plaintiffs secured the relief they sought, . . . would [it] redress their injury'?" *The Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (*quoting Mountain States*, 92 F.3d at 1233).

Even if Plaintiffs succeeded on the merits of their claims and the Court granted their request for declaratory and injunctive relief, *see* Complaint at 13-14 (Prayer for Relief), it would not redress their alleged injuries. Neither a declaratory judgment stating that the RFA applies to critical habitat designations nor remand of the rule to FWS to complete an RFA analysis would change the outcome here. As explained above, the Economic Analysis evaluated the economic impacts anticipated to arise from consultations on grazing activities occurring on National Forest

lands and concluded that the foreseeable economic injuries would stem from consultation costs that Federal agencies would bear. *See* Ex. 2 at ES-13; *id.* at 4-14 – 4-19. The other impacts alleged by Plaintiffs – study costs, risk assessments, mitigation fees, operational changes, and permit fees – are speculative future costs that cannot be reliably predicted or estimated. Even if ordered to undertake an RFA analysis for livestock grazing, FWS would not be able to predict the economic effects arising from uncertain future Section 7 consultations that may or may not indirectly affect Plaintiffs' members.

Plaintiffs lack standing because, even if accepted as true, the allegations in the Complaint do not show that Plaintiffs have suffered a cognizable injury that is traceable to Defendants and redressable by the Court. Thus, Plaintiffs have not met their burden to demonstrate standing and their Complaint must be dismissed for lack of subject matter jurisdiction.

II. THE COURT ALSO LACKS JURISDICTION BECAUSE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW.

The Court lacks jurisdiction over Plaintiffs' claims for an additional reason: the claims are not ripe for judicial review. "The 'basic rationale' of the ripeness doctrine 'is 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." *Cement Kiln Recycling Coal. v. Envtl. Prot. Agency*, 493 F.3d 207, 214 (D.C. Cir. 2007) (*quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). Courts determine whether an administrative action is ripe for judicial review by evaluating "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 808 (2003). Here Plaintiffs' claims are not ripe for review because they are unfit for judicial decision and the

parties would not suffer any significant hardship if the Court withheld consideration.

A. Plaintiffs' Claims Are Not Fit for Judicial Review.

A regulation "is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Although "[c]laims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues . . . even purely legal issues may be unfit for review." *Atl. States Legal Found. v. Envtl. Prot. Agency*, 325 F.3d 281, 284 (D.C. Cir. 2003) (citations omitted).

There has been no concrete action applying the challenged critical habitat designation in a way that harms Plaintiffs' members. Instead plaintiffs rely on speculative future injuries which may not occur. *See id.* ("a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (*quoting Texas v. United States*, 523 U.S. 296, 300 (1998)). The "direct and indirect regulatory burdens" alleged by Plaintiffs, Complaint ¶ 2, could not arise absent a consultation affecting the areas used by the members for grazing and livestock production. *See supra* Section I.B. Plaintiffs' grievance would be better litigated in the context of a challenge to a Section 7 consultation resulting in a biological opinion that restricts members' grazing allotments. At this time, any potential future injury to Plaintiffs is not yet concrete enough to create a controversy that is ripe for review.

B. Withholding Review Will Not Cause Substantial Hardship to the Parties.

Withholding court consideration of Plaintiffs' claims until the critical habitat rule has been applied in a concrete way would not cause the parties significant hardship. Plaintiffs cannot

show that they will suffer any injury from delayed review because "[t]hey are 'not required to engage in, or to refrain from, any conduct.'" *Atl. States*, 325 F.3d at 285 (*quoting Texas*, 523 U.S. at 301). As explained above, Plaintiffs have not alleged that their members are presently subject to any restrictions on their ability to use their grazing allotments as a result of the critical habitat rule. *See supra* Section I.A. Assuming that Plaintiffs can state a claim for relief, *see infra* Section III., they may raise their claims in a new lawsuit if such restrictions are imposed in the future. *See Atl. States*, 325 F.3d at 285 ("The need to bring fresh litigation is not a reason for finding an issue ripe.").

Plaintiffs' claims are not fit for judicial review and withholding court consideration would not impose any cognizable hardships on the parties. Therefore, the Court lacks jurisdiction and should dismiss Plaintiffs' claims as unripe.

III. PLAINTIFFS CANNOT STATE A CLAIM FOR RELIEF BECAUSE THEY ARE NOT WITHIN THE ZONE OF INTERESTS SOUGHT TO BE PROTECTED BY THE RFA.

Even assuming that the Court has jurisdiction in this case, Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because their alleged interests are not within the zone of interests protected by the RFA. "[A]s the Supreme Court has explained, constitutional standing is not the end of the game because the 'question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005) (*quoting Bennett v. Spear*, 520 U.S. 154, 162 (1997)). "Prudential standing requires 'that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory

provision.'" *Id.*[4] A plaintiff seeking judicial review of an agency action must establish that the alleged injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan*, 497 U.S. at 883 (citation omitted).

Even assuming, for purposes of this motion, the truth of Plaintiffs' allegations that they are small entities under the RFA, they do not meet the zone of interests test. *See* Complaint ¶ 8. The RFA protects only those small entities that are directly regulated under the proposed regulation. *See* 5 U.S.C. § 603(b)(3), (4); *Mid-Tex Elec. Coop. Inc. v. Fed. Energy Regulatory Comm'n*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("The problem Congress stated it discerned was the high cost to small entities of compliance with uniform regulations, and the remedy Congress fashioned—careful consideration of those costs in regulatory flexibility analyses—is accordingly limited to small entities subject to the proposed regulation."); *Cement Kiln*, 255 F.3d at 869 ("this court has consistently rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities") (citations omitted); *Am. Trucking Ass'ns v. Envtl. Prot. Agency*, 175 F.3d 1027, 1044 (D.C. Cir. 1999) (EPA air quality standards regulate small entities indirectly through state implementation plans, thus EPA's regulatory standards do not have a direct impact on those small entities); *Nat'l Women, Infants, & Children Grocers Ass'n v. Food and Nutrition Serv.*, 416 F. Supp. 2d 92, 108-10 (D.D.C. 2006) (rejecting RFA claim raised by food vendors to interim rule implementing supplemental food program because rule directly regulated only the actions of state agencies).

[4] The Supreme Court subsequently clarified that "prudential standing" is a misnomer, and that the zone of interests test is not jurisdictional but instead goes to whether the plaintiff has a cause of action under the relevant statute. *See Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1387 (2014).

Plaintiffs are not directly regulated by the critical habitat designation. The only effect of a critical habitat designation is that federal agencies must, in the future, consult to avoid adverse modification of that critical habitat. *See supra* Section I.A.; *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Thus, the directly regulated entities are federal agencies taking actions that may adversely affect critical habitat. *See Idaho Cty. v. Evans*, Case No. CV02-80-C-EJL, 2003 U.S. Dist. LEXIS 23459, at *18-19 (D. Idaho Sept. 30, 2003) (upholding agency's certification that rule was exempt from RFA analysis with respect to plaintiffs because the rule regulates federal agencies, not small businesses). Plaintiffs' use of public lands for livestock grazing does not render them regulated entities under the ESA. Rather, the injuries that Plaintiffs allege – study costs, risk assessments, mitigation fees, operational changes, permit fees, and consulting expenses – are examples of indirect economic effects that are not within the zone of interests sought to be protected by the RFA. *See* Complaint ¶¶ 5-7; *see also Mid-Tex Elec. Coop.*, 773 F.2d at 343 ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy"); *Cement Kiln*, 255 F.3d at 869 ("The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.") (*citing Mid-Tex Elec. Coop.*, 773 F.2d at 343).

A decision from another court in this District is instructive here. *See Permapost Prods., Inc. v. McHugh*, 55 F. Supp. 3d 14 (D.D.C. 2014). In that case the plaintiffs were trade associations and four member companies that either manufactured treated wood products or designed, sold, and installed systems containing treated wood products. *Id.* at 20. The wood is

used in projects that may require permits under Section 404 of the Clean Water Act. The plaintiffs challenged the government's approval of (1) regional conditions to nationwide permits under the Clean Water Act, and (2) a set of procedures used by the U.S. Army Corps of Engineers in carrying out consultations under the ESA. *Id.* at 18-19.

The court dismissed the plaintiffs' claims alleging that the Corps had violated the RFA, holding that the plaintiffs did not meet the zone of interests test because they are not directly regulated by the regional conditions or the consultation procedures. *Id.* at 30 ("Because none of the plaintiffs are 'subject to the requirements of the' Regional Conditions or [consultation] procedures, their interests do not fall within the zone of interests protected by the RFA and thus they lack prudential standing to bring their RFA claims.") (*citing Mid–Tex Elec. Coop.*, 773 F.2d at 342). Likewise, in this case Plaintiffs' RFA claims must be dismissed because they are not subject to the requirements of, or directly regulated by, the critical habitat designation.

CONCLUSION

Even accepting as true all allegations in Plaintiffs' Complaint, Plaintiffs cannot meet their burden to show standing because they have not alleged a cognizable injury that is traceable to Defendants. Plaintiffs' claims also are not ripe for review, and any hardship from delayed review would be minimal. Thus, Plaintiffs' Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Alternatively, Plaintiffs' Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief because Plaintiffs' alleged interests are not within the zone of interests protected by the RFA.

Respectfully submitted this 22nd day of November, 2017.

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