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, and CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Defendant-Intervenors.	Case No: 1:17-cv-01536-TNM **DEFENDANT-INTERVENORS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**

Defendant-Intervenors Center for Biological Diversity, Central Sierra Environmental Resource Center, and Western Watersheds Project (collectively the "Center") respectfully move this Court to dismiss Plaintiffs' Complaint (ECF No. 1) under FED. R. CIV. P. 12(b)(1) or 12(b)(6). This motion and following memorandum are filed in support of and to supplement Federal Defendants' correlating motion and memorandum, ECF No. 11, and are consistent with LCvR 7(a) and this Court's February 6, 2018 Order, ECF No. 34.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

Plaintiffs allege mere speculative, future injuries, and do not allege a plausible chain of events by which any of those alleged injuries could occur as a result of the challenged critical habitat designation. As such, the Court should dismiss this case for lack of subject matter jurisdiction under Rule 12(b)(1). Alternatively, the Court should dismiss this case for failure to state a claim upon which relief can be granted under Rule 12(b)(6). The Regulatory Flexibility Act ("RFA") provides no jurisdiction for the Court to consider Plaintiffs' claims regarding an initial regulatory flexibility analysis under 5 U.S.C. § 603. Additionally, judicial review of an agency's compliance with 5 U.S.C. § 604 of the RFA is only available for entities that are directly regulated by a challenged rule, and Plaintiffs have not sufficiently alleged that they or any of their members qualify as such an entity.

II. BACKGROUND

Plaintiffs claim the U.S. Fish and Wildlife Service ("Service") violated RFA procedures when it designated critical habitat under the Endangered Species Act ("ESA") for three amphibian species: the Sierra Nevada yellow-legged frog (*Rana sierrae*), the northern population of the mountain yellow-legged frog (*Rana muscosa*), and the Yosemite toad (*Anaxyrus canorus*). Compl.¶ 1, ECF No. 1. Plaintiffs assert the Service was required to prepare an initial regulatory flexibility analysis under 5 U.S.C. § 603 and a final regulatory flexibility analysis under 5 U.S.C. § 605 before doing so. *Id*. at ¶¶ 46-50. However, as the Center shows below, these claims are not properly before the Court because Plaintiffs' lack standing and, additionally, do not qualify for judicial review under the RFA.

A. Statutory Background[1]

To protect imperiled species and meet the requirements of the ESA, the Service must designate critical habitat when it lists a species under Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(a)(1). *See id.* § 1533(a)(3) ("[T]o the maximum extent prudent and determinable [the Secretary] shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat"). The function of critical habitat is to protect the species "by triggering what is termed a Section 7 consultation in response to actions proposed by or with a nexus to a federal agency." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Section 7 consultation requires federal agencies to work with the Service to ensure that any action they authorize, fund, or carry out is not likely to "jeopardize the continued existence" of any species or "result in the destruction or adverse modification" of its critical habitat. *Id*.

B. Factual Background[2]

On April 29, 2014, the Service listed the Sierra Nevada yellow-legged frog, the northern distinct population segment of the mountain yellow-legged frog, and the Yosemite toad as threatened with extinction under the ESA. 79 Fed. Reg. 24,256 (April 29, 2014). A majority of the area occupied by the three amphibians and designated as their critical habitat lies within ten

[1] The Center agrees with and hereby incorporates the statutory background in the Service's memorandum. Defs' Mot. to Dismiss 2-5, ECF No. 11-1.

[2] The Center agrees with and incorporates by reference the factual background presented by the Service. Defs' Mot. to Dismiss 5-7, ECF No. 11-1.

national forests in the Sierra Nevada in California. Federal agencies manage more than 95 percent of the lands designated as critical habitat.[3] 81 Fed. Reg. 59,046, 59,052 (Aug. 26, 2016).[4]

After the Service listed the species under the ESA, the U.S. Forest Service ("Forest Service") consulted with the Service to obtain its opinion as to programmatic effects of forest management on the amphibians in nine of those National Forests.[5] *See* U.S. FISH AND WILDLIFE SERVICE, PROGRAMMATIC BIOLOGICAL OPINION ON NINE FOREST PROGRAMS ON NINE NATIONAL FORESTS IN THE SIERRA NEVADA OF CALIFORNIA (Dec. 19, 2014), https://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/Documents/USFS_SNA_pbo.pdf. The Service found that the programmatic effects of forest management would not jeopardize any of the three amphibian species. *Id*. at 66. Subsequently, the Forest Service consulted with the Service to obtain its opinion at to effects on the amphibians of implementing site-specific projects on the forests. *See* U.S. FISH AND WILDLIFE SERVICE, APPENDAGE OF PROJECTS IN SEVEN FOREST PROGRAMS IN NINE NATIONAL FORESTS IN THE SIERRA NEVADA TO THE PROGRAMMATIC BIOLOGICAL OPINION (Feb. 17, 2015), https://www.fws.gov/sacramento/es/Survey-Protocols-Guidelines/Documents/USFS_PBO_appendage_2_17_2015.pdf. Again, the Service found that implementing site-specific projects would not jeopardize the continued existence of any of the three species. *Id*. at 3.

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[3] The Forest Service manages 61 percent of the area designated as critical habitat, and the National Park Service manages 36 percent.

[4] Filed as Exhibit 1 to Federal Defendants' Motion to Dismiss, ECF No. 11-3.

[5] The Humboldt-Toiyabe National Forest was not included in this consultation because it falls within the Forest Service's Intermountain region (Region 4), whereas the other nine Forests are all located within the Pacific Southwest Region (Region 5). *See* Defs' Mot. to Dismiss Ex. 3, at 3, ECF No. 11-8 (Concurrence and Biological Opinion)).

Subsequently, on August 26, 2016, the Service designated critical habitat for the three species, which became effective 30 days later. 81 Fed. Reg. 59,046 (Aug. 26, 2016). The Service designated as critical habitat only those areas that it considers to be occupied by one or more of the three species. *Id*. at 59,071-72. The Forest Service then reinitiated consultation with the Service as to the programmatic effects on the species of the designation of critical habitat in nine National Forests, as well as to the effects of implementing 56 projects in six of those forests. *See* Defs' Mot. to Dismiss Ex. 5, at 1, ECF No. 11-7 (Appendage of 56 Projects). That resulted in another biological opinion, which the Service issued on June 15, 2017. *Id*. The Service found that the continuation of the Forest Service's programmatic management and site-specific projects in the national forests would not destroy or adversely modify critical habitat for the three species. *Id*. at 10

Plaintiffs filed this lawsuit on July 31, 2017. Compl., ECF No.1.

III. STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(1), the 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)). However, the court need not accept as true the plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal is proper under Rule 12(b)(6) if a complaint fails to allege sufficient facts to state a claim for relief that is facially plausible. *Id*. at 679 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The complaint must do more than allege legal conclusions: "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

IV. ARGUMENT

A. Plaintiffs Fail to Demonstrate Standing

Article III of the Constitution limits federal courts' jurisdiction to cases and controversies. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). One element to satisfy the case-or-controversy requirement is that a plaintiff must have standing. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005) (citing *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915-16 (D.C. Cir. 2003)). To establish standing, a plaintiff must demonstrate it (1) has suffered some actual or threatened injury in fact (2) that is fairly traceable to the defendant's actions and (3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). A plaintiff bears the burden of establishing each element of standing. *Id*. at 561.

Plaintiffs here fail to allege facts sufficient to prove that they have suffered or will suffer an injury-in-fact that is traceable to the designation of critical habitat.

1. Plaintiffs Fail to Sufficiently Allege Injury-in-Fact

Plaintiffs do not allege any specific harm they in fact have suffered due to the designation of critical habitat. Nor do they sufficiently allege any imminent or concrete future harm they may suffer due to the designation. Instead, they allege hypothetical and speculative possible injuries such as study costs; risk assessments; mitigation and permit fees; and exposure to legal enforcement actions, none of which have occurred or are imminently likely to occur. Compl. ¶¶ 5-7. Although a court must accept as true all material allegations of the complaint on a motion to dismiss, where a plaintiff alleges it will suffer future economic harm as the result of a government action, plaintiffs "must demonstrate a *substantial probability* of injury-in-fact." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (emphasis added) (citations

omitted). Here, Plaintiffs fail to demonstrate there is a substantial probability that they will suffer from the injuries alleged in their Complaint.

In fact, no evidence indicates that the completed consultations under Section 7 to date have had any impacts at all in terms of changing or altering management of the public livestock grazing allotments the Plaintiffs' members allegedly use. *Cf.* Compl. ¶ 5-7. In its opinion of effects on critical habitat of 56 different projects, including livestock grazing on certain allotments, in no instance did the Service find that a *single* site-specific project was likely to prevent the recovery of the species or "appreciably reduce the value of the[ir] critical habitats." Defs' Mot. to Dismiss Ex. 5, at 9, ECF No. 11-7.[6] Instead, the Service found that mandatory conservation measures put into place *before* critical habitat was designated were sufficient to ensure the projects are not likely to destroy or adversely modify designated critical habitat. *Id.* at 10. The designation of critical habitat, and the completed consultation processes, have done nothing to cause any "significant reduction or elimination of grazing rights," Compl. ¶ 5-6, or any other specific harm to Plaintiffs. Because Plaintiffs fail to plausibly allege injury-in-fact to their members, they fail to meet the first element of the standing analysis, and the case must be dismissed on that ground alone. *See Double R Ranch Trust v. Nedd*, No. 17-cv-438 (CMC), 2018 U.S. Dist. LEXIS 7743, at *18 (D.D.C. Jan. 18, 2018) (dismissing case due to lack of standing where plaintiffs' complaint was "replete with references to the negative consequences of designation" of a wild and scenic river, but none were shown to have occurred or to be imminent).

[6] None of the fifty-six site-specific projects would occur in critical habitat for the northern DPS of mountain yellow-legged frog. Exh. 5 to Defs' Mot. to Dismiss, at 5 (ECF No. 11-7).

2. The Alleged Injuries Are Not Traceable to the Service's Designation

Plaintiffs also fail to meet their burden to demonstrate that their alleged injuries are fairly traceable to the designation of critical habitat. Again, the designation of critical habitat does not directly regulate private parties, such as Plaintiffs or their members. Rather, it requires federal agencies to consult under Section 7 of the ESA. 16 U.S.C. § 1536(a)(2). Where plaintiffs alleged injuries arise from agency actions that may govern third parties, rather than from the government's regulation of plaintiffs themselves, it is "'substantially more difficult' to establish standing." *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Lujan*, 504 U.S. at 562) (additional citations omitted), *cert. denied*, 545 U.S. 1104 (2005). Article III standing requires that federal courts act "only to redress injury that fairly can be traced to the challenged action of the defendant, *and not injury that results from the independent action of some third party not before the court*." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added).

Because the injuries that Plaintiffs allege would derive from these third-party actions and decisions, rather than from any requirement of the critical habitat designation itself, Plaintiffs have a high burden to establish that their alleged injuries are fairly traceable to the designation. Plaintiffs allege a highly speculative list of future injuries, but none are "fairly traceable" to the critical habitat designation. In fact, as discussed above, federal consultations found no "adverse modification" of critical habitat and therefore have not led to additional restrictions or fees related to grazing. Nowhere in the Complaint do Plaintiffs attempt to establish a plausible chain of events that would cause any injuries. Because Plaintiffs fail to allege facts sufficient to establish a strong causal link between the rule and their alleged injuries, they fail to comply with the second element of the standing analysis, and the case must be dismissed.

B. The Court Lacks Jurisdiction Over Plaintiffs' 5 U.S.C. § 603 Claim

This Court lacks jurisdiction to review Plaintiffs' challenge to the Service's decision not to conduct an initial regulatory flexibility analysis under 5 U.S.C. § 603. An agency's compliance with the RFA "shall be subject to judicial review *only* in accordance with" section 611 of the statute. *Id*. § 611(c) (emphasis added). Congress limited judicial review for the RFA to claims regarding "agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 . . . ." *Id*. § 611(a)(1); *see also id.* § 611(c). The listed sections do not include section 603; thus, Plaintiffs' claim that the Service violated that section must be dismissed for lack of jurisdiction. *Allied Local & Reg'l Mfrs. Caucus v. U.S. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000) (court was without jurisdiction to consider challenge to EPA's compliance with Section 603), *cert denied*, 532 U.S. 1018 (2001).

C. Plaintiffs Fail to State a Claim Upon Which Relief Can be Granted

Plaintiffs allege that the Service violated Section 604 of the RFA. Although that claim is within the scope of the RFA's judicial review provision, it must be dismissed for failure to state a claim upon which relief can be granted. Judicial review of an agency's compliance with section 604 of the RFA is only available for "a small entity that is adversely affected or aggrieved by final agency action." 5 U.S.C. § 611(a)(1). The D.C. Circuit has clarified that the RFA only requires an agency to consider the impact an action will have on entities that are directly regulated by that action. *Mid-Tex Elec. Coop. v. Fed. Energy Reg. Comm'n*, 773 F.2d 327, 342-43 (D.C. Cir. 1985) ("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 economy"); *Cement Kiln Recycling Coal. v. U.S. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("[T]his court has consistently rejected the contention that the RFA applies to small businesses

indirectly affected by the regulation of other entities." (citations omitted)). As the D.C. Circuit explained in *Mid-Tex*, this conclusion follows from the language of the statute, which indicates that Congress was concerned with the impact an agency's actions would have on entities that will actually be subject to a regulation. 773 F.2d at 342; *see* 5 U.S.C. § 603(b)(3), (4) (initial regulatory flexibility analysis must include description and estimate of number of small entities "to which the proposed rule will apply," and an estimate of classes of small entities that will be subject to the compliance requirement of a rule); 5 U.S.C. § 604(a)(4), (5) (stating similar requirements for final regulatory flexibility analysis).

Plaintiffs do not sufficiently allege they are directly subject to the critical habitat rule. Their claims are based on allegations that the critical habitat designation subjects their "members to substantial regulatory burdens that impose, among other things, study costs, risk assessments, mitigation fees, operational changes, permit fees, and consulting expenses." Compl. ¶¶ 5-7. However, Plaintiffs do not allege that the critical habitat designation would directly regulate their members, and instead appear to rely on this speculative laundry list of potential indirect effects. *Id*. But again, only federal agencies are directly affected by a critical habitat designation under the ESA; restrictions imposed by critical habitat designations are limited to actions involving "discretionary [f]ederal involvement or control." 50 C.F.R. § 402.03. Because the clear language of the ESA demonstrates that only federal agencies are directly subject to this regulation, Plaintiffs are not within the zone of interests regulated by the RFA. *See Permapost Prods. v. McHugh*, 55 F. Supp 3d 14, 30 (D.D.C. 2014) (finding plaintiffs' interests did not fall within the zone of interests protected by the RFA because none of the plaintiffs were subject to the requirements of the disputed regulations); *Idaho Cty. v. Evans*, No. CV02-80-C-EJL, 2003 U.S. Dist. LEXIS 23459, at *18-19 (D. Id. Sept. 30, 2003) (finding that an RFA analysis was not

required because there was no "direct" regulation of small entities by the final rule since the rule regulates federal agencies, not small businesses).

Plaintiffs also allege that the designation of critical habitat subjects its members to citizen suits and agency enforcement actions under the ESA, as well as other federal and state laws. Compl. ¶¶ 5-7. However, Plaintiffs again fail to allege how a critical habitat designation creates any legal causes of action against them. Critical habitat has been designated almost entirely on federal public lands. 81 Fed. Reg. at 59,052. While a citizen suit may be brought against a federal agency for its failure to consult with the Service to ensure that a project is not likely to "result in the destruction or modification of [critical] habitat," such a suit could not be brought against small entities because Section 7 only applies to federal actions. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.03, 402.14. In addition, Plaintiffs' claims must be dismissed because the critical habitat rule does not directly regulate them, nor are they subject to compliance requirements of the critical habitat designation.

V. CONCLUSION

For all the reasons explained above and in Federal Defendants' briefing, the Court should dismiss this case.

Dated: February 27, 2018.

Respectfully submitted,

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