IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.,*

Plaintiffs,

v.

DAVID BERNHARDT, Secretary, United States Department of the Interior, *et al.,*

Defendants.

Civ. No. 19-cv-02898-APM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Oral Hearing Requested

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INTRODUCTION

Plaintiffs Center for Biological Diversity and Center for Food Safety (collectively Plaintiffs) challenge a final, nationwide decision (the 2018 Decision) by the United States Fish and Wildlife Service and the United States Department of Interior (collectively Defendants, FWS, or the Agency) that allows for the widespread agricultural use of bee and bird-killing neonicotinoid pesticides (neonicotinoids) and pesticide-intensive genetically engineered crops (GE crops) across our nation's National Wildlife Refuge System (Refuge System). Defendants issued the 2018 Decision despite their prior decision in 2014 (the 2014 Decision) to discontinue these practices. Defendants finalized this action abruptly, without public notice, and in disregard for their legal obligations under the National Wildlife System Administration Act (Refuge Act). Defendants further neglected to conduct any legally-mandated environmental analyses or consultation on the effects of the 2018 Decision under the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA).

Yet, despite the 2018 Decision's profound risk to imperiled species, their habitats, and the very public lands that have been set aside to protect wildlife, Defendants now argue that their blatant disregard for the Refuge Act, NEPA, and the ESA in issuing the decision is not yet reviewable by this Court. Defendants' argument has no merit. To the contrary, the time for judicial review of this action is *now or never.* No future acts by FWS to implement the decision will change the already developed administrative record for the purely legal claims Plaintiffs have raised; no future acts will refine this already consummated, unambiguous final agency action, which is already being implemented; and no future action, especially on a site-specific level, can ensure that FWS will comply with its NEPA and ESA conservation obligations *before* the action has reached a stage that will foreclose the availability of adequate measures and alternatives for protecting endangered species and the environment.

Plaintiffs have a unique interest in stopping uses of neonicotinoids and GE crops on refuge lands. In withdrawing the 2014 Decision and replacing it with an inverse decision that allows these practices System-wide, Defendants have harmed Plaintiffs' interests and missions, the interests of their members, and the safety of national wildlife refuges for critical wildlife.

In sum, Defendants' Motion to Dismiss overstates the standard of review at this early stage of litigation, mischaracterizes the nature and effects of its 2018 Decision, and misconstrues Plaintiffs' allegations. Plaintiffs have amply established subject matter jurisdiction, and have pled sufficient facts to support their claims. The Court should deny Defendants' Motion.

STATUTORY FRAMEWORK

I. National Wildlife Refuge System Administration Act and National Wildlife Refuge System Improvement Act.

The Refuge Act, 16 U.S.C. §§ 668dd-668ee, passed in 1966 and amended by the National Wildlife Refuge Improvement Act of 1997, created the Refuge System, America's largest collection of lands specifically set aside for "the conservation of fish and wildlife, including species that are threatened with extinction." 16 U.S.C. § 668dd(a)(1). The Refuge System was established "for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2), (a)(4)(A). In passing the Act, Congress specified that "the fundamental mission of [the] Refuge System is wildlife conservation: wildlife and wildlife conservation must come first." H.R. Rep. No. 105-106, at 9 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-13; *see id.* at 8 (explaining that the mission of the Refuge Act cannot be fulfilled "unless [refuge lands] are consistently directed and managed as a national system," including "in a coordinated manner to meet the life-cycle needs of migrating species, [and] providing habitat for threatened or endangered species….").

FWS is responsible for managing all refuge lands "to fulfill the mission of the System, as well as the specific purposes for which that refuge was established …." 16 U.S.C. § 668dd(a)(3)(A). The Refuge Act lists criteria that FWS must meet in fulfilling the mission of the Refuge System. *Id.* § 668dd(a)(4). Among others, FWS "shall … (C) plan and direct the continued growth of the System in a manner that is *best designed* to accomplish the mission of the System, to contribute to the conservation of the ecosystems of the United States, [and] to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats." *Id.* § 668dd(a)(4)(C) (emphasis added). In so doing, FWS *must* "ensure that the biological integrity, diversity and environmental health of the System are maintained for the benefit of present and future generations of Americans." *Id.* § 668dd(a)(4)(A)-(B).

II. National Environmental Policy Act.

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a); 42 U.S.C. §§ 4331-4370h. Its purpose is to "help public officials make decisions that are based on understanding of environmental consequences …. " 40 C.F.R. § 1500.1(c). *NEPA is a procedural statute,* enacted to ensure that federal agencies engage in a public process in taking actions, and that they take a "hard look" at the environmental consequences of their decisions. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983).

NEPA and its implementing regulations require federal agencies like FWS to prepare an Environmental Impact Statement (EIS) regarding all major federal actions that "will or may" have a "significant" environmental impact. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.3.[1] The EIS must be prepared *before* an agency makes any irreversible and irretrievable commitment of

[1] To assess whether its proposed action may have significant impacts requiring an EIS, an agency may first prepare an Environmental Assessment (EA). 40 C.F.R. § 1508.9(a)(1).

resources. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1(b). "Action" broadly includes "[a]doption of official policy, such as rules, regulations, and interpretations…." 40 C.F.R. § 1508.18(a), (b)(1). "Major federal action[s]" under NEPA include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "If *any* 'significant' environmental impacts *might* result then an EIS must be prepared before the action is taken." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

NEPA prohibits an agency from avoiding significance, and thus from performing an environmental assessment, by dividing a proposed project into component parts. 40 C.F.R. § 1508.27(b)(7). A federal agency is instead to prepare a "Programmatic EIS" "for broad Federal actions such as the adoption of new agency programs or regulations." *Id.* § 1502.4(b); *see also id*. §§ 1508.18(b)(3) (definition of major federal action includes "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan"), 1508.23. A programmatic EIS ensures that an agency's NEPA review is "relevant to policy and [] timed to coincide with meaningful points in agency planning and decisionmaking," and "shall be available before the program has reached a stage of investment or commitment to implementation *likely to determine subsequent development or restrict later alternatives*." *Id.* § 1502.4 (emphasis added).

An EIS (including a programmatic EIS) must disclose all the consequences of the proposed action, including the direct, indirect, and cumulative effects. 40 C.F.R. § 1502.1; *id*. §1508.25(c). In addition to direct and indirect, a cumulative effect results from the incremental impact of the proposed action "when added to other past, present, and reasonably foreseeable future actions regardless of what agency … undertakes such other actions." *Id.* § 1508.7.

III. Endangered Species Act.

The ESA is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

Congress's "plain intent … in enacting [the ESA] was to halt and reverse the trend towards species extinction, *whatever the cost*." *Id.* at 184 (emphasis added). The ESA's "language, history, and structure" make clear that "Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174; *see* 16 U.S.C. §§ 1536(a); 1531(c)(1) ("[A]ll Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this [Act].").

To fulfill the purposes of the ESA, "each Federal agency shall, in consultation with and with the assistance of the [FWS], insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The scope of agency actions subject to consultation is broad, and includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02. This includes, "the promulgation of regulations; the granting of licenses [and] contracts, … or actions directly or indirectly causing modifications to the land, water, or air." *Id*. Consultation obligations attach to actions taken by FWS itself. Compl. ¶ 58. The ESA's definition of "effect" is also broad, and includes "all consequences to listed species and critical habitats that are caused by the proposed actions, including the consequences of other activities that are caused by the proposed action," including those that "may occur later in time." *Id.*

Consultations are required for "any action [that] *may affect* listed species or critical habitat;" 50 C.F.R. § 402.14(a) (emphasis added). Only where the action will have "no effect" on listed species or designated critical habitat is the consultation obligation lifted. *Id.* The ESA prohibits federal agencies from making "any irreversible or irretrievable commitment of

resources" that would "forclos[e] the formulation or implementation of any reasonable and prudent alternative measures" through the consultation process. 16 U.S.C. § 1536(d). An agency is required to review its actions "at the earliest possible time." 50 C.F.R. § 402.14(a).

IV. Administrative Procedure Act.

The APA authorizes judicial review of agency actions. 5 U.S.C. § 702. Under the APA, courts shall "compel agency action unlawfully withheld," *id.* § 706(1), and "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A).

FACTUAL AND PROCEDURAL BACKGROUND

I. National Wildlife Refuges and Impacts of Farming on Refuge Lands.

With a mission to conserve and protect wildlife, it is no surprise that the Refuge System provides critical sanctuaries for many of the nation's most sensitive species. According to FWS, in 2017 the Refuge System was home to approximately 220 mammal species; 700 bird species; 250 reptile and amphibian species; more than 7,000 marine species; and hundreds of pollinators and insect species. Compl. ¶ 129. Nearly every refuge within the System conserves at least one ESA-protected endangered or threatened species, and many wildlife refuges were established primarily to protect imperiled wildlife, including numerous species that may be harmed by the use of neonicotinoids and GE crop cultivation. Compl. ¶¶ 129, 133-34. Many national wildlife refuges also serve as sanctuaries for migratory birds. Compl. ¶ 129-32.

Unlike wildlife-dependent recreational uses, which are specifically recognized in the Refuge Act,[2] farming by private actors on refuge lands (often termed cooperative farming) is a discretionary economic use of refuge resources that can only be allowed if FWS determines "the

[2] Wildlife-dependent recreational activities include: wildlife observation and photography, fishing, hunting, environmental education and interpretation. 16 U.S.C. § 668ee(2).

use contributes to the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission," 50 C.F.R. § 29.1. According to FWS, that determination is made "only when [farming can] … meet wildlife or habitat management objectives, and only when more natural methods, such as fire or grazing by native herbivores, cannot meet refuge goals and objectives." Compl. ¶ 94 (citing FWS, 601 FW 3, § 3.15(B).

A. Genetically Engineered Crops in Refuge System.

Most GE crops cultivated in U.S. agriculture, including those used on refuge lands, are overwhelmingly developed for the explicit purpose of creating tolerance in the crop for pesticides, such a glyphosate, so that those pesticides can be used in amounts that would otherwise be lethal to the plant. *See* Compl. ¶¶ 109-11. In the recent past, U.S. agriculture's use of GE crops has dramatically increased the overall use of herbicides nationally. Compl. ¶¶ 110-11. For example, from 1996 to 2011, an extra 527 million pounds of herbicides are estimated to have been sprayed in U.S. agriculture because of GE crops. Compl. ¶¶ 111-13.

Increased uses of GE cropping technologies, including parallel increases in pesticide use, have had alarming impacts on pollinator insect populations such as monarch butterflies, among other species. Compl. ¶¶ 112-14. For monarch butterflies, the harm is so acute that FWS has determined that ESA protection may be warranted because "substantial scientific or commercial information" show potential listing may be necessary to save the species.[3] Compl. ¶¶ 113-15. Additionally, overuse of pesticides like glyphosate because of GE crops has also contributed to an epidemic of "superweeds" that are resistant to the pesticide. Compl. ¶¶ 123-24. This has resulted in the creation of new GE crops for additional toxic herbicides like 2,4-D and dicamba, both of which pose significant risks to wildlife and the environment. *Id*.

[3] 79 Fed. Reg. 78775-78778 (Dec. 31, 2014).

B. Neonicotinoids.

Neonicotinoids are neurotoxic pesticides that are known to cause adverse impacts on a wide range of taxonomic groups. Compl. ¶ 97. Neonicotinoids disrupt the central nervous system function of insects including bees and butterflies, resulting in overstimulation and eventually paralysis and death. Compl. ¶ 98. Vertebrates, such as birds, are also affected by neonicotinoids, with a wide variety of negative effects like decreases in fat stores and body mass, reproductive effects, and failure to orient correctly during migration. Compl. ¶¶ 98-99. Neonicotinoid are also systemic, meaning its pesticidal property is taken up and expressed throughout the plant. As a result, once one part of a plant is exposed to a neonicotinoid, the entire plant can cause potential toxicity to species that feed on it. Compl. ¶ 101. As a persistent pesticide that is highly soluble, neonicotinoids easily contaminate nearby waterbodies via runoff. Compl. ¶ 104. The European Union has banned outdoor uses of many neonicotinoids. Compl. ¶ 108. The U.S. Environmental Protection Agency (EPA) has also found neonicotinoids to pose a high risk to ESA-protected species, particularly to birds, insects, and aquatic invertebrates. Compl. ¶¶ 104-07.

II. FWS's 2014 Decision Discontinued the Agricultural Uses of Neonicotinoids and GE Crops Across the Refuge System.

On July 17, 2014, James Kurth, then-Chief of the Refuge System, announced that by January 2016: "[FWS] will no longer use neonicotinoid pesticides in agricultural practices used in the System," and will "phase out the use of [GE] crops to feed wildlife."[4] Compl., Ex. A, ECF No. 1-2, at 1. The 2014 Decision came after longstanding efforts by Plaintiffs to remove these toxic practices from sensitive refuge lands, including a 2014 petition (submitted prior to the 2014

[4] The 2014 Decision included two limited exemptions to the phase-out: (1) for specifically identified refuges with "lands mandated for agricultural purposes" and (2) for situations in which FWS determines that the use of neonicotinoid or GE crops is essential to meet a specific refuge's wildlife management objectives. Compl., Ex. A, at 1-2; Martinez Decl. ¶ 3.

Decision) that specifically requested FWS ban these practices from the Refuge System. Compl. ¶¶ 15 n.4, 20, 27; Kimbrell Decl. ¶¶ 8-10, 14; Suckling Decl. ¶ 13.

The 2014 Decision stated that phasing out these practices was necessary to comply with its own policy and enforce the mission of the Refuge Act. *See supra* pp 8-9. Regarding the use of neonicotinoids, FWS specifically found that "prophylactic use, such as a seed treatment, of the neonicotinoid pesticides that can distribute systemically in a plant and can potentially affect the broad spectrum of non-target species is not consistent with [FWS] policy." Compl., Ex. A, at 1. Additionally, FWS found that "[r]efuges throughout the country" had "successfully met wildlife management objectives without the use of [GE] crops," and thus "it is *no longer possible to say that their use is essential* to meet wildlife management objectives." *Id.* at 2 (emphasis added). FWS stated that the 2014 Decision memorialized the "decision of the National Wildlife Refuge System Leadership Team," and "*concluded* FWS's discussion about current agricultural practices across [the Refuge System] to meet refuge objectives, the use of [GE crop] seeds, and the use of pesticides." *Id.* at 1 (emphasis added). Following the 2014 Decision, all refuges in the Refuge System, except those refuges identified for exemption, were able to timely discontinue all uses of neonicotinoids and GE crops. Compl. ¶ 140; Martinez Decl. ¶ 6.

III. FWS's Abrupt Reversal of Its 2014 Decision.

On August 2, 2018, FWS issued the 2018 Decision affirmatively "withdrawing the July 17, 2014 memorandum in full." Compl., Ex. B, ECF No. 1-3, at 2. FWS stated in the 2018 Decision that it was "reversing the decision to universally ban the use of [GE] crops on refuges," and "withdrawing the 2014 memorandum's restrictions with regard to neonicotinoid pesticides." *Id.* The 2018 Decision opens the door for GE crops and neonicotinoids to be used across the Refuge System. *See id.*, at 2 n.1; Compl. ¶ 145 Other than generally noting that there may be instances when GE crops and neonicotinoids may contribute to refuge wildlife management,

FWS failed to explain how the reversal can be squared away with its prior findings in 2014. *See* Compl., Ex. B, at 1-2. Prior to issuing the 2018 Decision, FWS did not conduct any consultation under the ESA, environmental reviews under NEPA, or consider any public input.

IV. Plaintiffs and Their Claims.

Plaintiffs and their members have a significant stake in the proper implementation of the Refuge Act, NEPA, and the ESA. The Center for Biological Diversity (CBD) is "dedicated to the protection of native species and their habitats," and "[f]or decades … has worked to protect imperiled plants and wildlife, open spaces, and air and water quality, as well as to preserve the overall quality of life for people and animals," including from harmful pesticide uses. Compl. ¶¶ 14-15. The Center for Food Safety (CFS) is dedicated to curtailing the harms of industrial agriculture, including the harms of GE crop cultivation and neonicotinoids. *Id.* ¶¶ 17-18. In 2014, after years of litigation and advocacy and before the 2014 Decision, Plaintiffs petitioned FWS to ban neonicotinoids and GE crops from use in the System. *Id.* ¶¶ 15 n.4, 20, 27.

Plaintiffs assert three claims: (1) the 2018 Decision flouts the plain terms of the Refuge Act and is otherwise arbitrary and capricious in violations of the APA, Compl. ¶¶ 148-170 (Claim 1); (2). Defendants were obligated to comply with the procedural requirements of NEPA prior to issuing the 2018 Decision by conducting a programmatic NEPA review, *id*. ¶¶ 171-182 (Claim 2); and (3) Defendants were obligated to comply with the procedural and substantive requirements of the ESA prior to issuing the 2018 Decision, *id*. ¶¶ 183-189 (Claim 3).

STANDARD OF REVIEW

Defendants seek dismissal of Plaintiffs' Complaint under Rules 12(b)(1) (subject-matter jurisdiction) and 12(b)(6) (failure to state a claim). "[T]he Court's review of the plaintiffs' claims under 12(b)(1) is not fundamentally different from review under 12(b)(6), because both require the Court to accept as true all the factual allegations contained in the plaintiffs' Complaint."

Cronauer v. U. S., No. CIV A 04-1355 RBW, 2006 WL 2708682, at *1 n.1 (D.D.C. Sept. 20, 2006) (citation omitted). Under Rule 12(b)(1), "a court must assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged;" similarly under Rule 12(b)(6), "a court must assume the truth of all well-pleaded factual allegations and construe reasonable inferences from those allegations in favor of the plaintiff." *Organic Trade Ass'n v. USDA*, 370 F. Supp. 3d 98, 105-06 (D.D.C. 2019) (citations and quotation marks omitted).

"In deciding a motion under Rule 12(b)(6), a court may consider the facts alleged in the complaint," as well as "documents attached to the complaint as exhibits or incorporated by reference." *Id.* at 106 (citing *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007)). Similarly, a court "may consider materials outside the pleadings in deciding whether to grant a [12(b)(1)] motion to dismiss for lack of jurisdiction …." *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (citations and quotation marks omitted). The motion must be denied when the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Plaintiffs' Claims Are Ripe for Judicial Review.

In deciding whether an agency decision is ripe for review under Rule 12(b)(1), the court examines "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)). "The judiciary's ultimate determination of ripeness … depends on a pragmatic balancing of those two variables," and for "close questions" should be "guided by the presumption of reviewability." *Ciba-Geigy v. EPA*,

801 F.2d 430, 434 (D.C. Cir. 1986) (citations omitted). Plaintiffs' claims here are ripe for review because they present purely legal issues that will not benefit from further factual development, and because Plaintiffs will experience significant hardship should the Court withhold review.

A. The Claims Presented in This Case Are Fit for Judicial Review.

In determining fitness, the D.C. Circuit looks to "whether [the issue] is 'purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005) (quoting *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003)). The 2018 Decision satisfies all three elements.

i. Plaintiffs' Claims Are Purely Legal.

Starting with Plaintiffs' Refuge Act claims (Claim 1, Counts I and II): where, as here, Plaintiffs challenge a "definitive statement of the agency's position," the D.C. Circuit has established that such challenges present "purely legal question[s] of statutory interpretation" that should be considered immediately ripe and subject to judicial review. *Her Majesty the Queen in Right of Ontario v. U.S. EPA*, 912 F.2d 1525, 1532-22 (D.C. Cir. 1990); *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001). This is because "a purely legal" inquiry into an agency's definitive interpretation of a statute—in this case, that it is lawful under the Refuge Act to use neonicotinoids and GE crops for farming purposes on refuge lands—is "one that can be answered solely by consulting the text, legislative history and judicial interpretations" of the Act. *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990).

Regarding Plaintiffs' arbitrary and capricious Refuge Act claim (Count II), courts in the D.C. Circuit have repeatedly held such claims to also present "purely legal" issues that are "presumptively reviewable" in the context of a facial challenge. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003) ("[W]e ask first whether the issue raised in the petition for

review presents a purely legal question, in which case it is presumptively reviewable." (citation omitted); *see also Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1041 (D.C. Cir. 1991) ("In light of the wholly legal and facial nature of the present challenge, we cannot agree that our ability to review the agency's decision would be increased by delay."). Plaintiffs' facial challenge to the 2018 Decision as being arbitrary and capricious, lacking reasoned basis, and contrary to the Refuge Act, therefore, constitutes "purely legal" issues ripe for challenge.[5]

Plaintiffs' NEPA and the ESA claims (Claims 2 and 3) also present purely legal issues that are ripe for review. Indeed, despite Defendants' attempts to argue away the Supreme Court's holding in *Ohio Forestry Ass'n* by shuttling it into a separate "procedural claims" subsection, Defs.' Br. 25-26, it is dispositive here: "NEPA … simply guarantees a particular procedure, not a particular result. Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n*, 523 U.S. at 737. As precedent in the D.C. Circuit establishes, the same theory applies to Plaintiffs' ESA claim. *See Int'l Ctr. for Tech. Assessment v. Thompson*, No. 04-0062 (RMU), 2005 U.S. Dist. LEXIS 51516, *19-20 (D.D.C. Mar. 30 2005) (applying *Ohio Forestry Ass'n* to find plaintiffs' NEPA and ESA procedural challenges to be ripe at the time the failure takes place); *Nat'l Ass'n of Home Builders*, 417 F.3d at 1286 (analogizing procedural claim under the Regulatory Flexibility Act to those under NEPA and

[5] Despite Defendants' reliance in *Sprint Corp. v. FCC*, 331 F.3d 952 (D.C. Cir. 2003), the court there also agreed that "fitness … is more likely to be found where 'the issue tendered is a purely legal one,' and [that] … the question of whether an agency decision is arbitrary and capricious is a purely legal question." *Id.* at 956. (citations omitted). While it went on to find that a "case-by-case" review may be necessary when there is a "complex statutory scheme" or other "difficult legal issues," *id.*, those heightening criteria are not in play here, where Plaintiffs challenge a discrete agency action. This is especially true for Plaintiffs' NEPA and ESA claims, which necessarily demand a review at this time before additional resources are committed that would preclude meaningful consideration of harms and imposition of meaningful alternatives, as those laws require. *See infra* pp. 19-23. There is no surer footing for judicial review than now.

applying *Ohio Forestry Ass'n* to find that the procedural claim "'can never get riper.'" (citation omitted)); *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 9 (D.D.C. 2005).

Rather than addressing *Ohio Forestry Ass'n* head-on, Defendants argue that Plaintiffs' procedural claims under NEPA and the ESA are unripe because the Service's "obligations" under these laws have not yet arisen. Defs.' Br. 25. In so doing, they ask the Court to address whether Defendants were required to (and in fact did) comply with the requirements of the ESA and NEPA in taking this action. Such a substantive inquiry is not appropriate at this early stage of litigation, and should be reserved for consideration on summary judgment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("*Lujan*") (at the pleadings stage, the court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim"); *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008). Otherwise stated, under the appropriate standard at the Rule 12 stage, Defendants' Motion must be denied when the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (citation omitted). Plaintiffs have done so here, and more.

The cases Defendants rely on, all of which were decided at the summary judgement and/or merits phases of litigation, support this necessary conclusion. *See* Defs.' Br. 26-27 (citing *Wyo. Outdoor Council v. U.S. Forest Serv*.,165 F.3d 43 (D.C. Cir. 1999) ("*Wyoming II*") (decided on motion for summary judgment); *Fisheries Survival Fund v. Jewell*, No. 16-cv-2409 (TSC), 2018 U.S. Dist. LEXIS 168532 (D.D.C. Sept. 30, 2018) (same); *Wyo. Outdoor Council v. Bosworth*, 284 F.Supp.2d 81 (D.D.C. 2003) ("*Bosworth*") (same); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466 (D.C. Cir. 2009) (decided on the merits under the direct review provision of the Outer Continental Shelf Lands Act (OCSLA)). Moreover, those cases are

factually distinguishable from the claims currently before this Court because they are specific to when the agency has reached a "critical stage of a decision," often in the context of oil and gas leasing, under the OCSLA, the Mineral Leasing Act of 1920, and the Federal Onshore Oil and Gas Leasing Reform Act—statutes that grant a procedural framework to lease lands for energy development.[6] *Wyoming II*, 165 F.3d at 49 (finding that "[i]n the context of leasing, we conclude that WOC has not established the irreversible and irretrievable commitment of resources necessary to establish ripeness"); *Fisheries Survival Fund*, 2018 U.S. Dist. LEXIS 168532, *19-28, 28 n.7 (applying *Wyoming II* and finding that "[a]gainst this background" the lease sale was not yet ripe for review); *Bosworth*, 284 F. Supp. 2d at 92-93 (applying *Wyoming II*, finding ripeness to be lacking based on facts specific in the lease process, but determining ripeness remains a "flexible" doctrine, not "a *per se* rule"); *Ctr. for Biological Diversity*, 563 F.3d at 480 ("In the context of multiple-stage leasing programs," the matter was not ripe until the lease was issued); *see also Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) (noting that since the "decision to allow surface disturbing activities" was made "at the *leasing stage*," NEPA obligations attached at that point) (emphasis in original). But here Plaintiffs' claims, which do not concern energy leasing, rest not on contingent future events, but instead on the legality of the 2018 Decision—a final agency action that is unambiguous, went immediately into effect upon issuance, and creates an irreversible and irretrievable commitment of resources that will likely foreclose the formulation of adequate alternatives under the ESA and NEPA if only analyzed at

[6] To the extent Defendants' arguments also relies on a theory of "prudential ripeness," the Supreme Court has recently, and unanimously, questioned the doctrine, stating that once a court has deemed a party to have standing to raise a claim, thereafter dismissing the case as unripe for review based on prudential grounds would be "in some tension with our recent affirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citations omitted). Regardless, Plaintiffs' claims also satisfy that doctrine.

the site-specific level. *See infra* pp. 19-23. This matter is also distinguishable because the 2018 Decision *categorically approved* neonicotinoid and GE crop uses, uses previously disallowed; it does not just implement an existing statutorily established framework for granting leasing rights. FWS here has thus reached the necessary "critical stage" in its decision to require review.

ii. The 2018 Decision Is "Sufficiently Final."

As discussed more fully below, *see infra* pp. 25-29, the 2018 Decision is also "sufficiently final." Through the 2018 Decision, the principal director of FWS unambiguously announced to the Service Directorate[7] the agency's decision to "withdraw[] the July 17, 2014 memorandum *in full* and revers[e] the decision." Compl. ¶ 6; Ex. B, at 1 (emphasis added). The 2018 Decision, which contains none of the tentative or interim language that is the hallmark of non-final decision-making, is binding, took immediate effect across the Refuge System, and is controlling on the ground. *Id.*; Martinez Decl. ¶ 6; Connor Decl., Exs. A-C.[8]

For example, since the decision was issued, Cynthia Martinez, a high-ranking official,[9] has spoken with all Refuge Regional Chiefs to gather "current information on any requests or inquiries related to GMO/neonicotinoid use on refuges," and to aggregate and review requests from farm cooperators "to use these products on any of our refuges now that the 2014 memo has been revoked." Connor Decl., Ex. A. That exchange confirmed that at least 26 refuges, including

[7] The "Service Directorate" includes all of the Service's Regional Directors, Assistant Directors, Directors, Deputy Directors, and the National Conservation Training Center Director.

[8] Plaintiffs may provide supplemental evidence on the pleadings to respond to a "facial" jurisdictional challenge 12(b)(1) motion, such as Defendants' challenge to the ripeness of the 2018 Decision and Plaintiffs' Article III Standing. *See Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992).

[9] Ms. Martinez is the Chief of the National Wildlife Refuge System, and as a high-ranking official she maintains control over the System, including its "more than 855 million acres which include[] 568 national wildlife refuges, 38 wetland management districts, and 5 national monuments." Martinez Decl. ¶ 1.

those enjoyed by Plaintiffs' members, have already begun their inquiry into using GE crops and/or neonicotinoids. *Id.*, Ex. B; Jenkins Decl. ¶¶ 4, 7; Kasserman Decl. ¶ 6; Curry Decl. ¶ 10.

FWS is also preparing a guidance memorandum to explain how it will approve individual applications for neonicotinoid uses on refuges. *Id.*, Ex. C (identifying the system-wide approach FWS staff are to take in approving neonicotinoids for use on refuge lands, and recognizing that neonicotinoids have a high probability of adversely impacting non-target organisms). Upon implementation, individual pesticide approval processes are not subject to public notice or comment. Actions by FWS itself thus make abundantly clear that the 2018 Decision is final, and controlling its management of the Refuge System.

Yet, citing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) ("*National Wildlife Federation*"), Defendants allege that Plaintiffs claims are not ripe for review until the "scope of the controversy has been reduced to more manageable portions…." Defs.' Br. 23. *National Wildlife Federation* is factually distinguishable and contains an explicit exemption that applies to this case. There, plaintiff attempted to challenge the "continuing (and thus constantly changing) operations of the [Bureau of Land Management] in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans." *Nat'l Wildlife Fed'n*, 497 U.S. at 890. After describing in detail the extreme generality of plaintiff's challenge, *id*., the Supreme Court rejected that challenge, explaining that "respondent cannot seek *wholesale* improvement of this program by court decree …." *Id*. at 891 (internal citations omitted) (emphasis in original). The Court there recognized, however, that "[i]f there is in fact some specific order … applying some particular measure across the board," and if that order is final and ripe for review, "it can of course be challenged under the APA by a person adversely affected." *Id*. at 890 n.2. The Court further specified that "[t]he major exception, of course, is a

substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once." *Id*. (internal citations omitted). That is precisely the case here. As Plaintiffs show, (1) Plaintiffs here do not make a wholesale challenge to an entire federal program, but merely challenge one specific action: the 2018 Decision, and (2) Plaintiffs did adjust their conduct following the 2018 Decision, and have been adversely affected by that action.[10] *See, e.g., infra* pp. 33-44.

The Court should not accept FWS's Hail Mary argument that the purely legal issues presented in this case are not fit for review at this time because FWS may, in the future, take some additional administrative actions related to the 2018 Decision. As the D.C. Circuit has repeatedly determined, a challenged agency action "need not be the last administrative action contemplated by the statutory scheme" to qualify as sufficiently "final." *Nat'l Treasury Employees Union v. Fed. Labor Relations Authority*, 745 F.3d 1219, 1222 (D.C. Cir. 2014) (citation omitted); *see also Friedman v. FAA*, 841 F.3d 537, 542 (D.C. Cir. 2016); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1031 n.1 (D.C. Cir. 2008). As the Court has previously explained, "if the possibility … of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule … would ever be final as a matter of law." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

[10] Defendants' reliance on *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967), fairs no better. The Court there focused on the non-comital nature of the action ("Commissioner *may* under certain circumstances order inspection … and that further certification of additives *may* be refused"), the need for additional record development (including "an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets"), and a paucity of hardship to the petitioners to find ripeness to be lacking. *Id*. at 163-64 (emphases added). The Court further made clear that its conclusion was based on the specific facts of the case. *Id.* at 164. That case, therefore, has no bearing to whether ripeness is established in this matter.

That FWS retains some discretion with respect to taking additional actions to approve uses of neonicotinoids and GE Crops on refuges does not make Plaintiffs' purely legal challenge unfit.

iii. Additional Fact Development Is Not Needed.

Third, despite Defendants' protestations, Defs.' Br. 23-24, additional facts would not "significantly advance [the Court's] ability to deal with the legal issues presented." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior,* 538 U.S. 803, 812 (2003) (internal quotations and citations omitted); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock,* 783 F.2d 237, 250 (D.C. Cir. 1986). As it relates to the first count of Plaintiffs' Refuge Act claim, as the D.C. Circuit established in *Her Majesty the Queen:* where, as here, Plaintiffs challenge a "definitive statement of the agency's position" on a "purely legal question of statutory interpretation," judicial review "will not benefit from the development of further information; nor will it interfere prematurely with the [agency's] own consideration of the issue." 912 F.2d at 1532-33; *Int'l Union*, 783 F.2d at 250 (finding ripeness where the agency made a "broad pronouncement" in a non-enforcement decision "that goes far beyond the facts of any given case," thus the "sole issue" is "whether these new interpretations are inconsistent with the statute that they interpret"). Moreover, as it relates to second count of Plaintiffs' Refuge Act claim, the court's review must necessarily "be based on the full administrative record that was before the [agency] *at the time [it] made [its] decision*." *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added). Thus, no further factual development is necessary because the record on review *is already formed.*

Similarly, as it relates to Plaintiffs' NEPA and ESA claims, which are raised in part under the APA, the claims are ripe "[b]ecause [as] the alleged procedural violation … is complete, so

too is the factual development necessary to adjudicate the case." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084 (9th Cir. 2015) (finding that alleged procedural violation of the ESA was ripe for review prior to any project-specific implementation) (citing *Ohio Forestry Ass'n*, 523 U.S. at 737).

Defendants suggest that "[i]t would be helpful for the Court to know if any site-specific GMO or neonicotinoid pesticide determinations are ever applied," Defs.' Br. 23, but such future activities will not inform an already established record for an already final decision.[11] Accordingly, as the D.C. Circuit found under comparable circumstances in *Nat'l Ass'n of Home Builders*, "'[i]n light of the wholly legal and facial nature of the present challenge,'" Plaintiffs "purely legal" claims are presently fit for judicial review. 417 F.3d at 1282 (citation omitted).

B. Hardship to Plaintiffs of Withholding Review Is Present and Extensive.

Defendants are incorrect that withholding review of the 2018 Decision will not cause "any current or imminent harm" to Plaintiffs. Defs.' Br. 24. Quite to the contrary, the hardship to Plaintiffs' interests from delay is present and extensive, whereas the hardship to Defendants is minimal. *See Consol Rail. Corp. v. United States*, 896 F.2d 574, 577 (D.C. Cir. 1990) ("If we have doubts about the fitness of the issue for judicial resolution, then we balance the institutional interests in postponing review against the hardship to the parties that will result from the delay.").[12]

[11] Significantly, as discussed further in the hardship prong, the review of only the *individual future* approvals of neonicotinoid or GE crop use by FWS would not encompass cumulative, programmatic reviews envisioned by NEPA and the ESA. It would preclude the relief Plaintiffs' seek in this case, and may materially "foreclose[e]" the ability of FWS to require appropriately protective "reasonable and prudent measures" (ESA) or "alternatives" (NEPA). *See infra* pp. 20-23.

[12] In the alternative, if the Court finds the first prong of the ripeness test to be met (fitness), in the context of APA challenges, "Congress has emphatically declared a preference for immediate review … no purpose is served by proceeding to the second prong." *Nat'l Recycling Coal., Inc.*

Plaintiffs are conservation organizations dedicated to the protection of native species and their habitats. *See* Compl. ¶¶ 14, 18. Reducing or removing the use of toxic neonicotinoids and pesticide-promoting GE crops from the Refuge System is important to the organizations' missions and their members' interests. *See, e.g.*, Compl. ¶¶ 15, 18, 20; Suckling Decl. ¶¶ 4-7; Kimbrell Decl. ¶¶ 5-11, 25. The longer Plaintiffs wait for a judicial ruling on their claims, the longer their conservation objectives will suffer. *See* 16 U.S.C. § 668dd(a)(4)(A)-(B); *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009) (finding hardship where challenged action authorizes an activity that "is contrary to [Plaintiffs'] interest").

The severity of Plaintiffs' hardship here "is underscored by the realization that if the challenge is not ripe for review now, no review will ever be possible." *Int'l Union*, 783 F.2d at 250; *see also Cal ex rel. Lockyer v. USDA*, 575 F.3d 999, 1011 (9th Cir. 2009). Indeed, with regards to Plaintiffs' Refuge Act challenges, it is hard to imagine a future time in which a facial challenge to the 2018 Decision would be able to substantively address the matters Plaintiffs raise, and do so in a timely manner.

With regards to Plaintiffs' NEPA and ESA claims, understanding the purposes and demands of NEPA and the ESA are essential to understanding the true hardship of denying review at this critical stage to Plaintiffs and wildlife. Specifically, NEPA and ESA require programmatic and cumulative reviews upon the issuance of an action, like the 2018 Decision, to ensure adequate analysis of environmental and species impacts, and availability of mitigating alternative.[13] Thus, this Court's review of *individual future* approvals of neonicotinoids or GE

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v. Reilly, 884 F.2d 1431, 1434 (D.C. Cir. 1989) (quotation omitted); *see also Her Majesty the Queen*, 912 F.2d at 1533.

[13]*See, e.g.*, 40 C.F.R. § 1502.4 (requiring programmatic NEPA review "before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives"); *id.* § 1508.25 (a programmatic EIS is should be

crop use by FWS *will not reach* the "*programmatic"* environmental impacts of the 2018 Decision, as required by NEPA, nor the *full consequences* of that decision on threatened and endangered species, as required by the ESA—questions which are currently before this Court.

Indeed, as summarized by the D.C. Circuit in *Foundation on Economic Trends v. Heckler* as it relates to programmatic NEPA review:

> A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts …. Whereas the programmatic EIS looks ahead and assimilates "broad issues" relevant to [the program], the site-specific EIS addresses more particularized considerations ….

756 F.2d 143, 159 (D.C. Cir. 1985) (quoting *Nat'l Wildlife Fed'n. v. App. Regional Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981)); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (finding that, "if the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review"). Timely NEPA review through a programmatic EIS is therefore necessary to make certain that the government's review is "relevant to policy and [] timed to coincide with meaningful points in agency planning and decision-making" and "available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives." 40 C.F.R. § 1502.4.

Similarly, the ESA mandates that all federal agencies "insure that *any action* authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification" of designated critical habitat by adhering to the consultation process. 16 U.S.C. § 1536(a)(2) (emphasis added). In

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prepared if actions are "connected," "cumulative," or sufficiently "similar" because it is "the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions"); *id*. § 1508.28 (instructing additional regional, site-specific review based on the completed programmatic EIS through a process called "tiering"); *see also id*. §§ 1508.18(b)(4).

practice, this is done through consultation with FWS.[14] Such analysis is required "at the earliest possible time," *id*. § 402.14(a), so that an agency does not make "any irreversible or irretrievable commitment[s] of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures"—measures designed to protect against jeopardy to ESA-listed species or adverse modification of critical habitats. 16 U.S.C. § 1536(d). As the Supreme Court explained in *Tennessee Valley Authority*, the ESA's consultation language "admits of no exception," 437 U.S. at 173. Limiting judicial review to site-specific decision-making would undermine these statutes, unlawfully harm environmental resources, and leave Plaintiffs without an adequate remedy.

In contrast, no material hardship will befall Defendants by proceeding with judicial consideration. Defendants' decision-making process has run its course, and Plaintiffs bring purely legal claims challenging that decision. Plaintiffs' challenge could, in fact, not be more timely since resolution of Plaintiffs' claims at this stage would likely assist Defendants in clarifying the substantive, legal, and procedural problems with the 2018 Decision prior to FWS investing any additional agency resources to further implement the decision. *See Mead v. Holder*, 766 F. Supp. 2d 16, 28 n.8 (D.D.C. 2011) (finding that defendant presumably "has an interest in knowing sooner, rather than later" whether an opinion is lawful). From that perspective, it may have been out of sheer prudence and caution that FWS chose not to further implement these practices on individual refuges until this litigation was resolved.[15] Plaintiffs' challenge to the 2018 Decision thus also easily satisfies the hardship prong. Plaintiffs' claims are ripe for review.

[14] Consultation must "[e]valuate the effects of the action and cumulative effects on the listed species." 50 C.F.R. § 402.14(g)(3); *id*. § 402.02 ("Effects of the action" include "the direct and indirect effects of an action on the species … together with the effects of other activities that are interrelated or interdependent with that action.").

[15] Plaintiffs' lawsuit was not a surprise for Defendants. Plaintiffs sent their notice of intent letter

II. The Service's 2018 Decision is a Final Agency Action Subject to Judicial Review.

Parties agree that two conditions must be satisfied for an agency action to be "final" and subject to judicial review.[16] Defs.' Br. 28. "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). "The core question is whether the agency has completed its decisionmaking process, and whether the result of the process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). In making its assessment, the Court's inquiry should be "a 'pragmatic' and 'flexible' one." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1279; *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1810 (2016). Indeed, as the D.C. Circuit itself confirms, "[c]ase law interpreting this standard is 'hardly crisp,' and it 'lacks many self-implementing, bright-line rules, given the pragmatic and flexible nature of the inquiry as a whole.'" *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (citation omitted).

The 2018 Decision exceeds this test. The 2018 Decision is a formal agency decision with immediate effect that reversed a prior determination by Defendants that had "universally ban[ned]" the use of neonicotinoids and GE crops in the Refuge System. Compl., Ex. B; *see supra* pp. 9-10; Defs.' Br. 16-17; Martinez Decl. ¶ 6. The 2018 Decision changed the status quo ante and future of the System by throwing open previously locked doors for these practices. It clearly "mark[s] the consummation of the agency's decision making process," and is one "by

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under the ESA within a month of the 2018 Decision being finalized and soon thereafter brought this case to challenge the legality of the decision. *See* Compl. ¶ 12.

[16] Parties agree that the final agency action requirement is non-jurisdictional, raised under Rule 12(b)(6). *See* Defs.' Br. 27-28; *Trudeau v. FTC*, 456 F.3d 178, 183-184 (D.C. Cir. 2006).

which rights or obligations have been determined or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78.

A. The 2018 Decision Consummates the Agency's Decision-making Process.

The 2018 Decision is neither "tentative or interlocutory." *Id.* Rather it definitively "withdr[ew] the July 17, 2014 memorandum *in full*" and "reverse[d] the [2014 Decision]." Compl., Ex. B, at 2 (emphasis added). This about-face action finally and permanently replaced FWS's preexisting "universal[] ban" on neonicotinoid and GE crop uses with a decision that allows for these practices across the Refuge System. *Id.*; *supra* pp. 9-10. Such an unequivocal statement of the agency's position is sufficient to meet the first prong of final agency action. *Nat'l Ass'n of Home Builders,* 417 F.3d at 1278-79 (where "[t]here [was] nothing tentative or interlocutory about" a document, the court "need not tarry long on the finality test's first prong") (internal quotation marks omitted); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 917 (D.C. Cir. 1985) (absence of equivocal or tentative language indicates an agency's "final position"); *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004) (same).

While the 2018 Decision is unambiguous on its face, and therefore forecloses this analysis, in determining finality courts can also look to whether the challenged agency action establishes a "binding norm." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (quoting *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006)). An agency action is binding if, among other reasons, "an agency acts as if a document issued at headquarters is controlling in the field [and] if it treats the document in the same manner as it treats a legislative rule." *App. Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *Gen. Elec.*, 290 F.3d at 383 (agency pronouncement is binding "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.").

Such is true here. The 2018 Decision was reviewed and issued by the highest-ranking officials in the FWS, Gregory Sheehan, then Principal Deputy Director of FWS. Defs.' Br. 8. As such, the 2018 Decision "binds" the Agency by "definitively interpret[ing]" its Refuge Act authority. *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011); *see also Her Majesty the Queen*, 912 F.2d at 1531- 32; *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1268 (D.C. Cir. 2018) ("In evaluating the first *Bennett* prong, this Court considers whether the action is 'informal, or only the ruling of a subordinate official.'" (citation omitted)). Despite that Gregory Sheehan has since left the agency, FWS has further demonstrated no affirmative efforts to reverse or revise the 2018 Decision, but instead is "act[ing] as if a document issued at headquarters is controlling in the field." *App. Power*, 208 F.3d at 1021; *see also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (quoting *Franklin*, 505 U.S. at 798). The 2018 Decision has, for example, spurred internal communication between the Chief of the National Wildlife Refuge System and individually Refuge Regional Chiefs regarding its implementation. Connor Decl., Ex. A-B. And FWS is preparing a guidance that describes the agency's process for approving neonicotinoid use on refuges. *Id.*, Ex. C.

That the 2018 Decision "contemplates additional decisionmaking," Defs. Br. 29-31, does not alter its finality. Indeed, "[t]he principle of finality in administrative law is not … governed by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed." *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974). Just because FWS contemplates taking additional agency actions in the future does not mean that the 2018 Decision is not also reviewable, *especially* if those additional actions are not themselves judicially reviewable. As courts in this Circuit have "repeatedly" made clear, the test for whether an agency action is final and challengeable is "not

whether there are further administrative proceedings available, but rather 'whether the impact of the order is sufficiently 'final' to warrant review in the context of the particular case.'" *Friedman*, 841 F.3d at 542 (quoting *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 591 (D.C. Cir. 1971)); *NetCoalition v. SEC*, 715 F.3d 342, 351 (D.C. Cir. 2013) ("A final order need not necessarily be the last order.") (quotation marks and citations omitted): *see Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 745 F.3d 1219, 1222 (D.C. Cir. 2014). Under Defendants' view, almost no action would ever rise to a level of being considered "final" because in administrative actions something invariably must come next. *See Gen. Elec.*, 290 F.3d at 380; *Am. Bird Conservancy*, 516 F.3d at 1031 n.1 ("agencies cannot avoid judicial review of their final actions merely because they have opened another docket" to address related matters).

Nor does the APA set up such a high hurdle for judicial review. *See Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667 (1986) (finding that there is a strong presumption that Congress intends judicial review of administrative action, and review should not be withheld except in extraordinary circumstances); *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (APA creates a "presumption favoring judicial review").

In sum, the challenged 2018 Decision meets the definition of a challengeable agency action under the APA and the ESA.[17] 5 U.S.C. § 551(13); *id.* § 706(2); *id.* § 551(4) (further defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy …"); 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. And the action is final and judicially reviewable

[17] In addition to Plaintiffs' procedural NEPA challenge, which is reviewable under the APA, Plaintiffs also challenge the agency's "failure to act," which is additionally included in the definition of "agency action," and reviewable on independent grounds under the APA. 5 U.S.C. § 706(1); Compl. ¶ 182 (alleging that the 2018 Decision "constitutes agency action unlawfully withheld and unreasonably delayed").

because it unambiguously terminated the Service's prior moratorium on the use of neonicotinoids and GE crops in the Refuge System, and directs that those practices can now be used system-wide. Put another way, if the 2018 Decision had not been finalized, the use of these practices on national wildlife refuges would not even be allowed, period.[18] Because of the 2018 Decision, they are. Defendants admit the significance of this: "With the exception of refuges with lands mandated for agricultural purposes [as exempted from the Service's prior phase-out Decision], since 2016, the Service has not used or approved the use of genetically modified crops of neonicotinoids on national wildlife refuges for agricultural practices …." Martinez Decl. ¶ 6.

The cases cited by Defendants do not support a different conclusion. First, the action in *Holistic Candlers & Consumer Association v. FDA*, 664 F.3d 940 (D.C. Cir. 2012), an FDA pre-enforcement warning letter, was determined not to be final because it did not conclusively determine whether ear candles were medical devices, but merely "advised" recipients that it "appear[ed]" that the candles were intended to mitigate and treat disease, and asked for "voluntary" compliance with FDA's initial assessment. *Id.* at 944-45. Next, in *Soundboard*, the court found finality lacking for a letter that was "informal," "nonbinding staff advise" from a "subordinate official" that "nowhere presents [itself] as the conclusive view of the Commission." 888 F.3d at 1268-70. Here, the Court is being asked to determine the legality of a "statement of position" from the director of the FWS that "admit[ed] of no ambiguity" and gives "no indication that it was subject to further agency consideration or possible modification," clear indicia of a consummated final agency action. *Ciba-Geigy*, 801 F.2d at 436-37.

Defendants further rely on *Fund for Animals v. Williams*, 391 F. Supp. 2d 132 (D.D.C. 2005), for the idea that the 2018 Decision is not a final agency action because the action there

[18] That is, except in the limited circumstances provided in the 2014 Decision.

"had no direct and immediate effect on those regulated." Defs.' Br. 31.[19] But that case actually supports Plaintiffs' position. In short, pursuant to the Government Performance and Results Act, FWS (and other agencies) must prepare a Strategic Plan, later submitted to Congress and the Office of Management and Budget, that addresses its goals and projects its activities over a five-year period. *Fund*, 391 F. Supp. 2d at 135. For FWS, one of those goals stated was that "[b]y 2005, compatible, wildlife-dependent recreational visits to National Wildlife Refuges and National Fish Hatcheries [will] have increased by 20 percent from the 1997 levels." *Id*. The court found the goal, as captured in the Strategic Plan, not to be a final agency action because, in relevant part, FWS's publication of "goals" in a "strategic plan" did not "immediately authorize" "the opening or expansion of wildlife refuges to recreational uses," and was not final. *Id*. at 137. The same cannot be said for the 2018 Decision, which not only had immediate effect, but explicitly by its terms authorized the opening of wildlife refuges for uses of neonicotinoids and GE crops. The 2018 Decision does not signify a "moving target," but a "final and binding determination" that is judicially reviewable. *See Franklin v. Massachusetts*, 505 U.S. at 798.

B. Defendant's Action Is One From Which Legal Consequences Will Flow.

The 2018 Decision is also "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (citations omitted). As the D.C. Circuit determined in *Ciba-Geigy*,

> It is well settled that "[t]he authoritative interpretation of an executive official has the legal consequence, if it is reasonable and not inconsistent with ascertainable legislative intent, of commanding deference from a court that itself might have reached a different view if it had been free to consider the issue as on a blank slate."

[19] Defendants also rely on *National Wildlife Federation*, but as described above, the Court there dismissed as unripe generalized claims that amounted to a "wholesale" challenge to an entire federal program, not, as here, a specific final agency action. *See supra* pp. 16-19.

801 F.2d at 437 (citation omitted). FWS does not and cannot contest that the 2018 Decision was issued by an "executive official," nor that it had some kind of delayed effect in fully withdrawing the 2014 Decision without exception. Defs.' Br. 8.

Defendants instead split hairs by saying that because the Agency has yet to affirmatively approve a use of GE crops or neonicotinoids on any specific refuge, the 2018 Decision has no legal consequence. Defs.' Br. 33. Defendants' argument misses the point. That FWS did not go from not spraying neonicotinoids on refuges on the Thursday before its 2018 Decision to spraying them the following Monday following the decision is not the test for whether the 2018 Decision is one from which legal consequences flow. Rather, the proper inquiry, which is a "pragmatic" inquiry, is whether the action at issue "*gives rise to* 'direct and appreciable legal consequences.'" *See Hawkes*, 136 S. Ct. at 1810 (citation omitted) (emphasis added).

The 2018 Decision unambiguously generates legal obligations and gives rise to legal consequences by "alter[ing] the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 178. Specifically, it changed the status quo ante for the use of pesticides and GE crops *throughout* the Refuge System, and, in so doing, it bound FWS's Regional Directors to implementing that decision. This is similar to the D.C. Circuit's decision in *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), where the court held a guidance document concerning EPA's review of plans required by the Clean Air Act (CAA) to be final agency action subject to review because it "definitively interpreted" a provision of the CAA, and "altered the legal regime" by resolving a legal question as to whether the agency could consider certain alternatives in approving the plan. *Id.* at 320. And, in so doing, the court found that it bound the agency's "regional directors" to that interpretation. *Id.*

Defendants rely on *California Communities Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019), to argue that there are no legal consequences here because the 2018 Decision doesn't require any specific action. Defs'. Br. 32-33. There, "hew[ing] closely to the CAA provisions and EPA regulations," the court found no finality because, in part, neither EPA nor the regulated parties could rely on the memo as authoritative in permitting and it did not bind agency staff. *Id*. at 637-38. Unlike the memo in *California Communities*, which merely "*forecasts* EPA's definitive interpretation," here the 2018 Decision provides FWS's clear interpretation as to whether neonicotinoids and GE crops may lawfully be used in the Refuge System and binds agency staff to implementing that decision. *Id*. at 638 (emphasis added).

Defendants also suggest that the 2018 Decision merely returns this matter to its earlier status quo ante.[20] But the 2018 Decision itself makes clear that the status quo ante was set by the 2014 Decision, and it was from that status quo that the Court must consider the legal obligations and effects of the 2018 Decision. *See, e.g., Clean Water Act v. Pruitt*, 315 F. Supp. 3d 77, 82 (D.D.C. 2018) (determining that since an interim agency action redefined the status quo ante in a rulemaking process, Plaintiffs couldn't argue the status in place two steps prior to be the status quo ante). Here, FWS not only issued a decision to phase these practice out of the Refuge

[20] Further, through *State of California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019), another CAA case, Defendants call upon and attempt to rely on similar advisory language as was distinguishable with *Holistic Candlers. See* Defs.' Br. 33; *supra* p. 28. There, the court analogized the agency action "to an agency's grant of a petition for reconsideration of a rule" and found that because it only "evinced EPA's intention to begin the rulemaking process," and evidenced no actual change in emission standards, that it was not a final agency action. *State of Cal.*, 940 F.3d at 1350-51. Here, quite to the opposite, the 2018 Decision was more than a mere prelude to FWS's reconsideration of the 2014 Decision; it explicitly replaced the 2014 Decision. That change evidences not an interim action, as in *State of California*, but a final agency action that is definitive and binding on staff, and "gives rise to" direct and appreciable legal consequences. *Hawkes*, 136 S. Ct. at 1810.

System, it *succeeded* in that phase-out. The status quo ante is the 2014 Decision, and it is against that Decision that the 2018 Decision must be compared.

In addition to Plaintiffs' facial challenges to the Decision, Plaintiffs challenge FWS's failure to comply with the procedural requirements of NEPA and the ESA in issuing the 2018 Decision. As courts have determined on numerous occasions, "[t]he duty to prepare an EIS normally is triggered when there is a proposal to change the status quo." *Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03. (D.C. Cir. 1979); *see also Or. Nat. Desert Assoc. v. Green*, 953 F. Supp. 1133, 1147 (D.D.C. 1997) (finding that an alteration in the status quo triggered the agency's duty to prepare an EIS). The same is true for an ESA review.

The 2018 Decision thus constituted a final and binding action that changes the status quo by terminating a moratorium on the use of neonicotinoids and GE crops in the Refuge System, and re-introducing the availability of those practices in full. It also has the effect of creating additional obligations for, among other people, FWS staff. It thus consummates the agency's decision-making process, has legal consequence, and is final action under the APA and ESA.

III. Plaintiffs Have Adequately Alleged Standing.

It is undisputed that an organizational plaintiff can establish standing based on injury to the organization itself (organizational standing) or injury to its members (representational standing). Defs.' Br. 11. Plaintiffs' burden of establishing standing at the motion to dismiss stage is "relatively modest." *See Bennett*, 520 U.S. at 171. The Court must "treat the complaint's factual allegations as true" and "must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). The Court only needs to find that one Plaintiff has standing to find jurisdiction. *Mendoza v. Perez*, 754. F.3d 1002, 1010 (D.C. Cir. 2014).

As with its ripeness and final agency action arguments, Defendants' standing argument boils down to their insistence that Plaintiffs cannot establish standing until and unless some GE crops are cultivated, or some neonicotinoids sprayed, in a particular refuge. *See* Defs.' Br. 12. There is no support for this heightened standard. The 2018 Decision arbitrarily and capriciously eliminated the prohibition against the agricultural uses of GE crops and neonicotinoids in the Refuge System, injuring Plaintiffs by erasing their successful efforts to phase-out those practices and requiring them to re-start those efforts anew, and harming the recreational and aesthetic interests of Plaintiffs' members. Defendants' abrupt issuance of the 2018 Decision without adherence to procedures required by NEPA and the ESA also injured Plaintiffs and their members' informational and procedural interests, as well as their interests in protecting rare and unique refuge species and their habitats. At this juncture, the Complaint and the declarations filed with the present opposition amply demonstrate that plaintiffs and their members have (1) suffered injuries-in-fact (2) that are fairly traceable to the 2018 Decision, and (3) that are likely to be redressed by judicial relief. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).[21]

A. The 2018 Decision Injured Plaintiffs.

Organizational Plaintiffs such as CFS and CBD can establish standing to bring suit on their own behalves where a challenged action causes a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources." *People for the Ethical Treatment of Animals v. USDA.*, 797 F.3d 1087, 1092 (D.C. Cir. 2015) ("*PETA*") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 377, 379 (1982)) (quotation marks omitted).

[21] As the Supreme Court has noted, "The standing question … bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975).

To make this determination, a court asks "first, whether the agency's action or omission to act 'injured [the organization's] interest' and, second, whether the organization 'used its resources to counteract that harm.'" *PETA*, 797 F.3d at 1094 (citation omitted) (alteration in original).

Both prongs are met here. First, in light of Plaintiffs' organizational missions and their critical role in Defendants' issuance of the 2014 Decision, it is no surprise that the 2018 Decision "perceptibly impaired" Plaintiffs' interests and activities to protect species and the environment from the harms of neonicotinoids and GE crops. *Id.* at 1100 (explaining that the Supreme Court in *Havens* found organizational plaintiff had suffered an injury-in-fact where the challenged action "had 'perceptibly impaired'" the plaintiff's activities). *See, e.g.*, Compl. ¶¶ 15-16; 23-26 Kimbrell Decl. ¶¶ 16-24; Suckling Decl. ¶¶ 11-12, 19-26. Second, as the Complaint and supporting declarations detail, Plaintiffs have had to expend numerous resources to counteract the 2018 Decision. *See* Compl. ¶¶ 16, 22-23; Suckling Decl. ¶¶ 19-26; Kimbrell Decl. ¶¶ 16-24.

As to the first, the 2018 Decision reversing the 2014 Decision *has already* impaired CBD and CFS's ability to protect and conserve species and their habitats on national wildlife refuges because the reversal means that practices that are known to be harmful to species, including endangered and threatened species, can now be used across the Refuge System. Compl. ¶¶ 141-47. Because of the 2018 Decision, national wildlife refuges across the country are exploring using neonicotinoids and GE refuges, *see* Connor Decl., Exs. A-B; and the agency itself has already identified through its proposed guidance for implementing the use of neonicotinoids authorized by the 2018 Decision. *Id.*, Ex. C. These injuries to Plaintiffs' missions are augmented by FWS's failure to comply with the obligations of the ESA and NEPA in taking this action; if they had, then the true environmental harm of this action could have been analyzed

and alternatives and/or measures put into place to mitigate that harm. Compl. ¶¶ 28-29; Suckling Decl. ¶¶ 17-19; Kimbrell Decl. ¶¶ 22-23; *see infra* pp. 42-44.

As to the second, the 2018 Decision has already drained Plaintiffs resources by requiring them to divert significant staff time, expertise, and funds to counteract the harm to their missions, resources that would not had to have been diverted if not for Defendants' action. *See* Compl. ¶¶ 15-16, 20-23; Suckling Decl. ¶¶ 20-26 (listing additional resources diverted from CBD's programs to monitor and investigate the 2018 Decision; including significant resources spent on public record requests and membership outreach); Kimbrell Decl. ¶¶ 18-22 (detailing resources and staff time spent on education campaign regarding the 2018 Decision, and monitoring and investigation of its full scope and impacts). In light of Plaintiffs' past efforts and success in working to remove agricultural uses of GE crops and neonicotinoids throughout the Refuge System, there can be no question that having to restart those efforts is a diversion of resources, directly attributable to the 2018 Decision, beyond those that Plaintiffs otherwise would have needed to employ. Suckling Decl. ¶¶ 13, 20-26; Kimbrell Decl. ¶¶ 18-22.

Rather than accepting Plaintiffs' allegation as true, as they must, Defendants try to dismiss the injuries to Plaintiffs' interests as merely harming their advocacy. Defs.' Br. 17-18. However, the D.C. Circuit has explained "many … [D.C. Circuit] cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and, indeed, sometimes are." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011); *see also Spann*, 899 F.2d at 27-29.

Plaintiffs' injuries here are similar to those that the D.C. Circuit found cognizable in *PETA*. In *PETA*, an animal rights group challenged the United States Department of Agriculture (USDA)'s failure to apply the Animal Welfare Act to birds, alleging that this resulted in the

agency not generating inspection reports that plaintiff there had relied on for member education, and for lodging complaints with USDA about bird mistreatment. 797 F.3d 1087. The D.C. Circuit affirmed the lower court's finding, holding that plaintiffs had sufficiently alleged organizational injury in the form of the denial of investigatory information and resulting inability of the organization to bring statutory violations to the agency's attention. *Id.* at 1095. The D.C. Circuit in *PETA* concluded that the plaintiff "[had], *at the dismissal stage*, adequately shown that the USDA's inaction injured its interests and, consequently, [plaintiff] has expended resources to counteract those injuries." *Id.* at 1094 (emphasis added).[22]

Just as in *PETA*, the 2018 Decision "injured [Plaintiffs'] interests" in eliminating the harms of neonicotinoids and GE crops, particularly from the Refuge System, and caused Plaintiffs "to divert and redirect [their] limited resources to counteract and offset" the implications of the 2018 Decision on sensitive refuge lands. 797 F.3d at 1095. *See* Compl. ¶¶ 15-16, 22-23; Suckling Decl. ¶¶ 13, 18-26; Kimbrell Decl. ¶¶ 18-22. Prior to the 2014 Decision, Plaintiffs actively monitored, participated in, and educated their membership about FWS's refuge decision-making process as it related to the use of neonicotinoids and GE crops on refuges, and petitioned the FWS to ban those practices. *See* Compl. ¶¶ 15-16 & nn.4-5, 19-20 & n.7, 21 & n.8, 22-23, 28; Suckling Decl. ¶¶ 13, 26; Kimbrell Decl. ¶¶ 10-14. After the 2014

[22] The lower court in *PETA* distinguished *National Taxpayers Union v. United States*, 68 F.3d 1428 (D.C. Cir. 1995) and *Center for Law & Education v. Department of Education*, 396 F.3d 1152 (D.C. Cir. 2005), both cited by Defendants in the present motion, finding them irrelevant since they "deal with [plaintiff groups] that alleged injuries related to the costs of litigation, legal counseling, and lobbying, none of which is relevant here." *People for the Ethical Treatment of Animals, Inc. v. USDA.*, 7 F. Supp. 3d 1, 9 (D.D.C. 2013). Defendants try to mischaracterize Plaintiffs' expended activities as solely in preparation of the present litigation, Defs.' Br. 17-18, but Plaintiffs' activities to counteract FWS's activities as they relate to the 2018 Decision are far more extensive, and include investigating, monitoring, and education—activities that would *not* have occurred but for the 2018 Decision. *See supra* pp. 34-35.

Decision, Plaintiffs were able to divert their staff time and resources to alternative conservation efforts. The 2018 Decision forced Plaintiffs to once again redirect its valuable resources to address the uses of neonicotinoids and GE crops on refuge lands. *See, e.g.*, Suckling Decl. ¶¶ 15, 18-20; Kimbrell Decl. ¶¶ 18-22; Compl. ¶ 16.

Additionally, Plaintiffs' informational and procedural interests are injured by Defendants' failure to comply with NEPA, the ESA, and the Refuge Act. Because Plaintiffs were unable to receive valuable information through FWS's lawful compliance with those laws, Plaintiffs have had to rely on (and use a significant amount of their resources to seek out) information that should be public regarding the 2018 Decision, its implementation, and its harmful environmental effects to refuges, including under the Freedom of Information Act (FOIA). Plaintiffs have also had to spend resources processing that information, and conveying it to their membership and the public. *See infra* pp. 42-44; Compl. ¶¶ 16 ("[A]s a result of and to increase transparency around Defendants' implementation of the 2018 Decision, CBD has had to file and pursue numerous public records requests with the FWS"), 22 (same for CFS); Suckling Decl. ¶ 21-22 (CBD filed at least 5 public records requests); Kimbrell Decl. ¶ 22 (listing additional staff time and FOIA requests); *see Action All.*, 789 F.2d at 937-38 (finding organizational standing where a challenged agency action "significantly restrict[ed]" "a generous flow of information" that Plaintiffs "wish[ed] to use in their routine information dispensing"); *Air All. Hous. v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 124 (D.D.C. 2019) (this Court's finding that plaintiff had suffered informational injury where it had been "deprived of information that, on [its] interpretation, a statute requires the government … to disclose."); *id.* at 125 (noting that the D.C. Circuit found organizational standing in *PETA* where organization asserted injury because "it was 'not receiving inspection reports for birds that the Department ha[d] *voluntarily*

produced….") (alteration and emphasis added in original); *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 113-14 (D.D.C. 2009) (maintaining that organizations had *Havens* standing where they had to "dedicate additional resources … to obtain information … includ[ing] submitting requests for information under [FOIA and] conducting research on-line," and observing that "the deprivation of information" concretely hindered plaintiffs' activities where it "hinder[ed] … the informational service they provide to their members"); *Am. Anti-Vivisection Soc'y v. USDA*, -- F.3d --, No. 19-5015, 2020 WL 110829, at *3 (D.C. Cir. Jan. 10, 2020) (applying *PETA* to find injury where animal rights groups lacked information necessary to further their missions of raising public awareness regarding animal welfare due to defendant's failure to act).

Defendants rely principally on *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015) ("*FWW*") for arguing Plaintiffs' organizational interests are not impaired by the 2018 Decision. That case is distinguishable. There, an organizational plaintiff challenged USDA's changes to poultry inspection procedures. *FWW*, 804 F.3d at 919-20. The D.C. Circuit found the plaintiff had not adequately alleged organizational injury because the injuries identified were in the form of *future* expenditure of resources and time, should the challenged activity be allowed to remain in place, not *present* expenditures. *See id.* at 921 ("Although [plaintiff] alleges that FWW *will* spend resources educating its members and the public about [the challenged regulations], nothing in [plaintiff's] declaration indicates that [its] organizational activities *have been* perceptibly impaired ….") (emphases added). Here, Plaintiffs allege *significant past and ongoing* diversions of resources as a result of the 2018 Decision.

The other cases relied upon by Defendants are similarly inapplicable. Defs.' Br. 17-18. In *Turlock Irrigation District v. F.E.R.C.*, 786 F.3d 18 (D.C. Cir. 2015), the court found no injury to plaintiffs because: (1) plaintiffs only alleged future resource burdens and (2) "because [the

plaintiff groups] received exactly what [they] sought. FERC accepted some of the jurisdictional theories advanced by the [groups], and found that [the dam] was required to be licensed." *Id.* at 22-24. No such agency acquiescence exists here, where Defendants abruptly *reversed* the action that Plaintiffs originally sought. And in *Cigar Ass'n of Am. v. FDA*, 323 F.R.D. 54 (D.C. Cir. 2017), this Court found no injury to proposed organizational intervenors when "[n]ot one of the Proposed Intervenors has come forward with evidence showing that invaliding the Rule would inhibit the organization's daily operations," *id.* at 63, but instead have only alleged probable future harm. *Id.* at 56. Plaintiffs' allegations here amount to much more. Thus, while Defendants try to paint Plaintiffs' efforts as ordinary program costs, here, as in *PETA*, they are actually costs that Plaintiffs "'would not have needed to expend (or expend to the same extent) … absent [the USDA's] failures to comply with its mandates under the [Animal Welfare Act].'" 797 F.3d at 1095-96. Plaintiffs have sufficiently alleged organizational injury.

B. The 2018 Decision Injured Plaintiffs' Members.

Plaintiffs can also establish representational standing "when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181. Defendants do not (and cannot)[23] dispute that Plaintiff members' aesthetic interests in using and enjoying environmental resources and wildlife are cognizable interests. Instead, they argue that Plaintiffs' allegations on behalf of their members are not actual, imminent, or concrete, but are "entirely speculative," and that more "particular application[s] of GMOs or pesticides" must be

[23] It is settled law that the environmental plaintiffs "'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" have standing. *Friends of the Earth*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

identified to show harm to Plaintiffs' members' cognizable interests. Defs.' Br. 14. Defendants' argument twists the facts and the operative law to suit their argument and necessarily must fail.

Defendants cite *Lujan* and *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) in painting injuries to Plaintiffs' members as speculative, but those cases concern the level of specificity necessary to allege standing in motions for injunctive relief and summary judgment, not motions to dismiss. Defs.' Br. 14.[24] Rather, as the Supreme Court explained in *Lujan*, "general factual allegations of injury" adequately support standing at this stage because it is presumed that they "embrace those specific facts that are necessary to support the claim." 504 U.S. at 561; *Bennett*, 520 U.S. at 168; *see supra* pp. 10-11.

According to precedent in this Circuit and the Supreme Court, injury-in-fact does not require, despite Defendants' protestations to the contrary, that a specific harm befall a specific person in a specific refuge that is already using the practices allowed by the 2018 Decision. Instead injury is established when the risk of injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017); *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 6-7 (D.C. Cir. 2006) (upholding standing at the pleading stage based on claims of a "substantial risk" that the injury occur).[25] Here, Plaintiffs

[24] Moreover, *Summers* is inapplicable. There, in a challenge to defendant U.S. Forest Service's regulations exempting certain forest projects and salvaged timber sales from public notice and comment, the U.S. Supreme Court found a lack of Article III injury because the only member declaration specifically identifying a particular salvaged timber sale, affecting a specific national forest utilized by the member, had already resolved in a partial settlement reached before the case reached the Supreme Court. 555 U.S. at 494 ("We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action … but has settled that suit, he retains standing to challenge the basis of that action.").

[25] Even under the heightened summary judgment standard, the D.C. Circuit has consistently upheld the "substantial risks" analysis. *See, e.g., Ouachita Riverkeeper, Inc. v. Bostick*, 938 F. Supp. 2d 32, 42 (D.D.C. 2013) (finding injury because presence of a pipeline near property substantially increased the risk of leaks and property damage, even if no leaks had occurred).

have demonstrated standing to sue on behalf of their members because they have identified multiple members who "use … area[s]" that may use neonicotinoids and/or GE crops as a result of the 2018 Decision, and who are people "'for whom the aesthetic and recreational values of the area[s] will be lessened' by the challenged activity." *Friends of the Earth*, 528 U.S. at 183.

Specifically, Plaintiffs' members partake in recreational and professional wildlife-focused activities at wildlife refuges that, as a result of the 2018 Decision, are now able to and have begun the process of gaining approval to begin using neonicotinoids and/or GE crops. *See* Compl. ¶¶ 24-30; Jenkins Decl. ¶¶ 4, 8, 9; Kasserman Decl. ¶¶ 6, 7, 11; Curry Decl. ¶¶ 6-9, 16, 21, 22, 25. The 2018 Decision increases the risk of harm to Plaintiffs' enjoyment of these places. *See* Curry Decl. ¶ 22; Kasserman Decl. ¶¶ 7, 19; Jenkins Decl. ¶¶ 8-11. Many of the wildlife species enjoyed by Plaintiffs' members are ESA-protected species. *See, e.g.*, Curry Decl. ¶ 25 (endangered ring pink mussel, endangered pink mucket pearly mussel, and endangered orange-footed pimpleback pearly mussel); Kasserman Decl. ¶¶ 8-10 (endangered red-cockaded woodpecker); Jenkins Decl. ¶¶ 5,6 (springy pygmy sunfish). Plaintiffs have more than sufficiently alleged a "substantial [risk and] probability of harm" to show imminent injury at this juncture.[26] *See Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Circ. 2017).

[26] Defendants again cite to *FWW*, but it is still inapplicable. Defs.' Br. 15. There, plaintiff claimed the challenged action injured its members due to an increase in the statistical likelihood of contracting food-borne illnesses, but the court found that the statistics submitted by plaintiff did not establish such an increase. *FWW*, 808 F.3d at 914. Plaintiffs' members are not alleging harm from any statistically increased risk, but rather harm to their recreational, aesthetic and other interests in viewing wildlife in national wildlife refuges due to neonicotinoids and GE crops that may now legally be used in the areas where those species are found.

C. Defendants' Procedural Failures Injured Plaintiffs and Their Members.

Plaintiffs can also establish injury by showing that the procedural violations "threaten[] their concreate interest." *Mendoza*,754 F.3d at 1010. Defendants' failure to adhere to NEPA and ESA procedures in issuing the 2018 Decision harms Plaintiffs procedural interests because it precluded Plaintiffs from: participating in the review processes; gathering information about the harms to species and the environment from the agency's action; advocating for greater protection for species and the environment prior to the agency taking action, especially as it relates to improved alternatives under NEPA and reasonable and prudent alternative measures under the ESA; and developing and disseminating materials and information to educate and inform their members and the public about the agency's proposal and how that proposal might affect their interests, including interests in public lands, species, public health, and the environment. *See, e.g,* Compl. ¶¶ 15-16, 22, 28-29 ("Plaintiffs would have participated in and gleaned information from any public, [statutory] process …."); Suckling Decl. ¶¶ 15-17; Kimbrell Decl. ¶ 22. In abruptly issuing the 2018 Decision without analysis of the programmatic impact of its nationwide reversal required under NEPA, nor any consultation on the impacts of neonicotinoids and GE crops on ESA-protected species mandated by the ESA, FWS denied Plaintiff organizations the information necessary to understand this sweeping change, and to participate in the decision-making process on behalf of their members.

This Court and others in this Circuit have found such harms sufficient to establish a procedural injury. *See Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973) (finding procedural injury from agency's decision not to draft an EIS where plaintiff's "activities … include[d] making available to the public scientific information relevant to important social issues and stimulating and informing public discussion of the scientific aspects of questions of public policy"); *Air All. Hous.*, 365 F. Supp. 3d at 124-25

(noting that plaintiff in *PETA* "had standing to sue to compel the agency to promulgate regulations that in turn would cause the agency to voluntarily produce information.").[27]

FWS leans only on cases in which plaintiffs failed to tie a concrete injury to a procedural violation in its attempt to disprove plaintiffs' procedural injury. Defs.' Br. 19-20. For example, FWS cites *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013), for the premise that procedural injuries must be "tied to their respective members' concrete aesthetic and recreational interests." Defs.' Br. 20. That is precisely the case here. *See supra* pp. 39-41; *WildEarth Guardians*, 738 F.3d at 305-06 (finding sufficient procedural injury from defendant's failure to adhere to NEPA under summary judgment standard where appellants alleged injury to their "members' aesthetic interests in [the area affected by the challenged action] and specific plans to visit the area regularly for recreational purposes."); *Cf. Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 114 (D.D.C. 2015) (lack of procedural injury where plaintiffs only alleged informational injury without any explanation as to "how the Department's deprivation of information has caused [them] any concrete harm."); *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996) (no injury from defendant's failure to prepare EIS before issuing a tax credit where injury to plaintiff from Defendants' failure rested on the tax credit leading to more ethanol production, and resulting in agricultural pollution near areas utilized by wildlife of

[27] Defendants try to dismiss Plaintiffs' expended resources on FOIA requests, citing *Smith v. United States*, 237 F. Supp. 3d 8, 12 (D.D.C. 2017), but that case, involving only an individual plaintiff, is irrelevant to Plaintiffs' organizational standing. *See Smith*, 237 F. Supp. 3d at 13 (ruling that *pro se* plaintiff had failed to satisfy Article III standing when relying on FOIA litigation costs as injury to challenge government's compliance with statutes concerning classifying national security information). *Smith* does not reflect the present situation in which Plaintiffs are being forced to use FOIA as an alternate, more time-consuming, and inadequate mean of receiving information about the 2018 Decision that should have been readily available to Plaintiffs through NEPA and the ESA.

interest to appellants); *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (injury to protected interest "stacks speculation upon hypothetical upon speculation"); *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015) (injury too speculative where declarants averred "uncertain and unspecific prediction[s] of future harm").

D. Plaintiffs Adequately Assert Causation and Redressability.

First, as to Plaintiffs' claims challenging FWS's failure to adhere with NEPA and the ESA (Claims 2-3), Defendants acknowledge that the "normal standards for immediacy and redressability are relaxed." *Lujan*, 504 U.S. at 572 n.7; *see* Defs.' Br. 19. For those claims, "[a]ll that is necessary is to show that the procedural step was connected to the substantive result." *Mass. v. EPA*, 549 U.S. 497, 518 (2007); *see City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007).

Plaintiffs have more than sufficiently shown "that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Fla. Audubon*, 94 F.3d at 664. FWS's failure to complete the programmatic EIS and programmatic ESA consultation allows FWS to avoid assessing the impacts to the refuge system as a whole, which results in concrete impacts to species, including ESA-protected species, injuring Plaintiffs and their members. *See supra* pp. 42-44; *Am. Bird Conservancy*, 516 F.3d at 1031 (plaintiffs challenging FCC's failure to complete a programmatic EIS and ESA consultation for rules and procedures for building communications towers had standing due to recreational injuries); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179-80 n.2 (9th Cir. 2011) (finding standing to bring a facial challenge without challenge to site specific implementation, and explaining procedural injury under NEPA was ripe for facial challenge).

Second, Plaintiffs have also demonstrated causation and redressability for its claims under the Refuge Act (Claim 1). Defendants relies solely on *Center for Biological Diversity v.*

U.S. Department of Interior, 563 F.3d 466 (D.C. Circ. 2009), to disprove causation, but there the D.C. Circuit found causation lacking where, in order for the asserted injury to occur, the challenged first stage of the leasing program must lead to drilling activities, that in turn increases oil production and consumption, which will then lead to exacerbate the effects of climate change to the harm of species and habitats enjoyed by Plaintiffs' members. *Id.* at 478. In contrast, here FWS admits that as a result of the 2018 Decision, national wildlife refuges have begun considering using neonicotinoids and GE crops on refuges, including refuges utilized by Plaintiffs' members. Connor Decl. ¶¶ 4-5, Ex. A-B. The 2018 Decision thus directly triggered the risks that those practices will harm species of interest to Plaintiffs' members, and caused Plaintiffs to expend resources to monitor and educate the public regarding these toxic practices. *See supra* pp. 33-44. This two-step chain of causation is far less attenuated than the seven-step chain involving "various different groups not present in the case" rejected by the court in *Center for Biological Diversity v. DOI*. Defs.' Br. 16.

Finally, Defendants do not contest the Court's ability to redress Plaintiffs' injuries, nor could they. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2747 (2010). Plaintiffs have amply established that the 2018 Decision, has caused their organizational and member injuries. Reversal of the 2018 Decision until and unless Defendants comply with its statutory duties will redress harm to Plaintiffs, their members, and most importantly, this Nation's protected refuge environment.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion.

Dated this 10th day of January, 2020.

Respectfully submitted,

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