DAMIEN M. SCHIFF, No. 235101
E-mail: dms@pacificlegal.org
JONATHAN WOOD, No. 285229
E-mail: jw@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al.,

Plaintiffs,

v.

RACHEL JACOBSON, et al.,

Defendants.

and

FRIENDS OF THE SEA OTTER, et al.,

Intervenor-Defendants,

and

THE OTTER PROJECT, et al.,

Intervenor-Defendants.

No. 2:13-cv-05517-DMG-CW

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

Date: December 6, 2013
Time: 9:30 a.m.
Judge: Hon. Dolly M. Gee
Place: Courtroom 7, 2nd Floor

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

TABLE OF CONTENTS

Page

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

TABLE OF AUTHORITIES

Page

Cases

Statutes

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

INTRODUCTION

In this case, Plaintiffs (fishermen) challenge a final rule recently adopted by Defendants (the Service) terminating the Southern sea otter management zone and its protections for southern California fisheries and fishermen. The Service moves to dismiss on both failure to state a claim and jurisdictional grounds, but both raise a single issue—whether the statute of limitations has run on Plaintiffs' claim. The statute of limitations for challenging final agency actions under the Administrative Procedure Act (APA) is six years. On December 19, 2012, the Service adopted a rule exposing fishermen to criminal prosecution despite a statutory exemption for their activities. On July 31, 2013—only seven months after the rulemaking became final—the fishermen filed this complaint. Because the complaint was filed less than six years after the rulemaking became final the Service's Motion to Dismiss must be denied.

The Service argues otherwise. It claims that, because the fishermen's statutory argument would mean that a regulation adopted in 1987 is also illegal, the fishermen could only have brought their claim in a challenge to the 1987 regulation. But the Service's argument overlooks a key distinction between this case and those on which it relies—the more recent final agency action challenged here. In the cases dismissing APA claims as time-barred, the plaintiffs challenged the continued enforcement of a regulation adopted more than six years earlier. But in none of these cases did the plaintiff challenge an agency action that became final within six years of the filing of the complaint. Nor did the courts dismiss a timely-filed complaint on the grounds that its legal arguments would imply that an older regulation was also illegal. Because the APA gives the fishermen the right to challenge the 2012 rulemaking as inconsistent with the statute if brought within six years of when it became final, the fishermen have sufficiently stated a claim which this Court has jurisdiction to hear.

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

BACKGROUND

In 1986, Congress adopted P.L. 99-625, 100 Stat. 3500 (1986), authorizing the Service to relocate California sea otters outside their then existing range. Complaint for Declaratory and Injunctive Relief (Compl.) ¶ 27. The statute also imposes conditions on this authority, including: an obligation that the Service establish a "management zone" surrounding the newly created population; remove any otters found within this zone using all feasible nonlethal means; and an exemption from the provisions of the Marine Mammal Protection and Endangered Species Acts for any person who, while engaged in an otherwise lawful activity, harms an otter in this zone. Compl. ¶¶ 27-30. Although the Service's decision to exercise the authority granted in the statute was discretionary, these conditions became mandatory once exercised—the statute provides no authority for the Service to excuse itself from these obligations. Compl. ¶ 31.

In 1987, the Service exercised the authority given in the statute by adopting a regulation establishing the translocation program and a management zone from Point Conception to the Mexican border. Compl. ¶¶ 32-33; 52 Fed. Reg. 29,754 (Aug. 11, 1987). In this 1987 regulation the Service also asserted—but did not exercise—the authority to declare the program a failure and annul the statutory conditions. Compl. ¶ 34.

Twenty-five years later, the Service adopted a final rule terminating the program and relieving itself of its obligations under the statute. Compl. ¶ 53; 77 Fed. Reg. 75,266 (Dec. 19, 2012). In doing so, the Service relied on the assertion of authority and termination criteria contained in the 1987 regulation. Compl. ¶ 53; 77 Fed. Reg. 75,266.

This 2012 rulemaking is the subject of the fishermen's suit. Compl. ¶ 1. They assert that it is illegal because the Service cannot avoid these conditions having exercised the authority to which Congress attached them. *Id*.

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

ARGUMENT

The Service moves to dismiss this challenge to the 2012 rulemaking as time-barred. Def.'s Not. of Mot. & Mot. to Dismiss at 2. The 2012 rulemaking was adopted as a final rule on December 19, 2012. Compl. ¶ 53; 77 Fed. Reg. 75,266. The APA provides a cause of action to challenge any final agency action. 5 U.S.C. § 704. The statute of limitations for these challenges is six years from the date that the agency action became final. 28 U.S.C. § 2401(a); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010). Because the fishermen filed this case challenging the 2012 rulemaking—a final agency action subject to judicial review under the APA—less than eight months after it became final, its challenge cannot be dismissed as time-barred.

I

THE FISHERMEN'S CHALLENGE TO THE 2012 RULEMAKING CANNOT BE DISMISSED BECAUSE IT WAS BROUGHT LESS THAN SIX YEARS AFTER IT BECAME FINAL

The APA provides a cause of action to challenge any final agency action for which there is no other adequate opportunity for judicial review. 5 U.S.C. § 702. A formally adopted final rule is a "final agency action" under this section. *See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1363 (9th Cir. 1990).

Here, the Service adopted a final rule, the 2012 rulemaking, excusing it from complying with the conditions in the statute. Compl. ¶¶ 53-54; 77 Fed. Reg. 75,266. Because neither the statute nor any other law provides the fishermen an adequate opportunity to obtain judicial review of this final agency action, they have a claim under the APA. *See* 5 U.S.C. § 702; P.L. 99-625.

The statute of limitations for APA claims is six years from the date that the claim arose. 28 U.S.C. § 2401(a); *Hells Canyon Pres. Council*, 593 F.3d at 930. An APA challenge to a final agency action arises when the action becomes final. *See*

///

5 U.S.C. § 704. For purposes of a rulemaking, this is when it is adopted as a final rule and published in the federal register. *See Shiny Rock*, 906 F.2d at 1363.

The 2012 rulemaking became final on December 19, 2012, when it was adopted as a final rule and published in the federal register. *See* 77 Fed. Reg. 75,266. The time for bringing an APA challenge to the 2012 rulemaking will expire on December 18, 2018. *See* 28 U.S.C. § 2401(a). The fishermen filed their complaint on July 31, 2013. *See* Compl. Because the fishermen filed their challenge to the 2012 rulemaking less than six years after it became final, they have alleged a valid APA claim which cannot be dismissed under Rule 12(b)(6).[1]

II

THE FISHERMEN DO NOT MERELY CHALLENGE THE CONTINUED ENFORCEMENT OF A REGULATION MADE FINAL MORE THAN SIX YEARS AGO

The Service's argument obscures the essential distinction between this case and those on which it relies—less than a year ago the Service took a final agency action that is subject to challenge under the APA. That agency action—the 2012 rulemaking—is invalid because it exceeds the Service's statutory authority.

In the cases on which the Service relies, plaintiffs directly challenged stale regulations more than six years after they became final, and not agency actions of

[1] The Service also moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the grounds that this Court has no jurisdiction to hear an APA challenge once the statute of limitations has run. Def.'s Mem. of Ps & As at 13-14. However, the Ninth Circuit has held that the statute of limitations in 28 U.S.C. § 2401(a) is not a bar to jurisdiction. *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). Although the Service asserts a belief that *Cedars-Sinai Medical Center* should be overruled according to the reasoning in *John R. Sand & Gravel Company v. United States*, 552 U.S. 130 (2008), the Ninth Circuit has not done so. *See Aloe Vera of Am. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009). Since the Service's argument is contrary to precedent, this Court cannot dismiss this case as beyond its jurisdiction.

And if *Cedars-Sinai Medical Center* did not foreclose the Service's argument, it would have to be rejected because the fishermen brought their APA challenge to the 2012 rulemaking within the six-year statute of limitations.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

more recent vintage. These cases concern whether the ongoing enforcement of a stale regulation can be challenged notwithstanding the fact that the only final agency action was the adoption of the regulation more than six years earlier. In *Shiny Rock*, a mining corporation brought a procedural challenge against a rule withdrawing federal lands from mineral exploitation adopted twenty years earlier. 906 F.2d at 1363-64. The Ninth Circuit affirmed the dismissal because the statute of limitations for this challenge ran six years after the rule became final, notwithstanding that this particular mining corporation did not have standing to sue until later. *Id*. at 1365. Similarly *Cedars-Sinai Medical Center* was a procedural challenge to a medicare claims rule made final more than six years before the complaint was filed. *Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1128-29 (9th Cir. 1999). The court held that this direct procedural challenge was time-barred even though the agency continued to process medicare claims according to the policy. *Id*. at 1129. But the court was careful to distinguish this case from a challenge to the substance of a rule or the agency's authority to adopt it. *See id*.

In *Wind River Mining Corporation v. United States*, too, a plaintiff directly challenged a stale final agency action. 946 F.2d 710 (9th Cir. 1991). In that case, a mining corporation challenged a rule foreclosing mineral extraction on federal lands more than ten years after it became final. *Id*. at 711-12. *Wind River*, in contrast to *Shiny Rock*, challenged the substance of the stale rule and not the procedure of its adoption. *Id*. at 714. The Ninth Circuit held that, although a direct challenge against the stale rule was time-barred, the substance could be attacked in a challenge to a subsequent agency action that relied on the rule, including enforcement proceedings and denied petitions to rescind the rule. *Id*. at 716. *San Luis Unit Food Producers v. United States*, likewise, was a direct challenge to a stale rule. 772 F. Supp. 2d 1210 (E.D. Cal. 2011). There, property owners challenged a policy change by the Bureau of Reclamation that took place more than twenty years

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

before the complaint was filed. *Id*. at 1218. They did not challenge any final agency action taken within six years of the filing of the complaint. *See id*.

To illustrate why these cases are distinguishable from the fishermen's, suppose an agency promulgates a regulation prohibiting vehicles from a park. If, ten years after the regulation became final, a party challenged the continued enforcement of it as illegal, she would be barred by the statute of limitations. *See Cedars-Sinai*, 177 F.3d at 1129. But if the challenger drove a vehicle into the park and was punished under the regulations, she would be able to defend herself on the grounds that the regulation exceeds the agency's statutory authority. *Wind River*, 946 F.2d at 714.

If a party was unwilling to risk punishment in order to challenge the regulation, she could also obtain judicial review by petitioning the agency to rescind the regulation. *See Envtl. Prot. Info. Ctr. v. Pac. Lumber Co. (EPIC)*, 266 F. Supp. 2d 1101, 1120-21 (N.D. Cal. 2003). The agency's failure to satisfy the petition's request would be a new final agency action subject to judicial review under the APA. *See Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1018-19 (9th Cir. 2008).

Because they challenge a more recent final agency action, the fishermen's case is similar to a challenge to the denial of a petition and not time-barred. The key to both is that the challenge is directed at a subsequent final agency action for which the statute of limitations has not run. Moreover, if this Court granted the Service's motion, the fishermen could immediately file a petition requesting the rescission of both the 1987 and 2012 rules. If the Service didn't rescind both rules, the fishermen would be entitled to sue the Service to compel it to do so—notwithstanding the fact that the 1987 regulation was adopted more than 25 years ago. *See Nw. Envtl. Advocates*, 537 F.3d at 1018-19. But as explained above, this petition process is unnecessary to give the fishermen a claim under the APA because the 2012

///

///

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

rulemaking is a final agency action subject to challenge under the APA. *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 904-05 (9th Cir. 2012).[2]

Courts only interpret the statute of limitations to bar substantive challenges through this petition process where Congress has specifically provided for this result. *See, e.g., Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) (holding that a party cannot obtain review of the substance of a rule through the petition process because the statute of limitations period expressly provided that claims could only be brought against the specific type of rule if the grounds did not arise until after the statute of limitations period had run). If Congress wants to shield the substance of an agency rule from judicial review after the statute of limitations has run, it knows how to do so—by providing that any challenges to the substance of a rule brought after the statute of limitations period must be on grounds that arose only after the period had run. *See id.* But neither the statute nor the APA contain an express limitation analogous to that in *Nat'l Min. Ass'n*. *See* 28 U.S.C. § 2401; P.L. 99-625. Therefore, Congress did not intend the result which the Service presses for here.

The defects in the Service's argument become more apparent when this case is compared to those in which a plaintiff's claim was dismissed as time-barred although the particular plaintiff could not have brought her challenge within the limitations period. *See, e.g., Shiny Rock*, 906 F.2d at 1365-66. In those cases, some unique fact about the plaintiff caused it to avoid experiencing an injury until after the

---

[2] If the fishermen had to file and litigate a petition to rescind the 2012 rulemaking instead of challenging the 2012 rulemaking directly, that would be a great inequity. There is no strict deadline for the Service to respond to and comply with a petition. It could be years before the fishermen get any response from the Service. *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80-81 (D.C. Cir. 1984) (holding that an agency's five year delay in responding to an inquiry was an unreasonable delay and subject to challenge under the APA). And if the Service denied the petition—as the 2012 rulemaking strongly suggests it would—the fishermen would then only be back where they are now. But, in the meantime, they would have unnecessarily suffered the risk of criminal punishment for pursuing their occupations.

statute of limitations had run. But the cause of the injury was the rule adopted more than six years earlier.

This case is readily distinguishable. The cause of the fishermen's injury is the 2012 rulemaking. It threatens their fishery and exposes them to criminal prosecution for pursuing their occupation. 77 Fed. Reg. 75,266. Although the 1987 regulation asserted this authority, it didn't exercise it. 52 Fed. Reg. 29,754. Therefore, the 1987 regulation is not the cause of the fishermen's injury. As a result, the recentness of the fishermen's injury is not unique to these plaintiffs. *Noone* experienced an injury as a result of the 1987 regulation's assertion of authority.

If the Service's argument was correct, an agency could immunize its actions from judicial review by asserting some authority in a regulation and waiting more than six years to exercise it. For example, the Endangered Species Act provides standards by which the Service must determine whether a species is threatened with extinction and should be subject to the act's protections. 16 U.S.C. § 1533. Could the Service adopt a regulation claiming the power to remove species from the endangered species list based on pure whim and avoid scrutiny if it waited more than six years to do so? Of course, the answer is no. Instead, every time the Service relied on this asserted power to delist a species, that would be a final agency action subject to judicial review under the APA. *Cf. Ctr. for Biological Diversity v. Salazar*, 695 F.3d at 904-05 (holding that, although a challenge to a regulatory definition was time-barred, subsequent regulations using that definition could be challenged on the grounds that the definition exceeds constitutional or statutory authority); *EPIC*, 266 F. Supp. 2d at 1123-24 (explaining that the denial of a proposed amendment to a regulation that includes reconsideration of a stale rule is a final agency action that permits a party to challenge the substance of the reconsidered rule).

The same logic applies here. The fishermen's challenge is directed at the cause of their injury—the 2012 rulemaking—and was timely filed. *See* Compl. ¶ 1.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Therefore, this isn't a case where the fishermen have only recently been injured by a stale regulation. On this point, this case is indistinguishable from *Center for Biological Diversity v. Salazar*, 695 F.3d 893. There, the Ninth Circuit allowed a challenge to a five-year-old final rule which incorporated a regulatory definition promulgated thirty years earlier. *Id*. at 904-05. The government moved to dismiss on the grounds that the plaintiff's argument questioned the legality of the definition and any such arguments were barred by the statute of limitations. *See id*. But the court denied that motion, explaining that the statute of limitations only barred the plaintiff from directly challenging the thirty-year-old rule. *Id*. Any subsequent final agency action that relied on the definition could be challenged—even on the grounds that the definition contravenes the statute. *Id*.

CONCLUSION

The fishermen filed this challenge to a rulemaking that terminated protections for their fishery and their livelihoods—protections guaranteed by statute—less than one year after it became final. Because the statute of limitations afforded them six years to file this action, their complaint cannot be dismissed as untimely. The Service's arguments to the contrary ignore the importance of this final agency action. But in none of the cases that the Service cites did a court dismiss a timely filed complaint challenging a final rule because its legal arguments imply that an earlier rule is also illegal. Therefore, the motion to dismiss this complaint as time-barred must be denied.

DATED: November 14, 2013.

Respectfully submitted,

DAMIEN M. SCHIFF
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Plaintiffs

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747