IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA CATTLEMEN'S ASSOCIATION, *et al.*, Plaintiffs, v. UNITED STATES FISH & WILDLIFE SERVICE, *et al.*, Defendants, and CENTER FOR BIOLOGICAL DIVERSITY, CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER, AND WESTERN WATERSHEDS PROJECT, Defendant-Intervenors.	CASE NO. 1:17-CV-01536-TNM **PLAINTIFFS' COMBINED OPPOSITION TO MOTIONS TO DISMISS**

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INTRODUCTION

In 2016, the U.S. Fish and Wildlife Service designated over 1.8 million acres in 16 California counties as critical habitat for three frog and toad species. 81 Fed. Reg. 59,046 (Aug. 26, 2016) (Rule or Final Rule). Among other things, this Rule restricts the use of public and private lands for grazing and timber harvesting, threatening the livelihood of farmers, ranchers, landowners, and local enterprises dependent on these activities. Plaintiffs California Cattlemen's Association (CCA), California Wool Growers Association, and California Farm Bureau Federation are associations representing individuals and businesses directly harmed by the Service's Rule.

As detailed below, Plaintiffs and their members have suffered injury and will continue to be injured by the Service's critical-habitat designation. They seek relief under the Regulatory Flexibility Act (RFA), which requires federal agencies like the U.S. Fish and Wildlife Service here to describe the economic impacts of proposed and final rules on "small entities" like Plaintiffs and their members. 5 U.S.C. §§ 603, 604. The Service failed to prepare these "regulatory flexibility" analyses here and, as a result, the proposed and final critical-habitat designations were invalid. The RFA expressly grants injured parties the right to judicial review. 5 U.S.C. § 611(a)(1). Plaintiffs also seek relief under the Administrative Procedure Act (APA), because the Service's failure to prepare the regulatory flexibility analyses renders its Final Rule "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A).

Despite the express right to judicial review provided by both the RFA and the APA, the Government[1] and Intervenors Center for Biological Diversity, Central Sierra Environmental Resource Center, and Western Watersheds Project (collectively, CBD) argue that the Court cannot hear this case. They argue that Plaintiffs lack standing. But well-settled Supreme Court jurisprudence and binding precedent from this Circuit show that Plaintiffs' allegations alone are sufficient to show standing. Further, Plaintiffs here submit declarations that remove any doubt that Plaintiffs and their members have been injured, that the injuries were caused by the Service, and that this Court can redress the injuries by enjoining enforcement of the Final Rule against Plaintiffs and by requiring the Service to conduct the regulatory flexibility analyses it should have prepared in the first place.

The Government further argues that Plaintiffs' claims are not ripe for review and that Plaintiffs lack prudential standing. Neither argument withstands scrutiny. A purely legal claim is ripe when an agency's action is sufficiently final, and when consideration of the issues would not benefit from a more concrete setting. Plaintiffs have stated purely legal claims related to the Service's Final Rule, and nothing precludes the immediate resolution of these claims. Therefore, Plaintiffs' claims are ripe. Prudential standing requires that a plaintiff be within the zone of interests to be protected by a particular statute. Here, the RFA was adopted to protect small

[1] Plaintiffs sued the U.S. Fish and Wildlife Service; the United States Department of the Interior; Ryan Zinke, in his official capacity as Secretary of Interior; and Greg Sheehan, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service. The Defendants will be collectively referred to here as the Government.

entities like Plaintiffs and their members from economic impacts of regulations. Therefore, Plaintiffs are within the zone of interest to be protected by the RFA, and Plaintiffs may proceed with their claims. CBD raises two other, perfunctory arguments, neither of which has merit.

The Court should deny the motions to dismiss.

LEGAL BACKGROUND

Endangered Species Act

The Endangered Species Act, 16 U.S.C. §§ 1531–44 (ESA), provides certain protections for species listed as "threatened" or "endangered." *Id.* § 1533(a). Section 4 of the ESA authorizes the Service to list species as either endangered or threatened and requires the Service to designate "critical habitat" for a designated species. 16 U.S.C. § 1533(a)(1), (b)(2); *see Bennett v. Spear*, 520 U.S. 154, 157–58 (1997). "Critical habitat" includes any species-occupied areas that have the physical or biological features "essential to the conservation" of the species and that may require special management considerations or protection; and unoccupied areas that the Secretary of Interior finds "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(i), (ii). The determination of what constitutes a "critical habitat" is to be made (in this case) by the Secretary of the Interior, who delegated that responsibility to the Service. *Id.* § 1532(15).

The government may exclude an area from a critical-habitat designation if the economic impacts of inclusion—such as the negative economic impacts on small

entities like Plaintiffs' members here—outweigh the benefits of the critical habitat. 16 U.S.C. § 1533(b)(2).

Under Section 7 of the ESA, federal agencies that issue permits for activity that may affect critical habitat *must* consult with the Service to determine what conditions, mitigation, or alternatives may be imposed on the activity to protect or preserve the habitat. 16 U.S.C. § 1536; *see Bennett*, 520 U.S. at 158.

Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. § 500, *et seq*., establishes the procedures by which federal agencies may issue rules that bind private conduct. 5 U.S.C. § 553. The APA also establishes the right of judicial review of an "[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. Section 706 authorizes courts to set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 706(A).

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. §§ 601–12, requires federal agencies to consider the impacts that agency rules will have on small entities.[2] Whenever an agency is required by the APA to publish a general notice of proposed rulemaking for a proposed rule, it must also "prepare and make available for public comment" an "initial regulatory flexibility analysis." 5 U.S.C. § 603(a). This analysis "shall describe

[2] A "small entity" is any small business, small organization, or small governmental organization. 5 U.S.C. § 601(3), (6).

the impact of the proposed rule on small entities." *Id*. *See also id*. § 603(b)–(d) (listing requirements of analysis). The RFA further requires an agency, when adopting a final rule, to prepare and publish a final regulatory flexibility analysis. *Id.* § 604.

An agency may not avoid these requirements unless the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). If the agency head so certifies, the agency must publish the certification, "along with a statement providing the factual basis for such certification." *Id*.

Finally, any "small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), . . . and 610 in accordance with [the APA]." 5 U.S.C. § 611(a). In granting relief under the RFA, a court shall order the agency to take corrective action including, but not limited to, remanding the rule to the agency and deferring the enforcement of the rule against small entities. *Id.* § 611(a)(4).

FACTUAL BACKGROUND[3]

Pursuant to its authority under the ESA, the Service published a proposed rule[4] and then in 2016 a Final Rule,[5] designating approximately 1,812,164 acres of land in California as critical habitat for three amphibian species. 81 Fed. Reg. at 59,046. Included in the Rule are certain actions that the Service believes will either exacerbate or ameliorate threats posed to the listed species. *See id.* at 59,065–66. The Service also identified certain features of the critical habitat that, it says, are "essential to the conservation" of the species. *Id.* at 59,065. These features may thus require "special management considerations or protection[s]" to prevent, among other things, "impacts associated with inappropriate livestock grazing; and intensive use by recreationists, including packstock camping and grazing." *Id.* The Service identified seven grazing allotments that overlap the critical-habitat designation. *Id.* at 59,054. And the Service acknowledges that the total incremental costs of the designation "associated with grazing activities" will be $155,100. *Id.*; *see also id.*

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[3] For purposes of the Government and Intervenor-CBD's Motions to Dismiss, Plaintiffs' allegations are assumed to be true and must be construed in Plaintiffs' favor. *Ord v. Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009). Further, because the Court's subject-matter jurisdiction has been challenged, Plaintiffs may submit supporting declarations. 5B C. Wright & A. Miller, Federal Practice and Procedure § 1350 (3d ed. 2017).

[4] *See Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad,* 78 Fed. Reg. 24,516 (proposed Apr. 25, 2013)

[5] *See Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad*, 81 Fed. Reg. 59,046 (Aug. 26, 2016) (Final Rule or Rule).

(estimating costs of the designation associated with packstock grazing activities as $63,200).

Plaintiffs' members are individuals and businesses that engage in, among other things, livestock grazing on lands within the newly designated critical habitat, and their grazing rights have been restricted as a result of the Service's Final Rule and the Service's failure to conduct regulatory flexibility analyses. Compl. ¶¶ 2, 5–8, 28–29, 31–32, 34.

FIM Corporation, a member of Plaintiff California Wool Growers, suffered economic losses due to the critical-habitat designation. As FIM's owner states in an attached declaration, FIM held grazing permits with Forest Service Allotments, some of which overlap with the critical habitat. Declaration of Marrianne F. Leinassar (Leinassar Decl.) ¶¶ 2–3. During the 2017 grazing season, FIM suffered from regulatory delays due to critical-habitat consultations. *Id*. ¶¶ 7, 8(a). FIM was denied permission to graze until after the consultation was complete. *Id.* ¶8 (b)–(d). Further, FIM was denied permission to graze its sheep at higher elevations within its allotments in the critical habitat. *Id*. ¶¶ 7-8, 10. FIM grazed its sheep at lower elevations, which provide less nutritious food. *Id*. ¶ 7. As a result, FIM's lambs failed

to gain approximately 7,000 pounds. *Id.*[6] This cost FIM $1.60/pound in lost revenue. *Id.*[7]

Members of Plaintiff California Cattlemen's Association have also been adversely impacted by the Service's Final Rule. Declaration of Kirk Wilbur (Wilbur Decl.) ¶ 9. For example, one member, which held a grazing permit on the McKesick Peak Ferris Fields Allotment, was advised that its "grazing numbers ha[d] been reduced" to improve the critical habitat for the yellow-legged frog. *Id.* ¶ 10. As a result, the member's grazing rate was reduced nearly 30%. *Id.* Another member, with a permit to graze cattle on the Eagle Meadow Allotment, has been compelled to erect and take down approximately 11½ miles of fence each year to prevent cattle from entering the breeding areas of the protected Yosemite toad. *Id.* ¶ 11.

Plaintiffs' members, as well as Plaintiff CCA itself, have also incurred compliance costs resulting from the Service's Rule and the required Section 7 consultation process. Compl. ¶¶ 2, 5–8; Leinassar Decl. ¶¶ 2-10, Wilbur Decl. ¶ 6.

These negative impacts on Plaintiffs' members—and on others—were not considered by the Service when it issued the proposed and final rules. Compl. ¶¶ 2, 28–29, 31–32. As noted above, under the RFA, agencies are required to prepare and

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[6] As explained in the declaration of Ms. Leinassar, based on FIM's experience, lambs that graze in its allotments were expected to weigh between 110 to 112 pounds when weaned in the fall. Leinassar Decl. ¶ 7. Because of the grazing restrictions imposed by the Rule and its resulting consultation requirements, approximately 1,000 of FIM's lambs weighed (on average) only 104 pounds in the fall of 2017—a shortfall of approximately 7,000 pounds. *Id.*

[7] FIM may suffer additional losses due to lowered wool production and/or quality. This determination cannot be definitively established until the sheep are sheared in the spring. Leinassar Decl. ¶ 7.

publish an "initial regulatory flexibility analysis" when publishing a notice of proposed rulemaking for a proposed rule, 5 U.S.C. § 603(a), and a final regulatory flexibility analysis when publishing a final rule, *id.* § 604. These analyses are supposed to identify and describe the impacts of the (proposed and final) rule on "small entities." The Service failed to follow the RFA here.

Instead, in connection with the proposed rule, the Service provided only an incomplete analysis, which did not consider all of the proposed designation's impacts on small entities. Compl. ¶¶ 28–29. A full analysis was not required, the Service asserted, because the proposed designation would have "directly regulate[d]" "only Federal action agencies[,]" which are not "small entities" under the RFA. 78 Fed. Reg. at 24,542. Therefore, the Service claimed, it "may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities." *Id.* at 24,542–43.

The Service relied on the same excuse when it issued its Final Rule without a final regulatory flexibility analysis. Compl. ¶¶ 31–32; Final Rule (81 Fed. Reg. 59,046). The Service asserted that the final critical-habitat Rule regulates only federal agencies, which are not "small entities," and that therefore, "no initial or final regulatory flexibility analysis [wa]s required." 81 Fed. Reg. at 59,056.

As a result of the Final Rule, and the Service's failure to prepare regulatory flexibility analyses, Plaintiffs' members have suffered and will continue to suffer injury, in the form of restricted grazing rights that harm the members' businesses; costs they must incur for risk assessment and operational changes; compliance costs

such as permit fees, consulting fees, and consulting expenses; and lost revenues and profits. Compl. ¶¶ 2, 5–8, 28–29, 31–32, 34; Leinassar Decl.; and Wilbur Decl.

Plaintiffs seek an order from the Court (1) declaring that the designation of critical habitat under the ESA is not categorically exempt from the requirements of RFA §§ 603 and 604; (2) setting aside the Service's Final Rule or enjoining its enforcement against Plaintiffs and their members; and (3) remanding the Final Rule to the Service with an order to complete the initial and final regulatory flexibility analyses. Compl., Prayer for Relief.

ARGUMENT

I

STANDARD OF REVIEW

At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because courts must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (quotation and alterations omitted). Therefore, a plaintiff's pleading burden at the motion-to-dismiss stage "is relatively modest." *Bennett*, 520 U.S. at 171.

To determine whether a plaintiff has standing at the dismissal stage, courts "must assume that [the plaintiff] states a valid legal claim and must accept the factual allegations in the complaint as true." *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012) (citations and quotations omitted). Further, the court must "draw all inferences in favor of the nonmoving party." *Sherley*

v. Sebelius, 610 F.3d 69, 71 (D.C. Cir. 2010) (citation, quotation, and brackets omitted). When, as here, the suit challenges the "legality of government action or inaction, the nature and extent of facts that must be averred . . . to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561. If the plaintiff is an object of the action or forgone action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id*. at 561–62.

Plaintiffs bear the burden to establish standing, and they may submit supporting declarations to support their burden. *Lujan*, 504 U.S. at 561; *Jerome Stevens Pharms. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

II

PLAINTIFFS HAVE STANDING

Organizations like Plaintiffs here have Article III standing if one of their members has standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009); *Sierra Club v. EPA,* 754 F.3d 995, 999 (D.C. Cir. 2014). An organization may sue on behalf of its members if it can show that: (1) the interests that the organization seeks to protect through its lawsuit are germane to the organization's purpose; (2) neither the claim nor the relief requested requires the participation of the organization's members; and (3) at least one of its members meets Article III standing requirements. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). And "[f]or each claim, if constitutional and prudential standing can be shown for at least one

plaintiff, [a court] need not consider the standing of the other plaintiffs to raise that claim." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (citations omitted).

Neither the Government nor CBD disputes (1) that the interests Plaintiffs seek to protect in this lawsuit are germane to their purposes, or (2) that participation of Plaintiffs' individual members is unnecessary. Rather, they contend that Plaintiffs lack standing on the ground that they failed to allege an injury traceable to the critical-habitat Rule and redressable by the Court. *See* U.S. Br. at 10.

To establish an injury for standing purposes, a plaintiff must show (1) an "injury-in-fact" that is concrete and particularized, and actual or imminent rather than conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61.

Finally, to the extent that the arguments for dismissal turn on the legal interpretations of the ESA, the Final Rule, and other substantive rules, the motions must be denied. It is "improper" for the Government and CBD to "mix[] a merits question into the standing analysis[.]" *Emergency Coal. to Defend Educ. Travel v. Dep't of Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008). When considering standing, a court "must assume the merits in favor of the party invoking [] jurisdiction." *Id.* (citations omitted). Therefore, in considering the Motions to Dismiss here, the Court "must assume" that the RFA and the Rule "have the legal significance [Plaintiffs] assert." *Id.*

A. Plaintiffs Have Alleged an "Injury-in-Fact"

1. Plaintiffs Have Alleged, and Through Declarations Have Established, Injuries in the Form of Restricted Grazing Rights, Lost Revenues, Delays, and Compliance Costs

When considering whether a plaintiff has alleged an "injury-in-fact," courts ask simply whether the plaintiff has "asserted a present or expected injury that is legally cognizable and non-negligible." *Huddy v. FCC*, 236 F.3d 720, 722 (D.C. Cir. 2001). Injury to traditional economic interests supports a claim of standing. *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988). Indeed, a single dollar of economic harm suffices to prove injury-in-fact for standing purposes. *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).

Economic harms sufficient to establish an injury-in-fact include lost profits and compliance costs. *See Tozzi v. U.S. Dep't of Health & Human Servs.,* 271 F.3d 301, 308 (D.C. Cir. 2001) (compliance costs); *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 690 (1973) (since "an identifiable trifle is enough for standing," the *amount* of lost profits is irrelevant); *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293 (3d Cir. 2015) (compliance costs are a "classic injury-in-fact" for standing purposes).

The Government contends that Plaintiffs have failed to show any lost grazing opportunities caused by the critical-habitat designation, or that the designation "is substantially probable to cause a decline in their access to federal grazing allotments." U.S. Br. at 11-12 (quoting *Carpenters Indus. Council*, 854 F.3d at 7). But as discussed above, the allegations and the additional information provided in the attached declarations show that Plaintiffs have sufficiently shown an injury-in-fact.

See above, pp. 7-8. Plaintiffs' members have suffered and will continue to suffer injury, in the form of restricted grazing rights that harm the members' businesses; costs they must incur for risk assessment and operational changes; compliance costs such as permit fees, consulting fees, and consulting expenses; and lost revenues and profits. Compl. ¶¶ 2, 5–8, 28–29, 31–32; Leinassar Decl. ¶¶ 2–10; Wilbur Decl. ¶¶ 4–12.

The Government itself acknowledges that the Section 7 consultations required by the Final Rule are estimated to cause economic impacts of between $55,000 and $218,000 over 20 years. U.S. Br. at 6. The Government claims that these costs "are expected" to be borne by consulting agencies, not the permit holders. *Id*. Of course, the permit holders will be required to hire—and expend costs on—these consultants. Compl. ¶¶ 5–7; Wilbur Decl. ¶ 6.

These allegations and evidence are more than sufficient to establish standing at this stage in the lawsuit. *See Bennett,* 520 U.S. at 168 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.") (internal quotation marks and citations omitted).[8]

[8] In light of the evidence submitted in the declarations establishing restricted grazing, the Service's earlier predictions (*e.g.*, that livestock grazing on then-current allotments "[wa]s not likely" to adversely affect the critical habitat at issue, U.S. Br. at 13), and its statements accusing Plaintiffs of speculation (*e.g.*, the critical-habitat Rule "identifies not *all* grazing, but only *inappropriate* grazing" as a threat to the species, U.S. Br. at 12) can be disregarded here. These declarations show that Plaintiffs do not rely on "uncertain and unspecific prediction[s] of future harm . . . ." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015). Further, Plaintiffs and their members have incurred and will continue to incur compliance

2. Plaintiffs Have Procedural Standing

The Government admits that the RFA is a procedural statute, yet it claims that Plaintiffs cannot rely on this procedural statute to relax their standing burden because Plaintiffs must still allege a concrete interest affected by the deprivation of the procedural right. U.S. Br. at 13–14. Again, Plaintiffs have demonstrated that the Service's failure to prepare regulatory flexibility analyses harmed their members' business (grazing) interests in the critical habitat. The Service's failure to consider the negative impacts on Plaintiffs' members resulted in a critical-habitat designation that restricts the member businesses' grazing rights. These harms suffice to allege a claim based on the deprivation of a procedural right.

The D.C. Circuit's opinion in *Center for Biological Diversity v. Interior*, cited by the Government, supports Plaintiffs. There, the court noted that a plaintiff may have standing if it shows "that an agency failed to abide by a procedural requirement that was 'designed to protect some threatened concrete interest' of the plaintiff." 563 F.3d 466, 479 (D.C. Cir. 2009) (quoting *Lujan,* 504 U.S. at 573 n.8). The court held that the plaintiffs there had standing to challenge Interior's leasing program (to expand offshore oil and gas development) based on their "threatened particularized interest, namely their enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program." *Id*.

costs associated with determining whether their grazing is appropriate. *See*, *e.g.*, Wilbur Decl. ¶ 6; Leinassar Decl. ¶¶ 8, 10.

Here, the RFA was designed to protect "small entities" like Plaintiffs. 5 U.S.C. §§ 603, 604. *See also Mid-Tex Coop. Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (quoting S. Rep. No. 878, 96th Cong., 2d Sess. 3); *see id.* ("Congress was primarily concerned about the high costs of compliance with regulations by small businesses bound to conform their conduct to those regulations.") (citing S. Rep. No. 878, 96th Cong., 2d Sess. 3 at 6–7). Plaintiffs have sufficiently alleged an injury resulting from the Service's failure to follow the RFA. The rest of the Government's cited authorities are easily distinguished.[9]

3. Plaintiffs Have Standing to Pursue Injunctive Relief

Finally, the Government argues that Plaintiffs face a higher burden to establish an injury-in-fact because Plaintiffs seek injunctive relief. U.S. Br. at 14–15. But as noted above, Plaintiffs have substantiated their claims of ongoing and future injuries, which are "certainly impending." *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016).

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Plaintiffs have sufficiently alleged an injury-in-fact.

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[9] *See Summer*, 555 U.S. at 494 (noting that a former plaintiff (who settled) *established* standing to challenge Forest Service regulations exempting certain projects from notice, comment, and appeal process, based on plaintiff's harm in recreational and aesthetic interests in affected project); *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586–87 (D.C. Cir. 2011) (plaintiff lacked standing because it had withdrawn its application for a project and had no definite plans to apply in the future); *W. Wood Preservers Inst. v. McHugh*, 925 F. Supp. 2d 63 (D.D.C. 2013) (concluding that no standing existed for trade associations who failed to show that *they themselves* suffered or would suffer any environmental injury).

B. Plaintiffs' Injury Is Fairly Traceable to the Service's Actions and Inactions

1. Plaintiffs Have Shown, Through Allegations and Declarations, That Their Injuries Are Fairly Traceable to the Service's Final Rule, Which Did Not Contain the Required Regulatory Flexibility Analyses

The "fairly traceable" prong of the standing analysis requires "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560–61. Because Plaintiffs' claims here are based on the Service's procedural defaults, Plaintiffs "need not show that the default *necessarily* caused the injury . . . ." *Glickman*, 92 F.3d at 1233 (emphasis added) (citing *Lujan,* 504 U.S. at 572 n.7). Nonetheless, Plaintiffs have demonstrated that their injuries were caused by the Service's failure to prepare regulatory flexibility analyses—without which, the Service improperly issued its proposed rule and Final Rule restricting the use of land in the critical habitat.

The D.C. Circuit's decision in *Carpenters* is directly on point and supports Plaintiffs' standing. At issue in *Carpenters* was a final rule (issued by the Fish and Wildlife Service) that designated 9.5 million acres of federal forest lands as critical habitat for the northern spotted owl. *Id*., 854 F.3d at 2. On behalf of its member lumber-companies, the American Forest Resource Council challenged the legality of this rule. The Council alleged that the Service failed to use "the 'best scientific data available' when finalizing the critical habitat designation, as required by the [ESA]." *Id*. at 4 (quoting 16 U.S.C. § 1533(b)(2)). The district court ruled that the Council lacked standing because the declaration submitted by its president included only conclusory allegations of economic harm. *Id*. at 4–5.

The D.C. Circuit *reversed*. According to the appellate court, the analysis in cases like these—involving the government's "constricting a firm's supply of its main raw material, [which] clearly inflict[s] the constitutionally necessary injury[,]" *Glickman*, 92 F.3d at 1233—the standing analysis proceeds in three parts. *Carpenters*, 854 F.3d at 6. Thus, a plaintiff has standing if it can show:

> (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 [] 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 court in *Carpenters* held that the plaintiff had made all three showings. *Carpenters*, 854 F.3d at 6. According to the president of plaintiff American Forest Resource Council, because timber harvesting was one of the habitat considerations, the critical habitat would likely cause a decrease in the supply of timber to its members. Therefore, the court ruled, the critical-habitat designation restricted timber harvesting. *Id.* at 6-7 Furthermore, the declaration showed that its members obtained timber from land subject to the critical-habitat designations and that loss of timber would cause economic harm. *Id.* at 7.

Plaintiffs here have also made these showings. *First*, Plaintiffs have alleged and declared not only that the Service's actions will cause a decrease in the supply of feed for their grazing businesses, but also, that such a decrease has already occurred. Compl. ¶¶ 2, 5–8, 28–29, 31–32, 34; Leinassar Decl. ¶¶ 7–8, 10 (FIM limited to grazing in lower elevations, reducing nutrients to FIM's sheep and resulting in

reduced weight and thereby loss of revenues); Wilbur Decl. ¶ 10 (CCA member, a grazing permit holder, forced to reduce grazing).

Second, Plaintiffs do obtain raw materials (feed) from the lands within the critical habitat. Leinassar Decl. ¶¶ 2–8, 10; Wilbur Decl. ¶¶ 6–12.

Third, Plaintiffs have alleged and declared not only a substantial probability that their members will suffer some economic harm as a result of the decrease in the supply of raw material from the critical habitat, they also established that their members already have suffered such economic harm. Compl. ¶¶ 2, 5–8, 28–29, 31–32, 34; Leinassar Decl. ¶¶ 7–8, 10; Wilbur Decl. ¶ 10. Plaintiff CCA has itself incurred harm in the form of compliance costs resulting from the Service's Final Rule and the resulting consulting processes. Wilbur Decl. ¶ 6.

Accordingly, Plaintiffs have alleged and provided additional facts to show that their injuries are fairly traceable to the Service's actions here. Because Plaintiffs have alleged past harm, they need not meet any "heightened" pleading standard with respect to future injury. *Carpenters*, 854 F.3d at 5.

2. The Arguments by the Government and CBD Fail To Demonstrate a Lack of Standing

The Government and CBD argue that (a) Plaintiffs have failed to show damage arising from any Section 7 consultations; and (b) Plaintiffs' harm (if any) results from the unpredictable actions of third parties (*i.e.*, other federal agencies) who must engage in the Section 7 consultations. U.S. Br. at 15–19; CBD Br. at 7.

a. Plaintiffs Have Shown Damage Arising From Section 7 Consultations

As recounted above, Plaintiffs' members have been harmed by Section 7 consultations. *See* Leinassar Decl. ¶¶ 3, 8–10; Wilbur Decl. ¶¶ 6–12. Plaintiff CCA also suffered harm in the form of incurred costs to participate in the consultations and otherwise comply with the Service's Final Rule. Wilbur Decl. ¶¶ 4–8.

b. Plaintiffs Would Have Standing Even Without the Evidence in the Supporting Declarations

The Government and CBD contend that the only "direct effect" of the Rule is merely the required Section 7 consulting process. U.S. Br. at 16; CBD Br. at 7. Therefore, the argument continues, the final critical-habitat designation regulates federal agencies (and not small entities like Plaintiffs' members). U.S. Br. at 17. The Government and CBD thus ask the Court to ignore the regulatory burdens created by the Rule itself and to focus instead on the (supposedly) discretionary actions of other federal agencies—who are described as "independent" third parties. *Id.*; *see also* CBD Br. at 7.

This analysis defies well-established law, not to mention common sense. The restrictions on Plaintiffs exist not because of third-party decisions, but because of the restrictions imposed by the Final Rule itself. Indeed, as a direct result of the Final Rule's critical-habitat designation, other federal agencies *must* consult with the Service, and they *must* act to protect the habitat designated in the Rule. 16 U.S.C. § 1536. And the Final Rule "alter[ed] the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 169.

Thus, the injuries to Plaintiffs and their members are traceable directly to the Service's (invalid) issuance of the Final Rule—not to the supposedly unmoored discretion of other agencies.

To ignore the obvious practical effect of the rule would defy common sense. Any regulation could be reframed as a regulation of how an agency official regulates the public, but artful drafting cannot defeat regulated parties' standing to challenge regulations that directly harm them. In *Bennett*, for instance, irrigation districts sued the U.S. Fish and Wildlife Service over a biological opinion issued under the ESA that regulated the Bureau of Reclamation's ability to deliver water to the districts. 520 U.S. at 154. In that case, the Supreme Court expressly rejected the argument that an agency channeling its regulation of the public through another agency defeats standing. *Id.* at 168–71 (standing exists if the challenged agency action has a "powerful coercive effect" on the cause of Plaintiffs' injury).

Here, the Final Rule imposes a powerful coercive effect on Plaintiffs' grazing rights by controlling other agencies' permitting processes. 81 Fed. Reg. 59,046. The ESA requires all agencies to "insure" that the actions they approve, including grazing, will not "result in the destruction or adverse modification of habitat" designated as critical habitat. 16 U.S.C. § 1536(a)(2).

Plaintiffs' showing of causation is also supported by the *Carpenters* and *Glickman* decisions, which addressed nearly identical situations—critical-habitat designations, required Section 7 consultations, and restrictions on plaintiffs' land-use. For example, as in this case, *Carpenters* involved businesses "that directly

obtain[ed] their raw material . . . from certain forest lands[,]" and they alleged that the government's action "decrease[d] the supply of that raw material from those forest lands." *Carpenters*, 854 F.3d at 6. As such, the court explained, "[c]ommon sense and basic economics tells us that a business will be harmed by a government action" when the action decreases the supply of raw material from a source the business relies on, and the business cannot find a replacement without additional cost. *Id.* In sum, "'[g]overnment acts constricting a firm's supply of its main raw material clearly inflict[ed] the constitutionally necessary injury.'" *Id.* (quoting *Glickman*, 92 F.3d at 1233).

The same common sense should guide this Court's analysis. The Final Rule restricts grazing on lands within the critical habitat. Those lands are a source of raw material (feed) for Plaintiffs' members. Therefore, the Rule "inflict[s]" the necessary constitutional injury here, and even if Plaintiffs had not provided additional evidence (though they have), the complaint sufficiently alleges traceability to establish standing. The Government's attempt (supported by CBD) to disclaim all responsibility would deprive "small entities" like Plaintiffs and their members from their right to judicial review, as expressly guaranteed in the RFA and the APA. The Court should reject that argument.

* * *

Plaintiffs have alleged and submitted more than enough evidence to support the traceability prong of the standing analysis.

C. It Is Likely, and Not Merely Speculative, That the Injury Will Be Redressed By a Favorable Decision

To establish redressability, a plaintiff must show that a favorable decision on the merits of the claim will likely ameliorate the harm alleged. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 83 (D.C. Cir. 2005). Plaintiffs need not demonstrate with absolute certainty that the relief requested will eliminate the harms. Instead, they need show only "a substantial likelihood that the judicial relief requested will prevent or redress the[ir] claimed injury." *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 82 (D.D.C. 2007) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 79 (1978)). Indeed, because Plaintiffs have raised procedural claims, they "need not show that the . . . correction [of the procedural default] would *necessarily* redress the injury." *Glickman*, 92 F.3d at 1233 (citing *Lujan,* 504 U.S. at 572 n.7). *See also Am. Soc'y for the Prevention of the Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 338 (D.C. Cir. 2003) (court "must assume—because the case is at the pleading stage—that [plaintiff's] injury will be resolved" if he wins the case).

Here, Plaintiffs seek two remedies from the Court: (1) a declaration that the critical habitat designation under the ESA is not categorically exempt from the requirements of Sections 603 and 604 of the RFA; and (2) an order setting aside (or enjoining enforcement against Plaintiffs) and remanding the Final Rule until the Service completes the necessary economic analyses required by the RFA. Plaintiffs' injuries in this case are the direct result of the Service's final critical habitat designation, and Plaintiffs will continue to suffer injuries as long as the Final Rule

remains in effect. As such, the Court can redress the injuries by setting aside (or enjoining) and remanding the Final Rule.

Substantive arguments about the scope of the ESA and other statutes are of no moment here. Because the "alleged impediment to redress" here "stems . . . merely from the interplay of various statutes bearing on the substantive validity of the Forest Service decision[,]" they have no effect on the redressability question. *Glickman*, 92 F.3d at 1234. Indeed, "to treat [a substantive impact of a statute] as an impairment of redressability would seemingly allow any merits defect in plaintiffs' claim to defeat their standing." *Id.* Thus, the "ESA's substantive provisions are *irrelevant* on this point." *Id.* (emphasis added). *See also Emergency Coal. to Defend Educ. Travel*, 545 F.3d at 10 (The merits of Plaintiffs' RFA claims are not at issue here, and it is "improper" for the Government and CBD to "mix[] a merits question into the standing analysis[.]"); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 868–69 (D.C. Cir. 2001) (concluding that a small entity had standing to make RFA claim, even while ultimately rejecting entity's claim that it was regulated by the RFA). Thus, Plaintiffs satisfy the redressability requirement.

* * *

Since Plaintiffs have suffered an economic injury to their businesses that the Service caused and since the Court can address the Plaintiffs' injuries by requiring the Service to complete the economic analyses required by the RFA, Plaintiffs have established sufficient Article III standing.

III

PLAINTIFFS' CLAIMS ARE RIPE

In *Abbott Laboratories v. Gardner (Abbott Labs.)*, 387 U.S. 136 (1967), the Supreme Court established two general factors for determining the ripeness of a challenge to administrative action: (1) the fitness for judicial review of the issues presented; and (2) the degree of hardship that will befall the parties seeking review if review is withheld. *Id*. at 149. Further, according to the D.C. Circuit, the "'fitness of an issue for judicial decision depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Energy Future Coal. v. EPA*, 793 F.3d 141, 146 (D.C. Cir. 2014) (quoting *Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005)).

Under these factors, review of the challenged Rule is ripe. No additional factual development is necessary for this Court to determine whether the Service was justified in failing to issue regulatory flexibility analyses. There is no dispute that the Service's Rule is a final agency action. 5 U.S.C. § 704; *Abbott Labs.*, 387 U.S. at 151 ("The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties, is quite clearly definitive. There is no hint that this regulation is informal, . . . or only the ruling of a subordinate official, . . . or tentative.") (footnote and citations omitted). And under the RFA, Plaintiffs may bring challenges "beginning on the date of final agency action." 5 U.S.C. § 611(a)(3)(A).

Further, Plaintiffs challenge the legality of the Service's failure to provide regulatory flexibility analyses when it published the proposed rule and the Final Rule. *See* Compl. ¶¶ 45–47 (First Cause of Action) & ¶¶ 48–50 (Second Cause of Action). These challenges, brought under the RFA and the APA, are purely legal.

Consideration of these issues would not benefit from a more concrete setting. *Energy Future Coalition*, 793 F.3d at 146. The Government incorrectly argues that "no concrete action applying the challenged" designation has occurred. U.S. Br. at 20. But as discussed above, the Rule's application has directly injured Plaintiffs' members. Thus, this case does not depend on "contingent future events," and no obstacles exist to prevent this Court from hearing Plaintiffs' claims now.

Finally, Plaintiffs will be harmed if review is withheld because the Final Rule "requires an immediate and significant change in the plaintiffs' conduct of their affairs." *Abbott Labs.*, 387 U.S. at 153. The hardship criterion "is satisfied when 'the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.'" *Mid-Tex*, 773 F.2d at 337 (quoting *Abbott Labs.*, 387 U.S. at 152). In *Mid-Tex*, FERC issued a rule that electric utilities may generally include in their rate-bases amounts equal to 50% of their investments in construction work in progress (CWIP). *Id.* at 330. Under the rule, FERC was required to accept certain rate filings, and the utilities were required to pay them. *Id.* Notably, while the utilities were not obligated to file for increased CWIP, rates that include 50% of CWIP in rate-bases would be filed, and the utilities were required to pay. *Id.* at 337. There, a number of rates had already been filed and

were being paid by the utilities. Therefore, the court concluded, "as to inclusion of CWIP in rate base 'the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs.'" *Id.* (quoting *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967)). Finally, the court noted that while the utilities could have later challenged the FERC rule in a rate proceeding, that did not "make[] this case unripe. Because of the CWIP rule, [the utilities were] paying higher rates." *Id.* at 337–38.

The same conclusion applies here. The Service's Final Rule has been felt by Plaintiffs' members in conducting their day-to-day affairs. Plaintiffs have already suffered injuries (which continue), their claims are therefore ripe, and the Court should resolve the matter now.

IV

PLAINTIFFS ARE WITHIN THE ZONE OF INTERESTS THE RFA SEEKS TO PROTECT BECAUSE THEY ARE ORGANIZATIONS WHO REPRESENT SMALL BUSINESSES THAT ARE DIRECTLY REGULATED BY THE CRITICAL-HABITAT DESIGNATION

To demonstrate prudential standing, Plaintiffs must show that the interest they seek to protect is within the zone of interests to be protected or regulated by the law in question. *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169 (D.C. Cir. 2012). The zone-of-interests test is not meant to be especially onerous. Rather, it "is intended to 'exclude only those whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *N. Carolina Fisheries*, 518 F. Supp. 2d at 84. Plaintiffs easily meet this test.

The RFA provides that "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance . . . ." 5 U.S.C. § 611(a)(1). The Government does not dispute that Plaintiffs and their members are "small entities." Instead, the Government claims that Plaintiffs' members are not *directly* regulated by the RFA. U.S. Br. at 22–23. But under any reading of "affected or aggrieved," there is no question but that Plaintiffs' members have been (and will be) "adversely affected [and] aggrieved" by the Service's final critical-habitat Rule, which was improperly issued without the required regulatory flexibility analyses.

Small businessmen, small businesses, or organizations representing small-business interests—like Plaintiffs and their members here—who assert an RFA claim, fall within the zone of interests under the RFA. *N. Carolina Fisheries*, 518 F. Supp. 2d at 84. In *N. Carolina Fisheries*, the court found that the plaintiffs, small fishing businesses, were "precisely the type of entities Congress had in mind when it passed the RFA." *Id.* Indeed the RFA itself states that it was established "to improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities, and for other purposes." S. 299, Pub. Law No. 96–354, 94 Stat. 1164 (1980).

The cases on which the Government relies, only one of which addresses prudential standing for RFA claims, are distinguishable. The other cases address the *merits* of RFA claims—not whether the plaintiffs had prudential standing to pursue those claims. In *Mid-Tex*, the court held that (1) "wholesale" customers were not *small* entities under the RFA; and (2) the utilities—*not* the plaintiffs' customers—

were regulated by FERC. *See id.*, 773 F.2d at 330, 341. The dispositive question was whether the plaintiffs were—like Plaintiffs and their members here—"small entities *subject to the proposed regulation*." *Id.* at 342 (emphasis added).

Similarly, the court in *Cement Kiln* approved EPA's determination that only some of the petitioners were "small businesses" subject to the regulation, and that the impacts on those entities was not substantial. 255 F.3d at 868. But notably, the court also concluded—based on counsel's representation at oral argument—that one petitioner had standing to challenge the RFA, even while ultimately concluding that the petitioner was not subject to the regulation at issue. *Id*. at 868–69.

In *Am. Trucking Ass'ns Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), the court considered whether the EPA's issuance of national ambient air quality standards (NAAQS) required a regulatory flexibility analysis. As the court explained, individual states—not the federal government—are charged with regulating small entities with respect to NAAQS, and a state "may, if it chooses, avoid imposing upon small entities any of the burdens of complying with a revised NAAQS." *Id*. at 1044. *See also*, *Nat'l Women, Infants & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 108–10 (D.D.C. 2006) (applying *Am. Trucking* and concluding that no RFA analysis required when rule at issue regulated state agencies). Therefore, the EPA's NAAQS did not regulate small entities, and no RFA analysis was required. Here, of course, the Service's Final Rule itself restricts grazing rights in the critical habitat; as such, the Rule directly regulates Plaintiffs' members.

In the unreported opinion in *Idaho Cty. v. Evans*, the court found that increased compliance costs and delays threatened by the overbroad application of "essential fish habitats" were sufficient injuries to establish constitutional standing. No. CV02-80-C-EJL, slip op. at 5–6 (D. Idaho Sept. 30, 2003). The court also held that because the RFA was passed to protect small business entities and small rural local governments from "being overrun by federal mandates[,]" the plaintiffs were within the zone of interests meant to be protected by the RFA—and therefore, the plaintiffs had prudential standing. *Id.* at 6.

Nor does the *Permapost* case, the only case cited by the Government that addresses prudential standing for an RFA claim, save the Government's argument. In *Permapost Prods., Inc. v. McHugh*, the plaintiffs did not even allege that they were directly regulated by the regulations at issue. 55 F. Supp. 3d 14, 20 (D.D.C. 2014). Rather, the plaintiffs there alleged that *their clients* were subject to the permitting process. *Id.* at 20–21.[10] Therefore, the court held that plaintiffs were not within the zone of interests to be protected by the RFA. *Id.* at 30.

Here, because the Rule affects Plaintiffs' members' grazing permits, they are directly regulated by the Final Rule's designation. In short, Plaintiffs' members are "subject to" the Final Rule; *i.e.*, they are "those to which" the Final Rule "appl[ies]." *Cement Kiln* at 869 (quoting *Mid-Tex*, 773 F.2d at 342; 5 U.S.C. § 603(b)(3)). Thus,

[10] Notably, *Permapost* concluded that the plaintiffs had standing to pursue a claim based on the harm resulting from their customers' business decisions (not to use newly-precluded treated wood for their construction projects). 55 F. Supp. 3d at 21–22. The court held that "lost sales to competitors who market materials other than treated wood" is "plainly traceable" to the permit approvals.

Plaintiffs have prudential standing to bring their claims against the designation of critical habitat.[11]

V

THE COURT HAS JURISDICTION OVER ALL OF PLAINTIFFS' CLAIMS

CBD claims that this Court lacks jurisdiction over Plaintiffs' challenge to the Service's failure to perform an initial regulatory flexibility analysis under 5 U.S.C. § 603. CBD Br. at 8. CBD is correct that the RFA's judicial-review section does not mention § 603. *See* 5 U.S.C. § 611(a)(1) ("For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and [] 610 in accordance with chapter 7 . . . ."). But this Court still has jurisdiction, because § 611(b) provides that "[i]n an action for the judicial review of a rule, the regulatory flexibility analysis for such rule . . . shall constitute part of the entire record of agency action in connection with such review." As the D.C. Circuit explained, this court may consider the whole record, which includes the initial regulatory-flexibility analysis. *Mid-Tex*, 773 F.2d at 340.[12] *Cf. also Cement Kiln*, 255

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[11] CBD raises a similar, and similarly defective, argument. It claims that because Plaintiffs' members are only indirectly affected by the Service's violation of the RFA (5 U.S.C. § 604), Plaintiffs cannot state a claim for relief under § 604. CBD Br. at 8–10. But as explained above, Plaintiffs' members here are "subject to" the Rule; they are "small entities to which the proposed rule" applies. Accordingly, Plaintiffs have stated a claim upon which relief may be granted.

[12] The statute's language was amended after the *Mid-Tex* opinion was issued, but § 611(b) remains substantively the same. The previous version read, "When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such

F.3d at 868 (noting that the RFA "forces [an] agency to consider various factors set forth in the statute, including 'a description of the steps the agency has taken to minimize the significant economic impact [of the rule] on small entities.' 5 U.S.C. § 604(a) (final regulatory flexibility analysis); *see also id.* §§ 603(b) & (c) (initial regulatory flexibility analysis).").

Additionally, the RFA is not the only basis of Plaintiffs' claims. Plaintiffs also allege that the Service's failure to comply with 5 U.S.C. § 603 is reviewable under the APA, which provides aggrieved parties the express right to "judicial review" of an agency action that causes a legal wrong or that adversely affects or aggrieves the plaintiffs. 5 U.S.C. § 702. Further, a "preliminary, procedural, or intermediate agency action or ruling not directly reviewable *is subject to review* on the review of the final agency action." 5 U.S.C. § 704 (emphasis added). In this review, the Court will decide "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Therefore, this Court has jurisdiction to determine whether the Service violated 5 U.S.C. § 603.

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rule shall constitute part of the whole record of agency action in connection with the review." *See Mid-Tex*, 773 F.2d at 340.

CONCLUSION

The Court should dismiss the Motions to Dismiss filed by the Service and CBD.

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Respectfully submitted,

/s/ Jonathan Wood
JONATHAN WOOD
D.C. Bar No. 1045015
Pacific Legal Foundation
3033 Wilson Blvd., Suite 700
Arlington, Virginia 22201
Telephone: (202) 888-6881
Email: jw@pacificlegal.org

/s/ Oliver J. Dunford
OLIVER J. DUNFORD (Pro Hac Vice)
California Bar No. 320143
KAYCEE M. ROYER (Pro Hac Vice)
California Bar No. 317397
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: ODunford@pacificlegal.org

Counsel for Plaintiffs, California Cattlemen's Association, et al.

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, a copy of the foregoing document was served electronically through the Court's ECF system on all counsel of record.

/s/ Jonathan Wood
JONATHAN WOOD