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INTRODUCTION

For several years, Defendants Secretary of the Interior Gale Norton and the U.S. Fish and Wildlife Service (collectively "FWS") have failed to comply with their mandatory duty to timely respond to petitions to list imperiled species under the Endangered Species Act (ESA), including the five petitions at issue in this lawsuit. Section 4(b)(3) of the ESA requires FWS to make an initial finding on a citizen listing petition within 90 days "to the maximum extent practicable," but it no event may FWS take longer than 12 months. 16 U.S.C. § 1533(b)(3). The agency's repeated failure to comply with these deadlines has spawned multiple lawsuits. See, e.g., Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1173 (9th Cir. 2002) (listing cases). Plaintiffs submit that FWS's pattern and practice of violating section 4(b)(3) of the ESA is based on its desire to avoid listing imperiled species through the citizen petition process. Indeed, Judge Robertson recognized that FWS is choosing "to ignore citizens petitions, precisely in order to avoid starting the 12-month finding clock" that applies upon receiving an ESA listing petition. Biodiversity Legal Found'n v. Babbitt, 63 F.Supp.2d 31, 33 (D.D.C. 1999)

In the Tenth and Eleventh Claim for Relief, Plaintiffs challenge FWS's application of this pattern and practice to Plaintiffs' petitions to list the Dakota skipper, Gunnison prairie dog, Black Hills mountainsnail, Uinta mountainsnail, and the Parachute penstemon. Second Amended Complaint (SAC) ¶¶ 134-143. Based on this pattern and practice, FWS has not made the required initial finding on these petitions despite the fact they were received over 12 months ago. As a result, Plaintiffs seek (1) declaratory relief that this pattern and practice violates the ESA deadline for 90-day findings and Administrative Procedure Act (APA) standards, and (2) injunctive relief that enjoins FWS's continued application of this pattern and practice to Plaintiffs' petitions.

In its Motion, FWS seeks to dismiss Plaintiffs' two "pattern and practice" claims and

certain allegations on jurisdictional grounds.¹ The Court should deny this Motion because subject matter jurisdiction for these claims is properly derived from the ESA or, alternatively, the APA. The ESA's citizen suit provision provides jurisdiction because FWS's pattern and practice fails to comply with mandatory ESA section 4 deadlines upon receipt of a listing petition. 16 U.S.C. § 1540(g)(1)(C). Further, to the extent Plaintiffs must challenge "final agency action" under the ESA's citizen suit provision or the APA, the Court has jurisdiction because FWS's pattern and practice has been applied to the five specific listing petitions, which are the subject of this lawsuit.

LEGAL BACKGROUND

The ESA is a federal statute that "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The purpose of the ESA is twofold: (1) to prevent the extinction of animals and plants; and (2) to provide for the recovery of these critically-imperiled species. See id. § 1531. To achieve these purposes, the ESA provides several procedural and substantive protections for listed species. Id. § 1533(a)(3) (designate critical habitat), § 1533(f) (prepare and implement recovery plans), § 1536(a)(2) (ensure federal actions do not lead to extinction), and § 1538(a)(1)(B) (prohibit actions that "harm" species).

Because the ESA does not protect a species until it is listed, the "listing process" is the essential first step to species protection and recovery. See 16 U.S.C. § 1533. A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6) (emphasis added). A species is "threatened" if it "is likely to become an

¹ Oddly, FWS's Motion also seeks to dismiss factual allegations in Plaintiffs' Fourth and Seventh Claims, although not the claims themselves. The Fourth and Seventh Claims simply allege that FWS's pattern and practice was unlawfully applied to two of Plaintiffs' listing petitions and provide another reason why Plaintiffs are entitled to judgment on these claims. FWS does not cite any authority, nor is there any, that a motion to dismiss for lack of jurisdiction can be used as a vehicle to strike factual allegations from a complaint.

endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20). Based on these definitions, Congress intended that FWS list species and "take preventative measures before a species is conclusively headed for extinction." Defenders of Wildlife v. Babbitt, 958 F.Supp. 670, 679-80 (D.D.C. 1997). FWS must list a species if, based on the "best available scientific and commercial information," "any one or a combination" of certain enumerated factors warrant ESA listing. 16 U.S.C. § 1533(a)(1); § 1533(b)(1)(A); Carlton v. Babbitt, 900 F.Supp. 526, 530 (D.D.C. 1995). At no point in the ESA listing process may FWS consider political and economic factors. 16 U.S.C. § 1533(b)(1)(A); Homebuilders Ass'n of Northern California v. U.S. Fish and Wildlife Service, 258 F.Supp. 2d 1197, 1225-26 (E.D. Cal. 2003).

There are two ways to list species. First, FWS may initiate a listing. In this scenario, FWS will publish in the Federal Register a Proposed Rule to list a species, which must then be finalized a year later. Id. § 1533(b)(5) & (6). Absent a Proposed Rule, FWS identifies the imperiled species as a "candidate" for listing, which means the species deserves protection but must wait until FWS acts on other higher priority species that require more immediate attention. 50 C.F.R. § 424.15(b).² There is no specific timeframe by which FWS must act to protect candidate species. Id. § 424.15(b). Candidate species receive none of the protections afforded listed species. Id.

The second method for ESA listing involves a citizen preparing and submitting a petition to FWS. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a). The petition must contain detailed information and provide documentation regarding the status of the species and the threats to its survival. 50 C.F.R. § 424.14. Section 4 of the ESA establishes a detailed review process that requires FWS to make two findings on a petition within 12 months of receipt. 16 U.S.C. §

² A list of candidate species is periodically published in the Federal Register in the Candidate Notice of Review that includes the priority number for each candidate species. 50 C.F.R. § 424.15(b); see, e.g., 66 Fed. Reg. 54808 (Oct. 30, 2001); 67 Fed. Reg. 40657 (June 13, 2002); 69 Fed. Reg. 24876 (May 4, 2004).

1533(b)(3). In the initial finding, FWS must determine whether the petition contains "substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). FWS must render this initial finding "within 90 days" of receipt, to the maximum extent practicable, which is commonly referred to as the "90-day finding." 16 U.S.C. § 1533(b)(3)(A). If the petition presents substantial information, FWS must publish a second finding in the Federal Register as to whether listing is warranted, not warranted, or warranted but temporarily precluded by other higher priority listing actions. *Id.* § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This second petition finding is due within 12 months of receipt without exception. 16 U.S.C. § 1533(b)(3)(B).

RELEVANT FACTUAL BACKGROUND

Plaintiffs have recently submitted fully-documented ESA petitions to list five species due to their imperiled status.

The Dakota Skipper is a small to medium-sized butterfly that is native to tallgrass and mixed grass prairie habitats in the northern Great Plains. The skipper is known as an indicator species for a healthy prairie ecosystem. The conversion of prairie grasslands for agriculture, pesticide and herbicide application, and excessive livestock grazing threaten the skipper. The skipper has lost much of its former range and only 150 populations remain. In 1975, FWS designated the skipper a candidate species (40 Fed. Reg. 12,691) and it has since remained on that list without further listing action. As a result, Plaintiffs submitted a petition to list the Dakota Skipper on May 6, 2003.

The Gunnison prairie dog inhabits high desert and mountainous grasslands in limited parts of New Mexico, Arizona, Colorado, and Utah and has disappeared from more than 90% of its former range. This species of prairie dog is a keystone species that serves as prey for a variety of other animals. Researchers have concluded that the Gunnison prairie dog's communication system is the most complex of any non-human animal ever studied. Shooting,

poisoning, sylvatic plague, and habitat destruction threaten this species continued existence. On February 23, 2004, Plaintiffs submitted a petition to list the Gunnison prairie dog.

The Black Hills mountainsnail is a critically imperiled species of land snail that is found only in the forests of the Black Hills, an isolated mountain range located in western South Dakota and northeastern Wyoming. Logging, livestock grazing, mining, and road construction threaten this species. The specialized habitat requirements of the Black Hills mountainsnail make it an excellent indicator of the health of the Black Hills forest. Only thirty-two populations remain. Plaintiffs submitted a petition to list the Black Hills mountainsnail on September 24, 2003.

There is only one remaining population of the Uinta mountainsnail, found on less than one acre in northeastern Utah in the Ashley National Forest. The Uinta mountainsnail is extremely vulnerable to local, small-scale weather and other natural events; a single fire, severe storm, unusually hard winter, or prolonged drought in this one habitat area could completely eliminate the species. Livestock grazing and logging also threatens the Uinta mountainsnail's remaining habitat. Plaintiffs submitted a petition to list the Uinta mountainsnail on August 21, 2001.

The Parachute penstemon is among the rarest plants in North America and exists in only five locations along cliffs of the Roan Plateau in Garfield County, Colorado. Fewer than 750 plants remain, covering an area of less than 200 acres. Energy exploration and extraction threaten the Parachute penstemon. The Parachute penstemon is a long-lived species that is slow to reach sexual maturity and has low reproductive rates; as a result, this plant especially susceptible to extinction and has greater difficulty recovering from a population decline. FWS designated it a candidate species in 1990 (55 Fed. Reg. 6184, 6217), but has not acted on the species since then. As a result, Plaintiffs submitted a petition to list the Parachute penstemon on March 15, 2004.

To date, FWS has not responded to these five petitions.

In addition to these five petitions, FWS has repeatedly ignored citizen petitions for ESA listing. As a result, petitioners have filed multiple lawsuits in recent years. See, e.g., Center for Native Ecosystems v. Norton, Civ. No. 05-RB-188 (D.Colo. 2005) (Douglas County pocket gopher); Center for Biological Diversity v. Norton, Case No. 1:04-CV-2553 (N.D. Ga. 2004) (Agave eggertiana and Solanum conocarpum -- two plants); Institute for Wildlife Protection v. Norton, 337 F.Supp.2d 1223 (W.D. Wash. 2004) (western gray squirrel); Center for Biological Diversity v. Norton, Civ. No. 03-473-TUC-FRZ (D.Az. 2003) (Gentry indigo bush and porter feathergrass -- two plants); Center for Native Ecosystems v. Norton, Civ. No. 03-M-2300 (D.Colo. 2003) (Graham's penstemon); Defenders of Wildlife v. Norton, No. CV 02-165-M-DVM (D. Mont. 2002) (wolverine); Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2002) (Spalding's catchfly, mountain yellow-legged frog, redband trout, and yellow-billed cuckoo); Biodiversity Legal Foundation v. Babbitt, 63 F.Supp.2d 31, 34 (D.D.C. 1999) (Baird's sparrow); Rosmarino v. Babbitt, Case No. 1:99cv00322-LFO (D.D.C. 1999) (prairie dog); Restore the North Woods v. Babbitt, Case No. 97-10759-MLW (D.Mass. 1997) (Harlequin duck); Biodiversity Legal Found. v. Babbitt, Case No. 95-M-601 (D. Colo. 1996) (western boreal toad); Biodiversity Legal Found. v. Babbitt, Case No. 95-B-2509 (D. Colo. 1996) (Fisher); Biodiversity Legal Found. v. Babbitt, Case No. 96-B-2591 (D. Colo. 1996) (lesser prairie chicken); Biodiversity Legal Found. v. Babbitt, Case No. 95-N-1815 (D. Colo. 1995) (Kootneai river Population of the Interior Redband Trout).

ARGUMENT

Plaintiffs assert that jurisdiction for their two "pattern and practice" claims -- the Tenth and Eleventh Claims for Relief -- is based on the ESA's citizens suit provision. See SAC ¶ 15. Because FWS's pattern and practice violates mandatory ESA deadlines, the ESA provides jurisdiction over these claims. To the extent the ESA citizen suit provision requires final agency

action or jurisdiction must be based on the APA, the Court has jurisdiction over the two claims challenging FWS's illegal pattern and practice because it has been applied to the five listing petitions Plaintiffs have submitted to FWS.

I. JURISDICTION FOR PLAINTIFFS' TENTH AND ELEVENTH CLAIM LIES UNDER THE ESA CITIZEN SUIT PROVISION

The ESA's citizen suit provision provides courts with jurisdiction over claims alleging FWS violated section 4 mandatory duties. Section 11(g)(1)(C) provides:

Any person may commence a civil suit on his own behalf . . . against the Secretary [of the Interior] where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.

16 U.S.C. § 1540(g)(1)(C). In these cases, "district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be." *Id.* § 1540(g)(1). Accordingly, Plaintiffs may sue FWS under section 11(g)(1)(C) of the ESA's citizen suit provision when the agency ignores mandatory section 4 statutory deadlines upon receiving a listing petition. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking").

A. Section 4(b) Imposes A Mandatory Deadline On FWS

In the Tenth and Eleventh Claims, Plaintiffs allege FWS's pattern and practice violates an ESA non-discretionary deadline to make timely initial petition findings.³ Section 4(b)(3)(A) of the ESA imposes a 90-day deadline on FWS, although the 90-day deadline may be extended if

³ The duty to make an initial finding on a citizen's petition is also mandatory. Section 4(b)(3)(A) states "[t]he Secretary shall make a finding as to whether the petition presents substantial . . . information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). The Supreme Court has held that the use of the word "shall" in statutory language indicates Congress' intent to impose a mandatory duty to take action. *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988). Courts have concluded that "shall" as used without qualification in section 4 of the ESA, imposes a mandatory, nondiscretionary obligation. *See, e.g., Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999).

FWS demonstrates impracticability. 16 U.S.C. § 1533(b)(3)(A). However, FWS's ability to delay the timing of an initial finding is capped at 12 months because section 4(b)(3)(B) requires FWS to render a second finding within 12 months of petition receipt. *Id.* § 1533(b)(3)(B). The ESA grants FWS no leeway to extend this second deadline even if FWS lawfully delays the initial petition finding. *Id.*; see Biodiversity Legal Foundation v. Babbitt, 63 F.Supp.2d 31, 34 (D.D.C. 1999) (Judge Robertson held that "the 12 month period runs from the receipt of the petition, not from the preliminary finding"); Oregon Natural Resources Council v. Kantor, 99 F.3d 334, 338 (9th Cir. 1996) ("The deadlines for determining whether action on a petition is warranted and for publishing a proposed regulation are expressly tied to the filing of the petition"). Congress could have linked the deadline for this second finding to the date of the initial petition finding, and not petition receipt -- but chose not to. See Russello v. U.S., 464 U.S. 16, 23 (1983) (it is generally presumed that Congress acts intentionally where it includes disparate language in different sections within a statute). Accordingly, section 4(b)(3) of the ESA imposes a mandatory deadline on FWS to complete the initial petition finding no later than 12 months after petition receipt.

Indeed, courts have agreed that because the deadline for the second petition finding is not flexible, ESA section 4(b)(3)(A) means that the finding must be made within 90 days unless impracticable, in which case FWS must render the initial finding within 12 months of petition receipt. Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1173 (9th Cir. 2002); *id.* at 1171 ("the Service has discretion to extend the initial determination beyond ninety days; however, the Service is required to make a final determination on positive petitions within twelve months of receipt"); American Lands Alliance v. Norton, 242 F. Supp. 2d 1, 8 n. 7 (D.D.C. 2003) (referencing many missed ESA deadline cases). In Badgley, the court rejected FWS's argument that it can delay the initial finding "indefinitely," reasoning that "[t]he only way to give effect to both deadline provisions is to apply the twelve-month deadline to both the

initial and final determinations." Id. at 1174. Similarly, a district court in the Southern District of California correctly noted that "the only internally consistent interpretation of the plain language of the 90-day finding and the 12-month is that Congress intended to give some room in the initial processing of the [petitions], but intended to cap that discretion by imposing a 12-month requirement." Southwest Center v. Babbitt, Civ. No. 98-1785-J, Slip Op. at 9 (S.D. Cal. Oct. 28, 1999) (Exhibit 1) ("The discretion inherent in the 90-day finding must be curtailed to accord with the ultimate time-limit imposed by the 12-month finding").

The ESA's legislative history provides additional proof that Congress mandated a timely initial petition finding. Prior to the 1982 Amendments to section 4 of the ESA, FWS enjoyed, and often took advantage of, wide discretion to indefinitely delay responding to a citizen listing ESA petition. House Report No. 567, 97th Cong., 2d Sess. 10, reprinted in 1982 U.S.C.C.A.N. 2807, 2811. Congressional amendments to section 4, however, were principally intended to "replace the Secretary's discretion with mandatory, non-discretionary duties." H.R. Conf. Rep. No. 835, 97th Cong., 2nd Sess., reprinted in, 1982 U.S.C.C.A.N. 2860, 2861-62. Congress explained:

[U]nder current law [pre-1982], if a petition presents substantial evidence warranting a review of the status of a species, the Secretary is to undertake such a review. However, the statute imposes no deadlines within which such review is to be completed. In practice such status reviews have often continued indefinitely, sometimes for many years.

Id. at 2861-62 (emphasis added).

B. The ESA Citizen Suit Provision Provides Jurisdiction For Plaintiffs' Challenge To FWS's Pattern And Practice Of Violating Section 4(b)(3)'s Mandatory Duties

As the plain language of the statute, case law and the legislative history make clear, FWS has a mandatory duty to complete the initial finding within 12 months. Because Plaintiffs' Tenth and Eleventh Claims allege that FWS adopted a pattern and practice that violates this section 4(b)(3)'s mandatory deadline, the ESA's citizen suit provision provides jurisdiction over Plaintiffs' Tenth and Eleventh Claims. 16 U.S.C. § 1540(g)(1)(C); Bennett, 520 U.S. at 172

("[s]ince it is the omission of these required procedures that petitioners complain of, their § 1533 claim is reviewable under § 1540(g)(1)(C)"); Butte Environmental Council v. Norton, Civ. No. S-04-96, Slip Op. at 7 (E.D. Cal. June 2, 2004) (finding pattern and practice claim concerning violations of section 4 mandatory duties when designating critical habitat gave rise to ESA citizen suit jurisdiction).⁴

FWS offers several reasons why there is no ESA citizen suit jurisdiction over these claims, all of which should be rejected. First, the agency suggests it has "complete discretion" to not respond to citizens' listing petitions in a timely manner. FWS Motion at 10-11 (describing "Administrator's [sic] discretionary internal procedures").⁵ As detailed above, this argument is specious, as is highlighted by the fact FWS provides no statutory or case law support for its argument.

Second, FWS claims the ESA citizen suit provision does not authorize pattern and practice claims. FWS Memo at 10-11. However, this Court has previously ruled that 16 U.S.C. § 1540(g)(1)(C) provides jurisdiction when a plaintiff alleges violations of ESA section 4 mandatory duties, including claims that involve challenges to a FWS illegal pattern and practice. In Fund for Animals v. Norton, in response to the same argument FWS is presenting in this case, the Court found plaintiffs were alleging violations of mandatory duties in section 4(d) of the ESA, which concerned the non-discretionary duty to deny ESA permits unless certain criteria are satisfied. Fund for Animals v. Norton, Civ. No. 01-813 GK, Slip Op. at 13 (D.D.C. March 29, 2002) (Exhibit 2). Because "plaintiffs here have alleged that Defendants are granting permits without complying with mandatory criteria set forth in the permit regulations . . . [t]hey have therefore identified non-discretionary duties reviewable under § 1540(g)(1)(C)." Id. at 14-15.

⁴ This Slip Opinion was attached as Exhibit 1 to FWS's Motion to Dismiss. (Dkt. # 37.)

⁵ Plaintiffs note that FWS mistakenly refers to the Secretary of the Interior as the "Administrator" in several portions of its brief. FWS Memo at 10, 15. FWS's brief also refers to Plaintiffs' pattern and practice claims as concerning "permits," not petition findings. FWS Memo at 15.

Third, FWS argues "final agency action," a requirement relevant for jurisdiction under the APA, is necessary even for claims based on the ESA's citizen suit provision. FWS Memo at 17-18. This contention is fundamentally wrong. Notably, FWS does not cite the statute for this proposition. Further, in contrast to the APA, where final agency action is expressly required, the ESA's citizen suit provision imposes no such requirement for jurisdiction to be present. See 16 U.S.C. § 1540(g)(1); NRDC v. U.S. Dep't. of the Navy, 2002 WL 32095131 *22, n. 13 (C.D. Cal. Sept. 17, 2002) ("Plaintiffs' ESA claim is not subject to the finality requirement because it is brought pursuant to ESA's own citizen suit provision, 16 U.S.C. § 1540(g), rather than the APA").

Moreover, FWS's argument that final agency action is required is based entirely on an Arizona district court case, which involved a different provision of the ESA's citizen suit provision -- section 11(g)(1)(A). FWS Memo at 17, citing Defenders of Wildlife v. Flowers, 2003 WL 143270, *2 (D. Az. August 18, 2003). In Flowers, the court considered whether a pattern and practice claim against the Army Corps of Engineers for ESA section 7(a)(2) violations could be maintained under section 11(g)(1)(A) of the ESA's citizen suit provision. 2003 WL 143270, *2. Section 11(g)(1)(A) provides jurisdiction over civil suits "to enjoin any person including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this Act or regulation . . ." 16 U.S.C. § 1540(g)(1)(A). That subsection, however, sets forth different criteria than found in section 11(g)(1)(C), which is the provision applicable to Plaintiffs' Tenth and Eleventh Claims. Further, the Supreme Court held that 11(g)(1)(A) does not provide jurisdiction for claims against FWS for violations of mandatory section 4 duties -- section 11(g)(1)(C) does. Bennett, 523 U.S. at 171-74.⁶

⁶ FWS notes that in the present case, like in Flowers, the Army Corps did not have an "informal guideline or policy statement setting forth the alleged pattern, practice and policy." FWS Memo at 17. To the extent FWS is making a "factual" attack on jurisdiction in their Motion and this issue is relevant to deciding FWS's Motion, and the existence of the pattern and Pls.' Opp. to Motion to Dismiss

In sum, in the present litigation, section 11(g)(1)(C) of the ESA citizen suit provision provides jurisdiction over Plaintiffs' pattern and practice claims because they involve FWS's failure to comply with mandatory section 4 deadlines.

II. JURISDICTION OVER PLAINTIFFS' TENTH AND ELEVENTH CLAIMS IS PRESENT BECAUSE FWS'S PATTERN AND PRACTICE HAS BEEN APPLIED TO PLAINTIFFS' FIVE LISTING PETITIONS

Even if final agency action is necessary for ESA citizen suit jurisdiction or if Plaintiffs' Tenth and Eleventh Claims may only be brought under the APA, jurisdiction is present. These two claims do not present a general challenge to FWS's pattern and practice of not making petition findings or various other aspects of the ESA listing program, as FWS contends. Rather, Plaintiffs only challenge FWS's failure to make initial petitions findings in accordance with the mandatory deadlines of ESA section 4(b)(3). Moreover, Plaintiffs' challenge is tethered to the specific application of this pattern and practice to the five listing petitions at issue in this case.⁷ Because FWS's pattern and practice has played a causal role in delaying the mandatory findings on Plaintiffs' petitions for more than 12 months, Plaintiffs may challenge the lawfulness of the pattern and practice.

This Court rejected a similar FWS argument that plaintiffs failed to challenge a final agency action when challenging a pattern and practice. In Fund for Animals v. Norton, plaintiffs had challenge "defendants' policy and practice of granting argali [sheep] import permits." Slip Op. at 17 (Exhibit 2). In denying a motion to dismiss, the Court reasoned that plaintiffs had

practice is disputed for the purposes of this Motion, Plaintiffs suggest that a stay of FWS's Motion is appropriate to allow for discovery. See Butcher's Union Local No. 498 v. SDC, 788 F.2d 535, 540 (9th Cir. 1986) ("discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary"); Budde v. Ling-Temco-Vought, 511 F.2d 1033, 1035 (10th Cir. 1975) ("When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion."); Gould Electronics Inc. v. United States 220 F3d 169, 176 (3rd Cir. 2000); Commodities Export Co. v. United States Customs Service, 888 F2d 431, 436 (6th Cir. 1989).

⁷ FWS claims that agency inaction, such as the failure to respond to an ESA listing petition, is never final agency action under the APA. FWS Memo at 12. However, the APA defines agency action to include the failure to act. 5 U.S.C. § 551(13).

"named five individual permits that have been granted in direct violation of the permit regulations." Slip Op. at 16. The plaintiffs had also identified "over 100 other permits." *Id.* The Court rejected FWS's argument, which was based on the Supreme Court decision in Lujan v. NWF, 497 U.S. 871 (1990), because plaintiffs alleged that each permit was issued in violation of ESA regulations, were not challenging day-to-day operations of the agency but specific permits, and the challenge concerned primarily permits that had been issued and not some unknown future actions. Slip Op. at 20-21. Another court underwent the same analysis, finding it had jurisdiction because plaintiffs had challenged a pattern and practice that was applied in a particular ESA rulemaking process. Butte Environmental Council v. Norton, Slip Op. at 9-10 (application to ESA critical habitat designation for 15 species). For the same reasons, the Court should deny FWS's current Motion and its reliance on Lujan v. NWF.⁸

The Ninth Circuit decision in Neighbors of Cuddy Mountain v. Alexander supports the existence of APA jurisdiction over Plaintiffs' Tenth and Eleventh Claims as well. Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1050, 1066-67 (9th Cir. 2002). In that case, the U.S. Forest Service argued plaintiffs' claim was challenging forest-wide management and monitoring practices lacked a specific final agency action. However, the Ninth Circuit held otherwise, finding a specific connection between the allegedly unlawful practice and a site-specific timber sale. *Id.* at 1067. According to the Ninth Circuit, "there must be a relationship between the lawfulness of the site-specific action and the practice challenged." *Id.* at 1074; *id.* at 1068-69 (distinguishing Lujan on this basis). For this reason, the Ninth Circuit also distinguished the Fifth Circuit's ruling in Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000), a case FWS relies upon in its Motion (FWS Memo at 16):

The defect to which our sister circuit objected in Peterson was the plaintiffs' failure to limit their challenge to individual sales, instead using a laundry list of

⁸ Like Lujan, FWS's reliance on SUWA v. Norton, 124 S.Ct. 2374 (2004) (FWS Memo at 14) is misplaced because Plaintiffs have challenged the agency's application of its illegal pattern and practice to five specific listing petitions.

specific sales as mere evidence to support their sweeping argument that the Forest Service's . . . management of the Texas forests over the last twenty years violates the NFMA. In contrast, here [plaintiff] challenges only the Grade/Dukes sale and points to Forest Service practices as evidence that this particular sale is unlawful. Indeed, the Fifth Circuit specifically recognized that (in cases such as this one) environmental groups can challenge a specific final agency action [which] has an actual or immediately threatened effect, even when such a challenge has the effect of requiring a regulation, a series of regulations, or even a whole program to be revised by the agency.

Cuddy Mountain, 303 F.3d at 1068-69 (internal quotations and citations omitted).

Moreover, neither the Supreme Court nor any other court has prohibited, as a matter of law, challenges to agency patterns and practices. As this Court has ruled, "Lujan does not erect a bar to all claims seeking changes in an agency's program." Fund for Animals v. Norton, Slip Op. at 19 (Exhibit 2). When an agency engages in a practice of repeatedly making the same unlawful decision, that "practice is unquestionable subject to judicial review." Slip Op. at 17-18; see, e.g., McNary v. Haitian Refugee Center, 498 U.S. 479, 483 (1991) (permitting plaintiffs to pursue "an action alleging a pattern or practice of procedural due process violations by the Immigration and Naturalization Service in its administration of the [Special Agricultural Workers] program"); Payne Enterprises v. U.S., 837 F.2d 486 (D.C. Cir. 1988) (informal practice of evaluating FOIA requests subject to judicial review); Public Citizen v. Dept. of State, 276 F.3d 634 (D.C. Cir. 2002) (challenge to State Department's FOIA policy subject to review); San Juan Audubon Society v. Veneman, 153 F.Supp.2d 1, 11 (D.D.C. 2001). Indeed, challenges to an agency pattern and practice may proceed so as long as a plaintiff challenges its application to a particular agency action. In contrast to Lujan, where the plaintiffs had failed to identify a single agency action, here, Plaintiffs challenge FWS's illegal pattern and practice as applied to five ESA listing petitions. Plaintiffs' Tenth and Eleventh Claims may proceed even if judicial "intervention may ultimately have the effect of requiring . . . a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns." Lujan, 497 U.S. at 894.

Lastly, FWS cites Institute for Wildlife Protection v. Norton for the proposition that a plaintiff cannot include a pattern and practice claim under the ESA's citizen suit provision or the

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE FUND FOR ANIMALS, et al., :

Plaintiffs, :

v. :

Civil Action No.
01-813 (GK)

GALE NORTON, et al., :

Defendants. :

FILED

MAR 29 2002

U.S. DISTRICT COURT
CLERK

MEMORANDUM OPINION

Plaintiffs challenge, under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, the granting of permits by the Department of Interior ("DOI") and its Fish and Wildlife Service ("FWS" or "Service") to sport hunters for the importation from Central Asia of argali sheep "trophies."¹

The matter is now before the Court on the Motion to Dismiss of Defendants, Gale Norton, Secretary of the Interior, and Marshall P. Jones, Jr., Acting Director of the Service. Upon consideration of the Motion, Opposition, Reply, the Motions Hearing held in this matter on March 20, 2002, and the entire record herein, for the reasons discussed below, the Court denies Defendants' Motion.

I. BACKGROUND

¹ "Trophies" refer to the argali sheep head or other parts of the body.

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Plaintiffs are several national, non-profit membership organizations committed to preserving animal and plant species in their natural habitats and dedicated to halting the hunting of animal species in danger of extinction.² Defendants are Gale Norton, Secretary of the Interior, who has ultimate responsibility for implementing the ESA, and Marshall P. Jones, Acting Director of the Fish and Wildlife Service, the agency that has been delegated the day-to-day responsibility for implementing the ESA. Defendant Interveners are two sport hunting groups: (1) Safari Club International and Wildlife Conservation Fund of America; and (2) North American Wild Sheep, Grand Slam Club.

Plaintiffs filed this action in June 2001 to challenge the Service's grant of permits to sport hunters who want to import argali sheep "trophies" from Mongolia, Tajikistan and Kyrgyzstan. Plaintiffs also challenge the Service's failure to issue a final rule on its proposal to designate the argali as "endangered" under the ESA in these three countries. Before turning to the particulars of Plaintiffs' Complaint, some background on the argali and the statutory framework of the ESA is warranted.

² Plaintiffs are The Fund for Animals ("Fund"), the Animal Legal Defense Fund, Inc. ("ALDF"), and the Earth Island Institute ("the Institute"). Plaintiffs also include the Argali Wildlife Resource Center ("Center"), which is a non-governmental organization in Mongolia dedicated to wildlife management, and several scientists in Mongolia and the United States studying the argali sheep, namely Sukh Amgalanbaatar (Mongolian scientist), Zundui Namshir (Mongolian scientist), and Ron Nowak (Virginia scientist).

A. Argali Sheep

The argali sheep is an Asian relative of the North American bighorn sheep, and is the largest species of wild sheep in the world, weighing between 210-310 pounds, with spiral horns that can grow to 75 inches in length and 20 inches in circumference.

The historic range of the argali include Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan, southern Siberia, Mongolia, north-central and western China (including Tibet), Nepal, and the Himalayan portions of Afghanistan, Pakistan, and India. 57 Fed. Reg. 28,014 (1992).

The argali generally forages in broad valleys, high pastures, or cold deserts, and may seek refuge in adjacent mountains. In recent years, the argali's habitat has been significantly encroached on by domestic sheep and other livestock. The argali has also been subject to extensive habitat destruction, poaching, and poorly controlled sport hunting. 57 Fed. Reg. 28018-22 (1992).

B. Endangered Species Act¹

The ESA requires the Secretary of the Interior to determine whether a species is either "endangered" or "threatened" and sets

¹The ESA was enacted primarily to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

²"An endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range...[.]" 16 U.S.C. § 1532(6). A "threatened species" is

forth rule-making procedures for that purpose. 16 U.S.C. § 1533. Since 1992, the argali sheep has been classified as "endangered" everywhere it is found, except in Mongolia, Tajikistan, and Kyrgyzstan, where it is designated as "threatened."

The ESA treats the importation of "endangered" and "threatened" species differently. The Act expressly prohibits the import of "endangered" species, 16 U.S.C. § 1538(a), but authorizes a limited exception. A person seeking to import an endangered species may do so only "(A) for scientific purposes or to enhance the propagation or survival of the affected species... [.]" or "(B) incidental to, and not [for] the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(A), (B). An applicant must apply for a permit, and satisfy specific criteria. 16 U.S.C. § 1539(a)(2)(A), (B).

By contrast, the ESA contains no express prohibition on the importation of "threatened" species. It does, however, contain a provision that requires the Secretary to ensure that all regulations issued concerning "threatened" species are issued for "the conservation of such species"; the ESA also allows the

defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

⁵"Conservation" is defined to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Chapter are no longer necessary. Such methods and procedures include...all activities associated with scientific

Secretary to afford threatened species the same protections afforded to endangered species regarding, inter alia, imports. 16 U.S.C. § 1533(d). Specifically, the ESA provides that:

d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a) (1) of this title [i.e., "Prohibited Acts" including imports], in the case of fish or wildlife...

16 U.S.C. 1533(d).

Consistent with this authority, the Secretary has issued regulations providing threatened species some of the same protections afforded endangered species. 50 C.F.R. § 17.31(a). For example, ESA regulations prohibit the importation of both threatened and endangered species, unless certain permit criteria apply. 50 C.F.R. § 17.21(b); 50 C.F.R. § 17.31(a).⁴

The particular permit criteria for endangered and threatened

resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping...and in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." 16 U.S.C. § 1532(3).

⁴ Specifically, 50 C.F.R. § 17.31(b) provides that "It is unlawful to import or to export any endangered wildlife." Section 17.31(a) makes this prohibition applicable to threatened species: "...all of the provisions in 17.21 shall apply to threatened wildlife." 50 C.F.R. 17.31(a).

species, however, are different from one another and are set forth in separate regulations. The permit criteria for endangered species are set forth in 50 C.F.R. § 17.22. The permit criteria for threatened species are set forth at 50 C.F.R. § 17.32.

1. Section 17.32

Section 17.32, the regulation governing threatened species, provides that while the importation of threatened wildlife is generally prohibited, a person may apply for a permit to import such wildlife for certain limited purposes as long as the listed criteria are met.⁷ 50 C.F.R. § 17.32. The regulations also provide that if the Secretary has issued a "Special Rule" applicable to a particular threatened species, the issuance of permits for that species is governed by the Special Rule.⁸ 50 C.F.R. §§ 17.31(c), 17.32.

⁷ Section § 17.32(a) provides that permits issued under this section "must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act."

Section § 17.32 also sets forth certain criteria that must be satisfied by the applicant before issuance of a permit. 50 C.F.R. § 17.32(a)(2)(i-vi).

⁸ Section 17.31(c) provides that: "Whenever a special rule in §§ 17.40 to 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The special rule will contain all the applicable prohibitions and exceptions."

Section 17.32 provides that: "Such permit shall be governed by the provisions of this section unless a special rule applicable to the wildlife, appearing in § 17.40 to 17.48, of this part provides otherwise."

2. Special Rule

The Secretary has issued a Special Rule governing issuance of import permits for the argali, which is set forth at 50 C.F.R. § 17.40(j). The Special Rule provides that in order to obtain an import permit for the argali, an applicant has two options. She can either satisfy the permit requirements applicable to threatened species provided in § 17.32. 50 C.F.R. § 17.40(j)(1).⁹ Or, in the alternative, if the countries from which argali trophies are imported provide certain "certification" and documentation regarding the argali populations in their country, "the Director may, consistent with the Act, authorize...the importation of personal sport-hunted argali trophies, taken legally in Kyrgyzstan, Mongolia, and Tajikistan...without a Threatened Species permit pursuant to 17.32." 50 C.F.R. § 17.40(j)(2).¹⁰

⁹ Section 17.40(j)(1) of the Special Rule provides: "Except as noted in paragraph (j)(2)...all prohibitions of § 17.31 of this part and exemptions of § 17.32 of this part shall apply to this species in Kyrgyzstan, Mongolia, and Tajikistan. (Note--In all other parts of its range the argali is classified as endangered and covered by § 17.21)."

¹⁰ Section 17.40(j)(2) of the Special Rule provides:

Upon receiving from the governments of Kyrgyzstan, Mongolia, and Tajikistan properly documented and verifiable certification that (a) argali populations in those countries are sufficiently large to sustain sport hunting, (b) regulating authorities have the capacity to obtain sound data on these populations, (c) regulating authorities recognize these populations as a valuable resource and have the legal and practical capacity to manage them as such, (d) the habitat of these populations is secure, (e) regulating authorities can ensure that the

C. Plaintiffs' Complaint

Plaintiffs' Complaint states five counts. Plaintiffs' first claim ("Failure to Issue a Final Rule") is that Defendants violated the ESA by not issuing a final decision within one year as required by the ESA on its proposal to change the status of the argali in those regions where it is classified as "threatened" to "endangered." 15 U.S.C., § 1533(b)(6). Specifically, in 1993, the Service issued a proposed rule to change the argali's listing from threatened to endangered in Mongolia, Tajikistan and Kyrgyzstan. To date, the Service has not issued a final rule on the proposed change of listing.

Plaintiffs' second, third and fourth claims, are all variants of the same claim, and charge that Defendants' issuance of certain importation permits for the argali sheep violates the ESA, the threatened species permit rules (i.e., § 17.32) and the Special

involved trophies have in fact been legally taken from the specified populations, and (f) funds derived from the involved sport hunting are applied primarily to argali conservation, the Director may, consistent with the purposes of the Act, authorize by publication of a notice in the Federal Register the importation of personal sport-hunted argali trophies, taken legally in Kyrgyzstan, Mongolia, and Tajikistan after the date of such notice, without a Threatened Species permit pursuant to § 17.32 of this part, provided that the applicable provisions of 50 CFR part 23 have been met.

Rule (i.e., § 17.40(j))."

Plaintiffs' fifth claim ("notice and comment") charges that issuance of importation permits for the argali sheep, without affording any opportunity for public notice and comment before they are issued, and without making certain necessary "findings," violates the notice provisions in the ESA, 16 U.S.C. § 1539(c). (d), and is "arbitrary and capricious" in violation of the APA.

II. STANDARD OF REVIEW

Defendants have moved to dismiss the Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The legal standards for considering motions to dismiss under Fed. R. Civ. P. 12(b)(1) and Rule 12(b)(6) are different. A court has subject matter jurisdiction as long as the "claim arises under the laws of the United States" and "[u]nless the alleged claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or [is] wholly insubstantial and frivolous." Haddon v. Walters, 43 F.3d 1495, 1490 (D.C. Cir. 1995) ((internal quotation and citations omitted). A court may

"Plaintiffs' second claim ("Permits") charges that the Service has issued over 100 permits that violate the APA, ESA, and implementing regulations. Plaintiffs' third claim ("specific permits") is a challenge to five specific permits that were issued to several named individuals. Plaintiffs' fourth claim ("permit policy") charges that Defendants' pattern, practice and policy of issuing importation permits for argali sheep violates the APA, ESA, and its implementing regulations.

dismiss for lack of subject matter jurisdiction only where such claims are "insubstantial on their face." Hagan v. Lavine, 415 U.S. 528, 542 n. 10 (1974) (internal citations and quotations omitted).

Under R. 12(b)(5), "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. ANALYSIS

Defendants move to dismiss Counts 2-5 of Plaintiffs' five-count Complaint on the ground that Plaintiffs have failed to allege a final agency action as required under the APA. Defendants maintain that the Court therefore has no subject matter jurisdiction to hear these claims.

Plaintiffs respond that their claims are reviewable because (1) they arise under the ESA and that, in any event, (2) Plaintiffs have alleged "final agency" actions which are reviewable under the APA. The Court addresses these arguments below.

A. Plaintiffs' Claims Arise Under the ESA

Plaintiffs argue that the ESA's citizen suit provision authorizes judicial review of their claims. The relevant portion of the citizen suit provision provides:

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf-

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.

16 U.S.C. § 1540(g)(1)(C).

As the citizen suit provision makes clear, the Secretary may be sued for "failure to perform" a "non-discretionary" duty "under section 1533" of the ESA. The provision instructs the Court to examine both the plain language of section 1533, as well as the implementing regulations for any non-discretionary duties: "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation." 16 U.S.C. § 1540(g)(1)(C) (emphasis added).

Plaintiffs maintain that their claim is reviewable under § 1540(g)(1)(C) because the Secretary has failed to perform non-discretionary duties contained in section 1533(d) and the implementing regulations, namely 50 C.F.R. § 17.32 and § 17.40.

Defendants contend that judicial review is not available under the ESA for two reasons. First, they maintain that the duties in these regulations are "discretionary" and therefore not subject to challenge. Second, they argue that there has been no "failure to perform" within the meaning of § 1540(g)(1)(C), because "the

issuance of argali permits is an act, not a failure to act." See Def.' Reply at 6. The Court rejects both these contentions.

1. Plaintiffs Allege Non-Discretionary Duties

Section 1533(d) provides that:

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a) (1) of this title, in the case of fish or wildlife... with respect to endangered species;

This section requires the Secretary to issue regulations he deems "necessary and advisable" "for the conservation of" threatened species. Pursuant to this mandate, the Secretary has issued sections 17.32 and 17.40, which, as explained above, govern permits for threatened species generally (§ 17.32) and the argali, in particular (§ 17.40).

Defendants argue that these regulations set forth only "discretionary duties." Section 17.32, provides in relevant part:

Upon receipt of a complete application the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife. Such permit shall be governed by the provisions of this section unless a special rule applicable to the wildlife, appearing in § 17.40 to 17.48, of this part provides otherwise. Permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act.

Defendants point to the first sentence in § 17.32: "Upon receipt of

a complete application, the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife." Defendants point to similar language in § 17.40¹² Based on this language, Defendants argue that the ultimate decision of whether to issue a permit is "discretionary" and that therefore Plaintiffs cannot rely on the citizen suit provision to challenge issuance of the permits.

The second sentence of § 17.32, however, makes clear that there is a non-discretionary duty to deny permits unless certain criteria are satisfied: "Such permit shall be governed by the provisions of this section... Permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act." 50 C.F.R. § 17.32 (emphasis added). Section 17.40(j) contains analogous mandatory language requiring satisfaction of certain criteria before the issuance of a permit. See 50 C.F.R. § 17.40(j)(2).

Thus, the language of these regulations provides that the

¹² Upon receiving from the governments of Kyrgyzstan, Mongolia, and Tajikistan properly documented and verifiable certification that [six criteria are listed] "the Director may, consistent with the purposes of the Act, authorize . . . the importation of personal sport-hunted argali trophies . . . without a Threatened Species permit pursuant to 17.32...[.]"

Secretary is certainly free to deny any permit she chooses, even if an applicant satisfies the regulatory requirements; however, she has no discretion whatsoever to grant a permit if the regulatory criteria are not met (i.e., "Director may issue a permit...Such permits shall be governed by [...] and must be for one of the following purposes...[.]"). In other words, the Secretary has a non-discretionary duty to ensure that the agency's listed regulatory criteria are met before issuing a permit.

Indeed, the Supreme Court has made clear that even where the Secretary has final discretion as to a particular decision, she has no discretion to ignore specific decision-making requirements or criteria in arriving at that decision. In Bennett v. Spear, 520 U.S. 154, 172 (1997), the Supreme Court concluded that a Biological Opinion was reviewable under § 1540(g)(1)(C) because it implicitly determined critical habitat without "taking into consideration the economic impact, and any other relevant impact," as specified in § 1533(b)(2). The Supreme Court found that even though the act of designating critical habitat is discretionary, the Secretary had no discretion to ignore specific statutory decision-making criteria: "it is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." Bennett, 520 U.S. at 172 (internal citations and quotations omitted).

Similarly, Plaintiffs here have alleged that Defendants are

granting permits without complying with the mandatory criteria set forth in the permit regulations. They have therefore identified non-discretionary duties reviewable under § 1540(g)(1)(C).

2. Plaintiffs Allege a "Failure to Perform"

Defendants also argue that even if Plaintiffs can point to a non-discretionary duty, they have not alleged a "failure to perform" within the meaning of § 1540(g)(1)(C) because "the issuance of argali permits is an act, not a failure to act." See Def.' Reply at 6.

As in Bennett, where the alleged failure to perform was the Secretary's failure take into account certain considerations (i.e., economic impact) before designating critical habitat, the failure to perform alleged in this case is the Secretary's failure to following the mandatory criteria set forth in § 17.32 and § 17.40 when issuing permits. Accordingly, the Court concludes that Plaintiffs have alleged a "failure to perform" under § 1540(g)(1)(C).

In summary, given that Plaintiffs allege that the Secretary has failed to perform her non-discretionary duty to comply with the mandatory permit criteria of § 17.32 and/or § 17.40 when issuing permits for the importation of argali trophies, the Court concludes that Plaintiffs' claims are reviewable under § 1540(g)(1)(C) of the ESA.

B. Plaintiffs' Claims Are Reviewable Under the APA

Even if these claims were not reviewable under § 1540(g)(1)(C), the Court would still have subject matter jurisdiction under the APA because Plaintiffs have challenged the Service's "final agency action."¹³ 5 U.S.C. § 704.

To be reviewable under the APA, there must be a "particular 'agency action' that causes [] harm." Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990). Furthermore, such action must be "final," i.e., "the consummation of the agency's decisionmaking process" and "one by which rights or obligations have been determined, or from which legal consequences will flow," Bennett, 520 U.S. at 178 (internal citations and quotations omitted).

1. Plaintiffs Have Identified Final Agency Action

Plaintiffs have sufficiently identified in their Complaint "final agency action" which is being challenged. They have named five individual permits that have been granted in direct violation of the permit regulations. Plaintiffs also allege that the Secretary has issued over 100 other permits for the importation of argali that are in direct violation of the permit regulations.¹⁴

¹³ While the Court is aware that it need not reach the question of whether Plaintiffs' claims arise under the APA, since it has determined that they arise under the ESA, it may well be helpful, in the long run, to address jurisdictional questions under both statutes.

¹⁴ The fact that Plaintiffs have not identified the 100 other permittees by name is of no consequence. This is a motion to dismiss, and Plaintiffs need not plead at this preliminary stage

Each one of these is a final agency action because it marks the "consummation of the [Service's] decision-making process" with respect to each permit application. The Service has not maintained, for example, that there is any further action to be taken on these permits. See also San Juan Audubon Society v. Vaneman, 153 F. Supp. 2d 1 (D.D.C. 2001) (each placement by the Department of Agriculture of M-44 sodium cyanide ejectors in violation of Environmental Protection Agency restrictions was reviewable agency action under the APA).

Plaintiffs also allege that Defendants' "policy and practice" of granting argall import permits in violation of the permit regulations is reviewable agency action. Indeed, courts recognize that policy, pattern and practice claims may be reviewable under the APA. Shell Offshore v. Dep. of Interior, 997 F. Supp. 23, 27 (D.D.C. 1998) ("When a party seeks to challenge an agency policy or practice by which they are adversely affected or aggrieved in the courts, that party may seek judicial review under section 10(a) of the APA.") vacated on other grounds, Shell Offshore, Inc. v. U.S. Dept. of Interior, No. 98-5117, 2001 WL 238149 (D.C. Cir. Feb 26, 2001); Independent Petroleum Association of America v. Babbitt, 971 F. Supp. 19, 27 (D.D.C. 1997) (same). Where, as here, an agency is engaged in a practice of repeatedly making the same particular agency decision, that practice is unquestionably subject to

all that they may eventually need to prove.

judicial review. Payne Enterprises v. United States, 837 F.2d 486 (D.C. Cir. 1988) ("impermissible practice" of evaluating FOIA requests subject to judicial review); Public Citizen v. Dep.'t of State, 276 F.3d 634 (D.C. Cir. 2002) (challenge to Department of State's application of date-of-request cut-off policy to FOIA requests was ripe for review); cf. Veneman, 153 F. Supp. 2d at 5-6 (finding subject matter jurisdiction over claims alleging that Department of Agriculture engaged in repeated practice of violating EPA restrictions in placement of M-44 sodium cyanide ejectors); Liddy v. Cisneros, 823 F. Supp. 164 (S.D.N.Y. 1993) (plaintiffs' claims regarding HUD's alleged policy and practice of instructing section 8 owners to deny transfers to disabled persons already occupying section 8 housing are reviewable under the APA).

Accordingly, the Court finds that Plaintiffs have properly alleged final agency action in their Complaint.

2. Plaintiffs' Claims Are Not Barred By Lujan

Defendants contend that Plaintiffs' claims are barred because they constitute what is essentially a "programmatic challenge" similar to that barred in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). As explained below, Plaintiffs are not bringing a programmatic challenge, and their case is not barred by Lujan.

In Lujan, plaintiffs challenged the "land withdrawal review program" of the Bureau of Land Management ("BLM"). The "land

withdrawal review program" was the term selected by the plaintiffs in that case to describe a panoply of problems within BLM.¹⁵ The Lujan Court held that because plaintiffs had not identified any "final agency action" as required under the APA, the matter was not ripe. The Court explained that the "land withdrawal review program" itself could not be considered a "final agency action" because it was a general label sweeping into its purview conduct and practices as broad and multi-faceted as those encompassed by, for example, the "weapons procurement program" of the Department of Defense and the "drug interdiction program" of the Drug Enforcement Agency. Lujan, 497 U.S. at 890.

Importantly, Lujan did not erect a bar to all claims seeking changes in an agency's program. The Court made clear that as long as plaintiffs identified a "particular agency action," there was no bar to review, even if judicial "intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns." Id. at 894. The Court identified several reasons why plaintiffs in Lujan had failed to identify particular agency actions. None of these

¹⁵ The Supreme Court identified these problems as the: "failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, and failure to provide adequate environmental impact statements." Lujan, 497 U.S. at 891.

factors is presented in the case at bar.

First, the Lujan Court found that Plaintiffs had not identified or referred to a "single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." Lujan, 497 U.S. at 890. Here, Plaintiffs are alleging that each permit granted by the Service violates, inter alia, the plain terms of the permit regulations, including 50 C.F.R. § 17.32 and 50 C.F.R. § 17.40(j).

Second, the Lujan Court found that plaintiffs were mounting what was essentially a "generic challenge to all aspects of the 'land withdrawal review program.'" Lujan 497 U.S. at 890, n.2. The Court stated that plaintiffs could not seek "wholesale improvement" of BLM's land management program and its "day-to-day" operations. Id. at 890, 899. By contrast, Plaintiffs here are not challenging the "day-to-day" operations of the Service's permit program. Nor are they mounting a broad, multi-faceted challenge to the administration of the entire importation permit program. Their challenge is a narrow and targeted one: they seek review of the Service's specific discrete decisions to issue argali permits in violation of the ESA and its own permit regulations.

Finally, the Court in Lujan observed that much of the complaint in that case described actions and conduct by BLM that had not yet occurred and would not be ripe until BLM took further action: "it may well be...that those individual actions will not be

ripe for challenge until some further agency action or inaction...."

Id. at 892. In this case, by contrast, Plaintiffs are primarily challenging conduct that has already occurred (i.e., the granting of over 100 permits). No further action will be taken on these permits.

In summary, given that Plaintiffs have alleged final agency action, and given that Plaintiffs' allegations fall squarely within the parameters of reviewable actions established by Lujan, the Court rejects Defendants' argument that Plaintiffs' complaint is a non-reviewable programmatic challenge. Plaintiffs' claims are therefore reviewable under the APA.

C. Expiration of Permits Does Not Bar Plaintiffs' Claims

Defendants move to dismiss Plaintiffs' Claim Three, which is a challenge to the five named permits, for failure to state a claim, or, alternatively, because it is moot.

Defendants argue that the five named permits were not "valid or open" at the time Plaintiffs filed their action because the permittees had already used them to kill and import argali from abroad. See March 20, 2002 Motions Hearing Transcript ("Motions Hearing Tr.") ("at the time that they filed their complaint, those permits were not even open or valid anymore."). The Court rejects this contention for several reasons.

First, Plaintiffs maintain that, regardless of when the argali trophies were actually imported, the permits had not expired on

their face at the time this action was filed. Plaintiffs filed in June of 2001, and contend that the permits expired in October of 2001. Furthermore, according to Plaintiffs, all five permittees had failed to submit follow-up reports after importing argali trophies, as required by the permit. Plaintiffs maintain this failure also renders the permits open to challenge. See Pls.' Opp'n at 17-19.

As this matter is before the Court on a motion to dismiss, all of Plaintiffs' facts must be accepted as true for purposes of such motion. Defendants' theory of dismissal raises factual disputes regarding expiration of the permits, which are not appropriate for consideration at this preliminary stage of the proceedings.

Second, with respect to mootness, this controversy is the paradigmatic "capable of repetition yet evading review" exception. See, e.g., Friends of the Earth Inc. v. Laidlaw, 528 U.S. 167, 170 (2000). Indeed, the remainder of Plaintiffs' claims raise challenges to over a hundred permits which are identical to their challenges to the five named permits at issue in Claim Three. Furthermore, the Service plans to continue issuing argali permits, many of which, according to Plaintiffs, may suffer from the deficiencies alleged to exist in the five named permits.

Finally, Defendants' theory of dismissal, if accepted, would likely foreclose judicial review to any plaintiff seeking to challenge an argali permit. Defendants' theory is that no permit can be challenged before it is actually issued or after an argali

trophy is imported. Therefore, in order for this Court to hear a claim, a plaintiff must file her action during the narrow window of time between the day the permit is issued and the day an argali trophy is imported. Otherwise, her claim is either too early or too late.

It is unclear how a plaintiff could ever navigate between this Scylla and Charybdis. This is especially true given that there is no public notice or comment period while permit applications are pending or after permits have been granted; moreover, it is unknown how much time a permittee has after receiving a permit to kill and import an argali. See March 20, 2002 Motions Hearing Transcript ("Motions Hearing Tr.") at 21-25.

Nevertheless, Defendants argue that judicial review would not be foreclosed under its theory because a plaintiff wishing to challenge argali permits could submit a Freedom of Information Action ("FOIA"), 5 U.S.C. § 552 et seq., request seeking information on active permits. Under FOIA, it is argued, such information would have to be disclosed within twenty days, and Plaintiffs could then presumably rush to court after timely receipt of such FOIA disclosures and challenge any active permit before an argali was killed and imported on that permit. See Motions Hearing Tr. 22-23.

From a practical standpoint, it is well-known that FOIA timing requirements are impossibly strict. Indeed, the Court is unaware

of any instance in which the twenty day disclosure requirement has been observed. More importantly, the availability of judicial review for an otherwise reviewable final agency action simply cannot depend upon the vagaries of agency compliance with FOIA's timetables.

Accordingly, the Court finds that Plaintiffs have stated a claim with respect to the five named permits and that this claim is not moot. Defendants' motion is therefore denied as to Plaintiffs' Claim Three.

IV. CONCLUSION

For all the foregoing reasons, the Court denies Defendants' Motion to Dismiss. An Order will accompany this Opinion.

March 29, 2002

DATE

Gladys Kessler

GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**SOUTHWEST CENTER FOR
BIOLOGICAL DIVERSITY; CALIFORNIA
NATIVE PLANT SOCIETY,**

Plaintiff,

vs.

**BRUCE BABBITT, Secretary, Department of
the Interior; JAMIE RAFFAPORT CLARK,
Director, U.S. Fish and Wildlife Service,**

Defendant.

CASE NO. 98-CV-1785-J (RBB)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

**ORDER DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

**ORDER DENYING
DEFENDANT'S MOTION FOR
STAY**

[Docket #'s 14, 19]

This action is brought by the Southwest Center for Biological Diversity ("Southwest") and the California Native Plant Society ("Society") (collectively "Plaintiffs") against the Secretary of the Interior ("Secretary") and the Director of the Fish and Wildlife Service ("Director") (collectively "Defendants") under the Endangered Species Act ("ESA"), U.S.C. § 1531 et. seq. Plaintiffs seek: (1) a declaratory judgment that Defendants are violating their statutory duties under the ESA; (2) an injunction compelling Defendants to complete a pending 12-month finding on an herb, the San Diego ambrosia, and (3) payment of reasonable costs and attorney's fees.

Defendants admit that they have not taken final action on the 12-month finding, but deny that Plaintiffs are entitled to relief. Plaintiffs and Defendants have filed cross-motions for summary

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1 judgment under Fed. R. Civ. P. 56. In addition, Defendants have moved for a stay until January 19,
2 2000 to allow them to complete the 12-month finding.

3 I. BACKGROUND

4 A. The Endangered Species Act

5 In 1973, Congress enacted the Endangered Species Act ("ESA") which is designed to conserve
6 threatened and endangered species and the ecosystem upon which these species depend. 16 U.S.C.
7 §1531(b). To this end, the ESA requires the Secretary of the Interior to list species of plants and
8 animals that are facing extinction as threatened or endangered. 16 U.S.C. §1533(a). The Secretary,
9 in turn, has delegated the implementing authority to the United States Fish and Wildlife Service
10 ("FWS").

11 Section 4 of the ESA provides the guidelines for listing a species as threatened or endangered.
12 The listing process is the first step under the ESA to protect a species; a species that has not been listed
13 cannot be protected. 16 U.S.C. §1533(a), (d). Once a species is listed, the ESA requires the Secretary,
14 in his discretion, to promulgate regulations protecting it and to designate its "critical habitat." 16
15 U.S.C. §1533(d), 16 U.S.C. §1533(a)(3)(A), 16 U.S.C. §1533(b)(6)(C).

16 Any "interested person" may petition the Secretary to list a species. 16 U.S.C. §1533(b)(3)(A).
17 Within 90 days after a petition is made, or as soon thereafter as is practicable, "the Secretary shall
18 make a finding as to whether the petition presents substantial scientific or commercial information
19 indicating that the petitioned action may be warranted" ("the 90-day finding"). *Id.* Pursuant to the
20 Secretary's implementing regulations, "substantial information" means information that would lead
21 a reasonable person to believe that listing may be warranted. 50 C.F.R. § 424.14(b)(1).

22 If the Secretary finds that the petition presents substantial information, he must promptly
23 undertake a review of the subject species' status. 16 U.S.C. §1533(b)(2)(A). *Within 12 months of the*
24 *receipt of the original petition, the Secretary must make one of the following findings ("the 12-month*
25 *finding"):* (1) the petitioned action is not warranted; (2) the petitioned action is warranted -- in which
26 case he must publish in the Federal Register a general notice and the text of the proposed regulation
27 listing the species as endangered or threatened; or (3) the petitioned action is warranted, but
28 promulgation of the proposed and final regulations to list the species is precluded by pending proposals

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1 to list other species. 16 U.S.C. §1533(b)(3)(B); see also Oregon Natural Resources Council v. Daley,
2 6 F. Supp. 2d 1129 (D. Or. 1998). Within one year after publication of the proposed rule, the Secretary
3 must make a final decision whether to place the species on the endangered or threatened species list.
4 16 U.S.C. §1533(b)(6)(A).

5 B. Statement of Facts

6 On January 9, 1997, the FWS received Plaintiffs' petition, dated November 12, 1996, to list
7 the San Diego ambrosia as an endangered species pursuant to Section 4 of the ESA. (Compl. at ¶ 22).
8 The San Diego ambrosia or *ambrosia pumila* ("ambrosia") is a low-growing, perennial herb with
9 woolly gray-green leaves. (Compl. at ¶ 19). Populations of ambrosia occur on federal, state and
10 private lands located in southwestern Riverside and San Diego counties, California, and Baja
11 California, Mexico. (Compl. at ¶ 20). Plaintiffs assert that development of these regions threatens the
12 future of the ambrosia. *Id.* Plaintiffs' petition also included a request to employ the emergency listing
13 provisions of ESA §4(b)(7) and 50 C.F.R. 424.20 in order to protect the species from significant risk
14 until a final decision could be taken. (Compl. at ¶ 22). On or about January 23, 1997, the FWS sent
15 Southwest a letter, acknowledging receipt of the petition and recognizing certain statutory and
16 regulatory procedures to be followed in making findings related to the petition. (Compl. at ¶ 23.)

17 On October 1, 1998, Plaintiffs filed a complaint against Defendants seeking injunctive and
18 declaratory relief. The complaint alleged, *inter alia*, that the Defendants had failed to meet the ESA
19 statutory deadline to make a determination whether the ambrosia should be listed as endangered or
20 threatened. (Compl. at ¶ 2). On November 30, 1998, in response to Plaintiffs' complaint, Defendants
21 filed an answer in which they conceded that Plaintiffs' account of the agency's action with respect to
22 the ambrosia petition was accurate. (Answer at ¶ 2). At that time, almost two years after Defendants
23 received Plaintiffs' petition, Defendants had not completed either the 90-day or 12-month finding on
24 the status of the ambrosia.

25 On April 19, 1999, Defendants published a 90-day finding in the Federal Register, concluding
26 that the November 1996 petition "presents substantial scientific or commercial information indicating
27 that listing *Ambrosia pumila* as endangered may be warranted." 90-day Finding for a Petition to List
28 the Ambrosia, 64 Fed. Reg. 19108, 19109 (1999). This 90-day finding was published approximately

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1 730 days after the petition was received by FWS and approximately 780 days from the date of the
2 petition itself.

3 Defendants admit there was a long delay in completing the 90-day finding. (Answer at ¶ 26).
4 However, they argue that they have been restricted by the legacy of congressional budgetary
5 restrictions. (Def.'s Opp. at 16:3-5). Defendants argue that Public Law 104-6, which took effect on
6 April 10, 1995, prevented them from complying with the 90-day and 12-month deadlines for the
7 ambrosia. Public Law 104-6 prohibited the use of any "remaining [fiscal year] 1995 funds ... for
8 making a final determination that a species is threatened or endangered or that a habitat constitutes
9 critical habitat." Emergency Supplemental Appropriations and Rescissions for the Dept. of Defense
10 to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86 (Apr.
11 10, 1995). The agencies responsible for implementing the ESA remained under this moratorium until
12 April 26, 1996. (Def.'s Opp. at 6:17-18). When the moratorium was lifted, 243 proposed listings were
13 pending. See Def.'s Exh. 1, Decl. of Gary Frazer at 6.

14 Defendants claim that, when the initial petition was received in January 1997, the FWS was
15 operating under its final listing priority guidance ("LPG") for fiscal year 1997. See 61 Fed. Reg.
16 64475 (1996); Def.'s Opp. at 6:13-14. The LPG guided the FWS on how to clear a backlog that had
17 developed during a period of congressional cutbacks and budgetary withholdings. When the ambrosia
18 petition was received, the FWS faced a daunting task, namely catching up on the long list of pending
19 petitions. (Def.'s Opp. at 4:20-22). In January 1997, the FWS had petitions which had been waiting
20 for action for more than two years; many others were only midway through the review process. *Id.*

21 The FWS developed the LPG to streamline its review of cases by prioritizing all pending and
22 incoming matters. The LPG established a "multi-tiered approach that assign[ed] relative priorities,
23 on a descending basis, to actions carried out under Section 4 of the Act..." LPG for Fiscal Year 1997,
24 61 Fed. Reg. 64475, 64479 (1996). The LPG called for giving highest priority (Tier 1) to emergency
25 situations, second priority (Tier 2) to resolving the listing status of the outstanding proposed listings,
26 third priority (Tier 3) to resolving the conservation status of candidate species and processing
27 administrative findings on petitions, and lowest priority (Tier 4) to preparation of proposed or final,
28 critical habitat designations and processing delistings and reclassifications from endangered to

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1 threatened status. See 90-Day Finding for a Petition to List the Ambrosia, 64 Fed. Reg. 19108, 19109
2 (1999).

3 On January 23, 1997, two weeks after receiving plaintiffs' petition, the FWS notified
4 Southwest that, based on the LPG, the FWS would conduct a preliminary review of the petition to
5 determine whether the ambrosia fell within the Tier 1 emergency cases. (Def.'s Opp. at 7:1-4). On July
6 15, 1997, nearly six months after receiving the petition, the Service made a determination that an
7 emergency did not exist. (Def.'s Opp. at 7:7-8). Because this was a new, non-emergency listing, the
8 petition fell into Tier 3. See 64 Fed. Reg. 19109. The FWS pushed forward with the LPG, fulfilling
9 the needs of Tier 1 and Tier 2 cases.

10 In May 1998, a final LPG for 1998 and 1999 was published. See Final LPG for Fiscal Years
11 1998, 1999, 63 Fed. Reg. 25502 (1998). The 90-day and 12-month determinations had still not been
12 made on the ambrosia. The new LPG reduced the number of tiers from four to three, and the
13 processing of 90-day and 12-month determinations was placed in Tier 2 (below only the completion
14 of emergency petitions). Nonetheless, another eleven months passed before the FWS issued its 90-day
15 determination on the ambrosia. "On April 19, 1999, after reviewing the petition, supporting
16 documentation, and other information available in the [FWS] files to determine if substantial
17 information is available to indicate that the requested action may be warranted, the [FWS] published
18 a preliminary (90-day) finding on a petition to list the San Diego ambrosia." (Def.'s Opp. at 7:27-8:2).

19
20 Upon completion of the 90-day review, biologists in the FWS' Carlsbad Field Office undertook
21 a status review of the ambrosia. (Def. Opp. at 8:6-7). Defendants claim that the Carlsbad office will
22 complete its review by mid-October and that approval of the field office report will require an
23 additional 12 weeks. Therefore, the FWS predicts that it will complete its 12-month petition finding
24 for the ambrosia on January 19, 2000.

25 II. STANDARD OF REVIEW

26 Summary judgment is properly granted to a moving party when "there is no genuine issue as
27 to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV.
28 P. 56(c); See also *Celotex v. Catrel*, 477 U.S. 317 (1988). The "mere existence of some alleged

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1 factual dispute between the parties will not defeat an otherwise properly supported motion for
 2 summary judgment; the requirement is that there be no genuine issue of material facts." Anderson v.
 3 Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1985). Moreover, "as to materiality, the substantive law
 4 will identify which facts are material. Only disputes over facts that might affect the outcome of the
 5 suit under the governing law will properly preclude the entry of summary judgment." Id. at 248.

6 III. DISCUSSION

7 This action is aptly suited for summary disposition. The only facts at issue are those associated
 8 with the chronology of the administrative proceeding for the San Diego ambrosia, but there is no
 9 dispute of material fact as to the chain of events; Defendants admit it took over 730 days to issue a
 10 "90-day finding" and that it will take over 36 months to complete the "12-month finding." What is
 11 at issue is whether these delays constitute violations of the time requirements codified in the
 12 Endangered Species Act ("ESA"). Defendants argue that these delays are permissible under the
 13 statute, albeit undesirable. Plaintiffs counter that the plain language of the ESA statute countenances
 14 a strict time requirement, especially with respect to the 12-month finding. The question before the
 15 Court is therefore one of statutory construction — a question of law for which the Court is uniquely
 16 suited.

17 Section 4 of the ESA

18 At the heart of this controversy are the statutory provisions for agency action when a petition
 19 to protect an endangered species has been filed under Section 4 of the ESA. Section 4 sets forth the
 20 requirements for the "90-day finding" thusly:

21 *To the maximum extent practicable, within 90 days after receiving the petition of an*
 22 *interested person ... to add a species to, or remove a species from, either of the lists published*
 23 *under subsection (e) of [Section 4 of the ESA], the Secretary shall make a finding as to whether the*
petition presents substantial scientific or commercial information that the petition may
be warranted.

24 16 U.S.C. § 1533(b)(3)(A)(emphasis added). The plain meaning of this language is that the 90-day
 25 finding is subject to consideration of "practicability." See Biodiversity Legal Foundation v. Habbitt,
 26 146 F.3d 1249 (10th Cir. 1998). The legislative history of the ESA also supports the interpretation that
 27 the FWS has statutory flexibility regarding the timing for listing petitions in the course of 90-day
 28 findings:

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The phrase "to the maximum extent practicable" addresses the concern that a large influx of petitions coupled with an absolute requirement to act within 90 days would force the devotion of staff resources to petitions and deprive the Secretary of the use of those resources to list a species that might be in greater need of protection. This phrase is not intended to allow the Secretary to delay commencing the rule-making process for any reason other than the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition unwise.

1982 U.S.C.C.A.N. 2860, 2962 (H.C.R. No. 97-835).

By contrast, the ESA guidelines for the 12-month finding are as follows:

Within 12 months after receiving a petition that is found under subparagraph (A) [the 90-day finding] to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make (one of the three findings on actions to be taken and, if required, publish the proposed regulation).

16 U.S.C. §1533(b)(3)(B)(emphasis added).

Plaintiffs argue that 12-month finding, unlike the 90-day finding, has a nondiscretionary time limit of one year under the plain meaning of § 1533(b)(3)(B). Defendants, on the other hand, argue that the 12-month finding period is not intended to be restricted to twelve months; instead, they urge that they have nine months from the completion of the 90-day finding to complete the 12-month finding. Thus, the Court must determine whether the Defendants' construction and application of Section 4 of the ESA in this instance conforms with the requirements contained therein.

Scope of Review of Agency Statutory Interpretations

Under *Chevron* and its progeny, agency interpretations of the statutes that govern their administrative functioning are entitled to a significant degree of deference. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); see also *Pyramid Lake Paiute Tribe v. U.S. Dept. Of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) ("An agency's construction of the laws it administers is accorded considerable weight")(citing *Chevron*). However, this deference is limited to an agency's reasonable interpretations of an *ambiguous* statute. If the intent of Congress is clear and the plain meaning of the statute evident, courts are not obligated to defer to agency interpretations. In *Chevron*, the Supreme Court spelled out the inquiry as follows:

[W]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

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1 Chevron U.S.A. Inc., 467 U.S. at 842-43.

2 Hence, the Court's first inquiry must be whether Congress has directly spoken as to the time
 3 requirement for the 12-month finding in Section 4. Is there any ambiguity in the express language of
 4 the statute or is the plain meaning, and hence, Congress' intent clear? The Court finds that there is no
 5 ambiguity in the statute and that the meaning of the statute is plain on its face. The provisions of 16
 6 U.S.C. §1533(b)(3)(B) are crystal clear: Defendants are required to complete the 12-month finding
 7 within twelve months of receiving the petition.

8 Defendants reject this plain meaning of the provision, arguing that the provision also requires
 9 that the petition be one which is "found under subparagraph (A) [the 90-day finding] to present
 10 substantial information." Since the 90-day finding includes a discretionary provision to exceed the 90
 11 days if it is not "practicable" to render a finding within 90 days, they argue that it follows that the 12-
 12 month finding must be fungible as well. Certainly, they argue, Congress could not have intended to
 13 build in discretion at the first step with the preliminary finding and then require a strict deadline with
 14 the more advanced and time-intensive finding at the second step. Therefore, Defendants conclude that
 15 Congress did not really mean to start the clock upon receipt of the petition as the statute explicitly
 16 states, but rather it meant to start the clock when the 90-day finding was completed.

17 Defendants' construction is problematic in several respects. First, it clearly ignores the salient
 18 language "after receiving the petition." Second, taken to its logical conclusion, it vitiates all the
 19 time requirements existent in the statute as a whole. And, finally, it contravenes the clear intent of
 20 Congress in enacting the ESA.

21 *I. Plain Meaning*

22 As the 9th Circuit pointed out in Oregon Natural Resources Council v. Kantor (ONRC), 99
 23 F.3d 334 (9th Cir. 1996), "[t]he language of the ESA regarding the deadlines for action could hardly
 24 be more clear." ONRC at 338-39. The statute explicitly distinguishes between those deadlines tied
 25 to the filing of a petition and those that are contingent upon some other action:

26 "The deadlines for determining whether action on a petition is warranted and for
 27 publishing a proposed regulation are expressly tied to the filing of the petition. In contrast, the
 28 deadline for publishing a final regulation does not mention the filing of the petition, but rather
 expressly makes the deadline dependent on the publishing of the proposed regulation."

Id. at 339. Hence, it is improper for Defendants to effectively ignore the requirement that the tolling

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1 of the 12-month period commences "after receiving the petition." "Congress is presumed to act
2 intentionally and purposefully when it includes language in one section but omits it in another." *Estate*
3 *of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991).

4 **2. Time Requirements & Congressional Intent**

5 Defendants' open-ended requirement for the 12-month finding would also effectively obviate
6 all time requirements in the listing process as a whole. If the discretion inherent in the 90-day finding
7 is permitted to unleash the second requirement of a mandatory 12-month finding, the Rest of the statute
8 which rests, not on definitive time lines but on the completion of subsequent steps, would be subject
9 to the complete discretion of the agency. Such a result is at express odds with the time-sensitive
10 purpose of the ESA to protect endangered species. In the joint explanatory statement to the 1982
11 Amendments to ESA, the Conference Committee expressly noted that "these amendments are intended
12 to expedite the decisionmaking process and to ensure prompt action in determining the status of the
13 many species which may require the protections of the Act." H.R. Conf. Rep. No. 97-835 (1982),
14 reprinted in 1982 U.S.C.C.A.N. 2860, 2861-62; see also Biodiversity Legal Foundation, 146 F.3d at
15 1253 ("Congress' 1982 amendments to the ESA were enacted to force the Service to act more quickly
16 on petitions to list."). Furthermore, the Conference Committee pointedly acknowledged that prior to
17 the amendments, the statute imposed no deadlines, and status reviews had "continued indefinitely,
18 sometimes for many years." *Id.* The amendments were, therefore, designed to "force action on listing
19 and delisting proposals" and to "replace the Secretary's discretion with mandatory, nondiscretionary
20 duties." *Id.*

21 In light of the Congressional purpose to expedite the processing of petitions, the only internally
22 consistent interpretation of the plain language of the 90-day finding and the 12-month finding is that
23 Congress intended to give some room in the initial processing of the amendments, but intended to cap
24 that discretion by imposing a 12-month requirement. In other words, Congress did not intend the "to
25 the maximum extent practicable" language governing 90-day findings to imply a period of time in
26 excess of the year mandated for completion of the 12-month finding. Congress clearly imposed some
27 rigid time-limits, some "mandatory, nondiscretionary duties" on the processing of petitions, and to
28 effectuate these limits, the discretion inherent in the 90-day finding must be curtailed to accord with

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1 the ultimate time-limit imposed by the 12-month finding.

2 Summary

3 Since there is no ambiguity in the statutory language governing the 12-month finding, the Court
4 need not employ a deferential scope of review when evaluating Defendants' construction of the statute
5 and the Court need not assess whether Defendants' interpretation is "reasonable." *Chevron*, 467 U.S.
6 at 842-43. The Court is sympathetic to the funding issues that triggered the implementation of the
7 listing priority guidelines ("LPG") by Defendants. However, the Court cannot uphold a process which
8 expressly contravenes the plain statutory provisions of the ESA. The Court recognizes that the 10th
9 Circuit has determined that "the LPG is a reasonable interpretation of section 4(b)(3)(A) [the 90-day
10 finding] in the light of the entire statutory scheme." *Biodiversity Legal Foundation v. Babbitt*, 146
11 F.3d at 1256. However, the 10th Circuit itself acknowledged that its review was "limited" and that
12 "the question of the 1997 LPG's validity where a violation of a mandatory provision of the ESA is
13 alleged is not before us." *Id.* The 12-month ruling is such a mandatory provision; the 10th Circuit
14 itself characterized the 12-month ruling as a "non-discretionary mandate." *Id.* at 1255. Hence, the
15 10th Circuit did not expressly consider the issue before this Court, but rather considered whether the
16 LPG fit within the discretion left to the agency under the 90-day rule. As such, the Court does not find
17 *Biodiversity's* conclusions persuasive authority for this determination.

18 In light of the plain language of the statute and the clear intent of Congress, the Court
19 GRANTS Plaintiff's motion for summary judgment. The Court finds that Defendants have violated
20 the ESA's provisions by failing to make a 12-month finding on the San Diego ambrosia within twelve
21 months of having received the petition.

22 Defendants' Motion for Stay of All Proceedings

23 Defendants also present an alternative argument to the Court, arguing that, if they are not
24 entitled to summary judgment, a stay would be the most appropriate means of ensuring that they
25 complete the 12-month finding in the time frame they have allotted. Defendants contend that their
26 inability to comply with the listing requirements of the ESA is a function of restrictive congressional
27 action in 1995. Defendants argue that Public Law 104-6, which took effect on April 10, 1995,
28 prevented them from complying with the 12-month deadline. See Public Law 104-6. The agencies

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1 responsible for implementing the ESA remained under this moratorium until April 26, 1996. Thus,
2 Defendants allege that they were precluded from complying with ESA deadlines during that period
3 and in its aftermath.

4 Given the time and budgetary constraints they faced, Defendants argue that they lacked the
5 resources to expedite the processing of the ambrosia. Therefore, Defendants urge this Court to find
6 that, even if summary judgment is not appropriate, a stay should be granted to allow them to complete
7 the 12-month review on their planned schedule. Defendants, however, have presented no evidence
8 that they cannot complete their review of the Carlsbad Field Office report in less than 12 weeks.
9 Moreover, Defendants have failed to demonstrate that they could not have undertaken the field
10 research more expeditiously, without sacrificing the quality of their review. In fact, Defendants' delay
11 in completing the review process continues to threaten the ambrosia.

12 Thirty-three months have passed since the petition was filed, and the 12-month finding still has
13 not been completed. Defendants claim they require an additional three months to complete the
14 approval process for the 12-month finding. The Court notes that, even after the proposed regulation
15 has been published, the Secretary will have one more year before a final regulation must be
16 implemented. Thus, time is of the essence in moving to that next stage of the listing process. Of
17 course, it is possible that the Secretary will not find that the ambrosia is threatened or endangered, but,
18 based on the 90-day finding published by the FWS, the ambrosia faces an ominous future. See 61 Fed.
19 Reg. 64475 at 19109. The Court recognizes the backlog faced by all of the agencies charged with
20 implementing the ESA. The Court further notes that this backlog was the result of external constraints
21 on the agencies — namely congressional budgetary restrictions — and that the agencies are not the
22 direct cause of their own backlog. Even as the agencies are busy catching up, new cases continue to
23 roll in, some requiring immediate review. Nevertheless, as discussed above, Defendants' argument
24 that they have nine months from the completion of the 90-day finding to complete their 12-month
25 finding is, simply put, incorrect. Moreover, a stay is inappropriate here because defendants have failed
26 to (1) make any effort to expedite the status review in light of the positive 90-day finding; (2) provide
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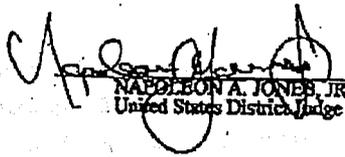
1 evidence that the 12-month finding could not have been conducted more quickly,¹ or (3) justify the
2 need for an additional twelve weeks to review the Carlsbad Field Office report.

3
4 **CONCLUSION**

5 For the reasons set forth above, the Court **GRANTS** Plaintiffs' motion for summary judgment
6 and **DENIES** Defendants' motion for summary judgment and request for a stay. Defendants are
7 **ORDERED** to complete the 12-month finding required by Section 4 of the ESA no later than
8 December 10, 1999. Until then, the Court shall retain jurisdiction over this matter. Plaintiffs may file
9 a separate motion requesting reasonable costs and attorney's fees.

10
11 **IT IS SO ORDERED.**

12
13 DATED Nov 27, 1999


NAPOLEON A. JONES, JR.
United States District Judge

14
15 cc: All Parties
16 Magistrate Brooks

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26 ¹ For example, in crafting its 12-month finding, the FWS might have relied on the August
27 1996 Multiple Species Conservation Program prepared in a separate matter by the FWS on the
28 basis of the "best scientific and commercial data available." That Program listed the ambrosia's
risk of survival as "high." See Plaintiffs' Exhibit 6, Multiple Species Conservation Program, Vol.
I, Table 3-5. While the results of that report may not be conclusive, they certainly should have
assisted in expediting the status review process.