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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF THE RIVER, a non-)
profit corporation, DEFENDERS OF)
WILDLIFE, a non-profit)
corporation, and CENTER FOR)
BIOLOGICAL DIVERSITY, a non-)
profit corporation,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES ARMY CORPS OF)
ENGINEERS, and MAJOR GENERAL)
MEREDITH W.B. TEMPLE, in his)
official capacity,)
)
Defendants.)

Case No. 2:11-CV-01650 JAM-JFM

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS

Before the Court is Defendants' United States Army Corps of Engineers and Major General Meredith W.B. Temple, (collectively "the Corps" or "Defendants"), Motion to Dismiss (Doc. #26) the First Amended Complaint ("FAC," Doc. #25) filed by Plaintiffs Friends of the River, Defenders of Wildlife, and the Center for Biological Diversity, (collectively "Plaintiffs"). Plaintiffs oppose the motion (Doc. #47).¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for February 22, 2012.

I. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

1 Plaintiffs allege that for decades the Corps has allowed,
2 encouraged, and, in some cases, required the planting of trees and
3 vegetation on levees for environmental purposes, including habitat
4 preservation. Plaintiffs allege that the Corps reversed course
5 when it issued the "Final Draft White Paper: Treatment of
6 Vegetation within Local Flood Damage-Reduction Systems" ("White
7 Paper") on April 20, 2007. Plaintiffs contend the White Paper
8 calls for a vegetative-free-zone for all levees.

9 Plaintiffs allege that Defendants changed the regulatory and
10 environmental status quo when they adopted Engineer Technical
11 Letter 1110-2-571 ("ETL"), allegedly replacing EM 1110-2-301, on
12 April 10, 2009 and again ten months later when they produced the
13 draft Environmental Assessment/Finding of No Significant Impact on
14 February 9, 2010 for the "Policy Guidance Letter - Variance from
15 Vegetation Standards for Levees in Floodwalls" ("PGL"). Plaintiffs
16 allege that through a Federal Register Notice ("Federal Register
17 Notice") the PGL acknowledged that the ETL Guidelines establish
18 "mandatory vegetation-management standards for levees." 75 Fed.
19 Reg. at 6364.

20 The ETL establishes "Guidelines for Landscape Planting and
21 Vegetation Management at Levees, Floodwalls, Embankment Dams, and
22 Appurtenant Structures." Plaintiffs aver that the ETL prohibits
23 all vegetation except grass, requires a vegetation-free zone 15
24 feet to each side of a levee, and requires removal of all non-
25 compliant vegetation. The ETL, according to Plaintiffs, requires
26 levee operators to seek a variance to retain non-compliant
27 vegetation for environmental purposes. Plaintiffs further allege
28

1 that the Corps itself described the ETL standards as "mandatory" in
2 the Federal Register and the Corps is currently implementing the
3 ETL in California in the course of levee inspections.

4 Plaintiffs allege that the PGL substantively changed the
5 Corps' policy on existing variances and has had direct, indirect,
6 and cumulative impacts on the environment including impacts to
7 listed species and critical habitats.

8 Plaintiffs allege that on about April 2, 2010, the Sacramento
9 Area Flood Control Agency ("SAFCA") and the Central Valley Flood
10 Protection Board formally applied to the Corps for a variance from
11 the standard vegetation guidelines set forth in the ETL as non-
12 federal sponsors of the American River Watershed Canyon Features
13 Project. Plaintiffs aver that on about June 16, 2010, the Corps
14 approved in part and denied in part the variance request.
15 Plaintiffs further allege that on about December 30, 2010, in
16 rejecting a request from the California Department of Water
17 Resources ("DWR") to cease implementing the ETL, the Corps declared
18 "should there be information available that warrants a revision or
19 an improvement to the standards in the ETL, we will change the
20 standard. However, until that time, the Corps will continue to
21 implement the current standards in the ETL." FAC ¶ 39.

22 Plaintiffs allege that the Defendants' actions were final
23 agency actions, major federal actions, and rulemaking that require
24 compliance with the National Environmental Policy Act ("NEPA"), 42
25 U.S.C. § 4321 et seq., the Endangered Species Act ("ESA"), 16
26 U.S.C. 1531 et seq., and the Administrative Procedure Act ("APA"),
27 5 U.S.C. §§ 553, 701-706. Plaintiffs contend that the Corps failed
28 to comply with those statutes. Plaintiffs allege that the Corps

1 did not prepare an Environmental Impact Statement or an
2 Environmental Assessment under NEPA before issuing the White Paper,
3 ETL, Federal Registrar notice, or PGL. Likewise, Plaintiffs allege
4 that the Corps did not consult with the fish and wildlife agencies
5 under the ESA. Finally, Plaintiffs allege that the Corps did not
6 provide notice and comment in violation of the APA.

7 Plaintiffs filed their Complaint (Doc. #1) on June 20, 2011.
8 On July 27, 2011, Plaintiffs filed a Motion for Summary Judgment
9 (Doc. #11). The Court granted the Corps' motion to stay briefing
10 on the summary judgment motion until the Court decides the Corps'
11 Motion to Dismiss (Doc. #23). On September 19, 2011, the Corps
12 filed its Answer to Plaintiffs' Complaint (Doc. #24). On October
13 10, 2011, Plaintiffs filed the FAC (Doc. #25) alleging three causes
14 of action: (1) NEPA violations; (2) ESA violations; and (3) APA
15 Violations. On October 21, 2011, Defendants filed the instant
16 Motion to Dismiss (Doc. #26) which included two exhibits and
17 several attachments. Plaintiffs oppose the Motion (Doc. #47) and
18 object to the exhibits in the Motion (Doc. #48).

19 II. STATUTORY BACKGROUND

20 A. Administrative Procedure Act

21 The Administrative Procedure Act ("APA") provides that a
22 "person suffering a legal wrong because of agency action, or
23 adversely affected or aggrieved by agency action within the meaning
24 of a relevant statute, is entitled to judicial relief thereof." 5
25 U.S.C. § 702. The APA provides that "[a]gency action made
26 reviewable by statute and final agency action for which there is no
27 other adequate remedy in a court are subject to judicial review."
28 5 U.S.C. § 704. In reviewing agency action, the court may set

1 aside the action only if it is "(A) arbitrary, capricious, an abuse
2 of discretion, or otherwise not in accordance with law . . . ;
3 (C) in excess of statutory jurisdiction, authority, or limitations,
4 or short of statutory right; or (D) without observance of procedure
5 required by law." 5 U.S.C. § 706(2) (A), (C), (D).

6 B. National Environmental Policy Act

7 The National Environmental Policy Act ("NEPA") has "twin aims.
8 First, it places upon [a federal] agency the obligation to consider
9 every significant aspect of the environmental impact of a proposed
10 action. Second, it ensures that the agency will inform the public
11 that it has indeed considered environmental concerns in its
12 decisionmaking process." Balt. Gas & Elec. Co. v. Natural Res.
13 Def. Council, Inc., 462 U.S. 87, 97 (1983) (citation and internal
14 quotation marks omitted). NEPA does not contain substantive
15 environmental standards. Rather, it "establishes 'action-forcing'
16 procedures that require agencies to take a 'hard look' at
17 environmental consequences." Metcalf v. Daley, 214 F.3d 1135, 1141
18 (9th Cir. 2000).

19 NEPA requires federal agencies to prepare an Environmental
20 Impact Statement ("EIS") prior to taking "major Federal actions
21 significantly affecting the quality" of the environment. 42 U.S.C.
22 § 4332(2) (C). Some proposed federal actions categorically require
23 the preparation of an EIS. If the proposed action does not
24 categorically require the preparation of an EIS, the agency must
25 prepare an Environmental Assessment ("EA") to determine whether the
26 action will have a significant effect on the environment. See 40
27 C.F.R. § 1501.4 (Council on Environmental Quality ("CEQ")
28 regulations implementing NEPA); Metcalf, 214 F.3d at 1142. If the

1 EA reveals that the proposed action will significantly affect the
2 environment, then the agency must prepare an EIS. If the EA
3 reveals no significant effect, the agency may issue a Finding of No
4 Significant Impact ("FONSI"). See 40 C.F.R. §§ 1501.4; see also
5 Metcalf, 214 F.3d at 1142.

6 C. Endangered Species Act

7 The Endangered Species Act ("ESA") established a program for
8 conserving certain species listed by the Secretaries of the
9 Interior and Commerce as endangered or threatened species ("listed
10 species"). 16 U.S.C. §§ 1531(b), 1532(6), (20), 1533. Where an
11 agency determines that its action "may affect listed species or
12 designated critical habitat[,]" 50 C.F.R. § 402.14(a), it must
13 pursue some form of consultation ("informal" or "formal"), with the
14 U.S. Fish and Wildlife Service ("USFWS") or the National Marine
15 Fisheries Service. 50 C.F.R. §§ 402.13, 402.14. If the agency
16 determines that a particular action will have "no effect" on a
17 listed species or critical habitat, there is no consultation
18 requirement. 50 C.F.R. § 402.12; Sw. Ctr. For Biological Diversity
19 v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996).

20
21 III. OPINION

22 A. Legal Standard

23 1. Motion to Dismiss

24 Dismissal is appropriate under Rule 12(b)(1) when the District
25 Court lacks subject matter jurisdiction over the claim. Fed. R.
26 Civ. P. 12(b)(1).

27 When a defendant brings a motion to dismiss for lack of
28 subject matter jurisdiction pursuant to Rule 12(b)(1), the

1 plaintiff has the burden of establishing subject matter
2 jurisdiction. See Rattlesnake Coal. v. U.S. E.P.A., 509 F.3d 1095,
3 1102, n.1 (9th Cir. 2007) ("Once challenged, the party asserting
4 subject matter jurisdiction has the burden of proving its
5 existence.").

6 There are two permissible jurisdictional attacks under Rule
7 12(b)(1): a facial attack, where the court's inquiry is limited to
8 the allegations in the complaint; or a factual attack, which
9 permits the court to look beyond the complaint at affidavits or
10 other evidence. Savage v. Glendale Union High Sch., 343 F.3d 1036,
11 1039 n.2 (9th Cir. 2003). "In a facial attack, the challenger
12 asserts that the allegations contained in a complaint are
13 insufficient on their face to invoke federal jurisdiction, whereas
14 in a factual attack, the challenger disputes the truth of the
15 allegations that, by themselves, would otherwise invoke federal
16 jurisdiction." Li v. Chertoff, 482 F.Supp.2d 1172, 1175 (S.D. Cal.
17 2007) (internal citations omitted).

18 If the moving party asserts a facial challenge, the court must
19 assume that the factual allegations asserted in the complaint are
20 true and construe those allegations in the light most favorable to
21 the plaintiff. Id. at 1175 (citing Warren v. Fox Family Worldwide,
22 Inc., 328 F. 3d 1136, 1139 (9th Cir. 2003)). If the moving party
23 asserts a factual attack, a court may resolve the factual disputes
24 by "look[ing] beyond the complaint to matters of public record,
25 without having to convert the motion into one for summary judgment.
26 White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). The court "need
27 not presume the truthfulness of the plaintiff's allegations." Id.

28 However, "jurisdictional finding of genuinely disputed facts

1 is inappropriate when the jurisdictional issue and the substantive
2 issues are so intertwined that the question of jurisdiction is
3 dependent on the resolution of factual issues going to the 'merits'
4 of an action." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039
5 (9th Cir. 2004) (internal citations and quotations omitted). The
6 question of jurisdiction and the merits of an action are
7 intertwined where "a statute provides the basis for both the
8 subject matter jurisdiction of the federal court and the
9 plaintiff's substantive claim for relief." Id. (internal citations
10 and quotations omitted).

11 B. Evidentiary Objections

12 Defendants premise their Motion to Dismiss on a factual
13 challenge, arguing that this Court lacks subject matter
14 jurisdiction because the White Paper, ETL, and PGL, whether taken
15 separately or together, do not constitute reviewable final agency
16 action and are not substantive rules. Because Defendants base
17 their Motion to Dismiss on a factual challenge, they attach two
18 exhibits and several attachments for the Court to consider.

19 Plaintiffs object to all the exhibits. See Doc. #48.
20 Plaintiffs provide three main arguments why the Court should strike
21 these exhibits: (1) the Court should not consider materials outside
22 the complaint on a motion to dismiss, so the documents are not
23 relevant to the instant motion; (2) the documents are not
24 admissible under Federal Rule of Evidence 402 because the
25 provisions of the Administrative Procedure Act ("APA"), 5 U.S.C.
26 § 706, require review of administrative decisions based on the
27 whole record and Defendants' exhibits constitute part, but not all,
28 of the administrative record; (3) the Rabbon declaration is

1 irrelevant to the instant motion because it is not based on
2 personal knowledge and the opinions offered are without foundation
3 as to any relevant expertise, in violation of Federal Rule of
4 Evidence 702.

5 Defendants respond that the Court should consider its exhibits
6 and attachments. See Doc. #50. First, Defendants argue that the
7 exhibits are relevant because the Corps challenges some of the
8 Plaintiffs' factual allegations, and as such, the Court can
9 properly consider the documents attached to the Motion to Dismiss.
10 Additionally, Defendants argue that the factual allegations are not
11 so intertwined with the merits that the Court cannot resolve the
12 jurisdictional issues separately. Secondly, Defendants argue that
13 the administrative record is not necessary to consider the instant
14 motion and that some of the documents attached to the Motion to
15 Dismiss post-date the alleged agency actions at issue, and
16 therefore, would likely not be part of the administrative record.
17 Defendants point out that Plaintiffs initially moved for summary
18 judgment on the basis of many of these same documents, arguing that
19 no administrative record was necessary for the Court to decide the
20 issues and asked the Court to take judicial notice of many of these
21 documents. See Pls.' Notice of Mot. for Summ. J. (Doc. #11)
22 (asking the Court to take judicial notice of the White Paper and
23 ETL among other documents); Statement of Undisputed Facts in Supp.
24 of Mot. for Summ. J. & Req. for Judicial Notice (Doc. #11-2); Pls.
25 Opp'n. to Defs. Mot. to Stay (Doc. #21). Finally, Defendants
26 contend that the Court can properly consider the Rabbon Declaration
27 because the declaration is based on his personal and official
28 knowledge and information and that he provides background

1 information and facts surrounding the Framework process. In the
2 alternative, Defendants submit that the Court can decide the Motion
3 to Dismiss without considering the disputed documents; it could
4 decide that Plaintiffs lack standing or that Plaintiffs' claims are
5 an impermissible programmatic challenge without considering any
6 documents outside Plaintiffs' FAC. The Court could also decide
7 that the ETL and PGL are not final agency actions and that the
8 Corps was not required to comply with the APA's formal rulemaking
9 procedures by considering only the ETL and draft variance policy.

10 Because Defendants assert a factual challenge to the Court's
11 subject matter jurisdiction, as discussed supra, the Court may
12 "look[] beyond the Complaint to matters of public record . . . [and
13 it] need not presume the truthfulness of the plaintiff's
14 allegations." White, 227 F.3d at 1242. Thus, the Court may
15 properly consider documents outside the complaint.

16 Here, the Court finds that Defendants' motion and exhibits are
17 arguments on merits issues, such as the presence or absence of
18 final agency action, whether rulemaking has occurred, and whether
19 the ETL was a new substantive rule or merely a reiteration and
20 clarification. The issues "are so intertwined[,] that the question
21 of jurisdiction is dependent on the resolution of factual issues
22 going to the merits' of [the] action." Safe Air, 373 F.3d at 1040.
23 Much of the evidence upon which these merits issues could be
24 decided is solely within the possession of Defendants. Defendants
25 concede that the documents currently before the Court do not
26 constitute the complete administrative record. To resolve these
27 questions, the Court must consider the entire administrative
28 record. The Court cannot merely look to the face of the documents

1 to determine whether they are final agency actions or whether they
2 prescribe substantive rules. "[T]o ensure fair review of an agency
3 action, [the Court] should have before it neither more nor less
4 information than did the agency when it made its decision."
5 Biodiversity Legal Found. v. Norton, 180 F.Supp.2d 7, 10 (D.D.C.
6 2001) (internal quotation omitted). Additionally, Defendants
7 concede that the Court could decide the Motion to Dismiss without
8 considering some or all of the documents attached.

9 While the Court will not consider all of the documents
10 attached to the Motion to Dismiss because they form an incomplete
11 administrative record, the Court takes judicial notice of the ETL
12 and the White Paper as background materials. The Court may take
13 judicial notice of facts that are "capable of accurate and ready
14 determination by resort to sources whose accuracy cannot reasonably
15 be questioned." Fed. R. Evid. 201(b)(2). The Court must take
16 judicial notice for a judicially noticeable fact "if requested by a
17 party and supplied with the necessary information." Fed.R.Evid.
18 201(c)(2). Additionally, both parties requested judicial notice of
19 these documents. While it is appropriate for the Court to take
20 judicial notice of public records in this type of motion, the Court
21 is limiting its notice of these documents to background materials
22 and it will not rely on these documents to resolve any factual
23 dispute. See U.S. v. 14.02 Acres or Land More or Less in Fresno
24 Cnty., 547 F.3d 943, 955 (9th Cir. 2008) (holding that district
25 court judge did not abuse its discretion in taking judicial notice
26 of a government study for the limited purpose of background
27 material without relying on it to resolve any factual dispute).
28 The Court elects to take judicial notice of these documents because

1 they are heavily relied upon by both parties and there is no
2 dispute as to the accuracy of the documents. The parties disagree
3 as to whether the documents reflect final agency actions or
4 substantive rules.

5 As a final matter, the Court will not consider the Rabbon
6 Declaration. Mr. Rabbon's declaration is not based on personal
7 knowledge and the opinions offered are without foundation as to any
8 relevant expertise. See Fed.R.Evid. 702.

9 C. Claims for Relief

10 1. Final Agency Action

11 Defendants argue that Plaintiffs' NEPA and APA claims should
12 be dismissed because the Corps has not taken a final agency action
13 subject to review and that the ESA claim should be dismissed for
14 not identifying a discrete violation of the ESA.

15 Claims under the APA require the presence of a final agency
16 action. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83
17 (1990).

18 As a general matter, two conditions must be satisfied
19 for agency action to be final: First, the action must
20 mark the consummation of the agency's decisionmaking
21 process - it must not be of a merely tentative or
22 interlocutory nature. And second, the action must be
one by which rights or obligations have been
determined, or from which legal consequences will
flow.

23 Fairbanks N. Star Borough v. U.S. Army Corps of Engineers, 543 F.3d
24 586, 591 (9th Cir. 2008) (quoting Bennett v. Spear, 520 U.S. 154,
25 177-78 (1997)).

26 Defendants argue that the ETL is not a final agency action
27 because instead of marking the end of the agency's decisionmaking
28 process or determining legal rights and obligations, the ETL

1 provides guidelines to be considered in future decisionmaking and
2 contemplates further, site-specific action. Defendants further
3 argue that the White Paper and PGL are not agency actions.
4 Defendants explain that the Corps developed the White Paper to
5 serve as a discussion paper outlining the treatment of vegetation
6 within local flood-damage-reduction systems and to recommend
7 further steps. In the final section of the White Paper, Section 7
8 (titled "Recommendations"), the document lists recommended actions,
9 which Defendants contend are only recommendations, not final agency
10 actions. Defendants further argue that the White Paper is marked
11 "Final Draft," and was never finalized as an official Corps
12 document or agency position. Likewise, Defendants contend that the
13 PGL is not final agency action because it is explicitly a draft
14 document, is subject to change, and even once it is finalized, the
15 PGL would not be final agency action because it merely outlines the
16 variance process as opposed to dictating an outcome in any
17 particular case. Finally, Defendants argue that taken together,
18 the three documents do not constitute final agency action.

19 Plaintiffs counter that Defendants' actions are final agency
20 actions and major federal actions that require compliance with NEPA
21 and the ESA. Plaintiffs argue that even if the ETL did not require
22 immediate changes on the ground, they aver in the FAC that real
23 consequences and impacts flow from these actions by changing the
24 status quo for existing variances and requiring a significant
25 change in vegetation management on existing levees. With respect
26 to the PGL, Plaintiffs argue that they allege in the FAC that the
27 PGL has the force of law and that it established an interim rule.
28 Plaintiffs further argue that the Corps' actions constitute major

1 federal action subject to NEPA and that the ETL should have been
2 subjected to NEPA compliance. Similarly, Plaintiffs argue that the
3 Corps' actions were agency actions subject to the ESA and that ESA
4 consultation was required prior to the ETL, interim rule, and PGL's
5 implementation.

6 Defendants analogize this case to United States v. Alameda
7 Gateway LTD., 213 F.3d 1161 (9th Cir. 2000). In Alameda Gateway,
8 the Ninth Circuit found that a Corps Engineer Regulation did not
9 have the force and effect of law because its text indicated that it
10 merely "memorializes the general policy." Id. at 1168. The Ninth
11 Circuit further found that the Engineer Regulation did not have the
12 force and effect of law because it "was not published in either the
13 Code of Federal Regulations ["C.F.R.")] or the Federal Register,
14 providing further evidence that the regulation was not intended to
15 be binding." Id. Defendants argue that the ETL's language is
16 similar to the Engineer Regulation, indicating that the ETL is a
17 general policy statement, not a substantive rule. The ETL, titled
18 "Guidelines," states that it provides guidelines to "be used with
19 reasonable judgment" and is tailored to the specifics of an
20 individual project. Moreover, Defendants argue that the ETL was
21 not published in either the C.F.R. or the Federal Register.

22 Plaintiffs distinguish Alameda Gateway from the instant case
23 by arguing that Alameda Gateway was brought by the Corps to recover
24 costs associated with the removal of a pier by defendants; it was
25 decided on summary judgment, not a motion to dismiss; it did not
26 involve the APA, NEPA, or the ESA; and Plaintiffs are not
27 challenging the vegetation standards themselves, rather Plaintiffs
28 allege that the Corp adopted substantive changes in the rules for

1 levee management affecting the environment and listed species and
2 habitats without undertaking the required environmental review
3 under NEPA and consultation under the ESA.

4 The Court finds Plaintiffs' arguments persuasive - in Alameda
5 Gateway, the Ninth Circuit sua sponte raised the issue that it
6 "will not review allegations of noncompliance with an agency
7 statement that is not binding on the agency." Id. at 1167. The
8 court found that the regulation was not binding because the
9 Engineering Regulation was more of a policy statement and it was
10 not published. However, the Ninth Circuit made this determination
11 at the summary judgment stage, presumably with the aid of the
12 administrative record to guide its decision. Additionally, the
13 instant case is a procedural challenge and not a substantive
14 challenge, further distinguishing Alameda Gateway.

15 Like Alameda Gateway, most environmental cases considering
16 subject matter jurisdiction are decided only after reviewing the
17 administrative record, generally at the summary judgment stage.
18 See e.g. River Runners for Wilderness v. Martin, 593 F.3d 1064 (9th
19 Cir. 2010) (finding on a motion for summary judgment that the
20 defendant's policies do not proscribe substantive rules, and were
21 not promulgated in conformance with the procedures of the APA); Or.
22 Natural Desert Ass'n v. U.S. Forest Service, 465 F.3d 977 (9th Cir.
23 2006) (finding on a motion to dismiss, but after reviewing the full
24 administrative record, that the defendant's policies were final
25 within the meaning of the APA); High Sierra Hikers Ass'n v.
26 Blackwell, 390 F.3d 630 (9th Cir. 2004) (finding final agency
27 action and NEPA violations on a motion for summary judgment);
28 Northcoast Env'tl. Ctr. v. Glickman, 136 F.3d 660 (9th Cir. 1998)

1 (finding on a motion for summary judgment that no environmental
2 impact statement was necessary).

3 Defendants rely on three cases, Fairbanks N. Star Borough v.
4 U.S. Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008),
5 Rattlesnake Coal. v. U.S. E.P.A., 509 F.3d 1095 (9th Cir. 2007),
6 and Inst. For Wildlife Prot. v. Norton, 205 F.App'x 483, 485 (9th
7 Cir. 2006), in support of their argument that courts routinely
8 dismiss claims for lack of jurisdiction where there is not final
9 agency action within the meaning of the APA. These cases are
10 distinguishable from the instant case. In Fairbanks, a judgment on
11 the pleadings action, the Ninth Circuit determined that there was
12 no final agency action under the APA for purposes of judicial
13 review. 543 F.3d at 591. In a judgment on the pleadings case,
14 unlike here, the court takes "all the allegations in the pleadings
15 as true." Id. Here, Defendants contradict Plaintiffs' pleadings
16 and ask the Court to consider outside evidence of a final agency
17 action. Rattlesnake Coalition is distinguishable because the
18 primary issue in the case was whether there was sufficient federal
19 control over the contested policy. The Ninth Circuit did not
20 address whether there was final agency action. See 509 F.3d at
21 1105 (holding that only the federal government can be a proper
22 defendant in an action to compel compliance with NEPA). Finally,
23 in Institute for Wildlife Protection, a terse Ninth Circuit
24 opinion, the Court held that the plaintiffs failed to challenge a
25 final agency action. 205 F.App'x at 485. Aside from holding that
26 the plaintiffs asserted a programmatic challenge, not within the
27 district court's jurisdiction, the Ninth Circuit provides no other
28 reasoning for its decision.

1 Determining whether the ETL, PGL, and White Paper are final
2 agency actions in the instant case requires a review of the full
3 administrative record because, as discussed supra, "the question of
4 jurisdiction is dependent on the resolution of factual issues going
5 to the merits' of [the] action." Safe Air for Everyone v. Meyer,
6 373 F.3d 1035, 1040 (9th Cir. 2004). Therefore, because the Court
7 requires the entire administrative record, it cannot, at this
8 juncture, determine whether there has been final agency action.²

9 2. Programmatic Challenges

10 Defendants argue that Plaintiffs' NEPA and APA claims should
11 be dismissed because they are broad programmatic challenges.
12 Defendants argue that Plaintiffs do not challenge discrete or final
13 agency action, but the Corps' vegetation removal policy.
14 Defendants contend that Plaintiffs do not challenge any site-

15
16 ² The Court reviewed Plaintiffs' Notice of Supplemental Authority
17 (Doc. #53) in which Plaintiffs supplied the Court with the recently
18 issued per curiam United States Supreme Court decision in the case
19 of Sackett v. E.P.A., 2012 U.S. LEXIS 2320 (U.S. Mar. 21, 2012).
20 In Sackett, the Supreme Court held that property owners and other
21 regulated parties may challenge administrative compliance orders
22 issued by the Environmental Protection Agency ("EPA") under the
23 Clean Water Act. The Court found that the compliance order "has
24 all the hallmarks of APA finality." 2012 U.S. LEXIS 2320 at *9.
25 The compliance order determined rights or obligations because the
26 plaintiffs had the legal obligation to "'restore' their property
27 according to an agency-approved Restoration Work Plan," they had to
28 "give the EPA access to their property and to records and
documentation related to the conditions at the Site," and "the
order expose[d] the Sacketts to double penalties in a future
enforcement proceeding." Id. at *10. The government argued that
judicial review of the compliance order was unavailable unless and
until the EPA filed a civil enforcement suit against them. Id. at
*13-14. Unlike the present case, the government did not argue that
the compliance order was a draft or was not a final decision.
Here, the dispute concerns whether the ETL, PGL, and White Paper
are final agency actions or draft recommendations. Once the Court
considers the entire administrative record, it can turn to Sackett,
among other authority, to determine whether the disputed documents
constitute final agency action.

1 specific action. Defendants continue that the three specific
2 examples Plaintiffs mention in their FAC do not prevent their
3 claims from being impermissible programmatic challenges because the
4 Plaintiffs do not make any specific allegations that the cited
5 actions were final, that the Corps violated NEPA, the APA, or the
6 ESA with regard to those instances, or that Plaintiffs were
7 themselves harmed by those actions. Defendants argue that
8 Plaintiffs' requested relief is not tailored to any specific
9 project but seeks to enjoin nationwide standards and statewide
10 activity. Defendants further argue that the ESA does not authorize
11 open-ended challenges and Plaintiffs' ESA claim does not fall
12 within the limited scope of the citizen management standard.
13 Defendants continue that the specific documents Plaintiffs
14 challenge do not have the force of law and do not have any force or
15 effect unless and until the Corps acts separately to apply them.

16 Plaintiffs counter that that they have challenged
17 identifiable, final agency actions within the meaning of the APA.
18 Plaintiffs argue that they seek vindication of procedural rights
19 conferred by NEPA, the ESA, and the APA, and the substantive
20 protections of the ESA. Plaintiffs also argue that the nature of
21 the challenged actions cannot be determined in a 12(b)(1) motion.

22 The Supreme Court has made clear that the APA does not allow
23 "programmatic" challenges, but instead requires that Plaintiffs
24 contest a specific final agency action which has "an actual or
25 immediate threatened effect." Lujan v. Nat'l Wildlife Fed'n, 497
26 U.S. 871, 882-94 (1990). In Lujan, the plaintiffs alleged that the
27 defendants violated the Federal Land Policy Act, NEPA, and APA in
28 the administration of the "land withdrawal review program" of the

1 Bureau of Land Management, but failed to challenge any particular
2 agency action that caused harm. Id. at 875, 891. The Court held
3 that the "land withdrawal review program" was not an identifiable,
4 much less final, agency action or series of such actions within the
5 meaning of the APA. Id. at 890.

6 Unlike the challenge in Lujan to the "land withdrawal review
7 program," Plaintiffs challenge identifiable, final agency actions
8 within the meaning of the APA. Plaintiffs seek vindication of
9 procedural rights conferred by NEPA, ESA, and APA, and the
10 substantive protections of the ESA. While the parties dispute
11 whether or not Defendants have issued final agency actions, if
12 through discovery, Plaintiffs can prove that the PGL, ESL, and
13 White Paper are final agency actions, then Plaintiffs' claims are
14 proper.

15 Furthermore, Defendants' argument that agency programs, as
16 opposed to specific decisions, are not subject to ESA compliance is
17 not persuasive. "The Ninth Circuit has undeniably interpreted ESA
18 to require consultation on programmatic actions and rules,
19 including consultation at the planning stage, not just at the site-
20 specific stage." Citizens for Better Forestry v. U.S. Dep't of
21 Agric., 481 F.Supp.2d 1059, 1095 (N.D.Cal. 2007); see also Pac.
22 Rivers Council, 30 F.3d 1050, 1055 (9th Cir. 1994) (holding that the
23 Forest Service's LRMPs which established comprehensible management
24 plans governing a multitude of individual projects required ESA
25 consultation because they may affect listed species).

26 Similarly, NEPA compliance is required even if the challenged
27 actions are part of a broad program. Programmatic EISs have been
28 recognized and utilized in a number of cases before the Ninth

1 Circuit. See, e.g., N. Alaska Env'tl. Ctr. v. Kempthorne, 457 F.3d
2 969 (9th Cir. 2006) (concluding that programmatic EIS prepared by
3 Forest Service with respect to oil and gas leasing in Alaskan
4 preserves was sufficiently site-specific even though it lacked
5 analysis of the effect on each parcel since there was no way of
6 knowing at time programmatic EIS was prepared what development
7 would materialize); Friends of Yosemite Valley v. Norton, 348 F.3d
8 789 (9th Cir. 2003) (discussing the distinction between site-
9 specific and programmatic EISs, and holding that programmatic EIS
10 prepared in conjunction with creation of a land management plan for
11 Yosemite was sufficient at the implementation stage and provided
12 guidelines for future actions); N. Alaska Env'tl. Ctr. v. Lujan, 961
13 F.2d 886 (9th Cir. 1992) (holding programmatic EIS prepared in
14 conjunction with approval of mining in Alaskan parks was adequate).

15 The Ninth Circuit's recognition of the propriety of
16 programmatic EISs, and its distinction between the requirements for
17 programmatic EISs and site-specific EISs, suggests that, at least
18 in this circuit, NEPA's requirement of an EIS is not necessarily
19 limited to site or project-specific impacts or activities, as
20 Defendants suggest. In recognizing programmatic EISs, the Ninth
21 Circuit has held that "[a]n EIS for a programmatic plan . . . must
22 provide 'sufficient detail to foster informed decision-making,' but
23 that 'site-specific impacts need not be fully evaluated until a
24 critical decision has been made to act on site development.'" Friends of Yosemite, 348 F.3d at 800 (quoting Lujan, 961 F.2d at
25 890); see also California v. Block, 690 F.2d 752, 761 (9th Cir.
26 1982) (explaining that considerations regarding the adequacy of a
27 programmatic EIS may differ from those for a site-specific EIS).
28

1 Indeed, Plaintiffs' procedural challenges to the alleged
2 programmatic NEPA decisions are immediately ripe for review because
3 they "will influence subsequent site-specific actions" and "pre-
4 determine[] the future." Laub v. U.S. Dep't of the Interior, 342
5 F.3d 1080, 1088, 1091 (9th Cir. 2003). Accordingly, the Court
6 finds that Plaintiffs' programmatic challenge is cognizable under
7 these statutes.

8 3. Rulemaking

9 Defendants argue that the Court should dismiss Plaintiffs'
10 third claim which alleges that the Corps violated the APA by
11 failing to complete formal rulemaking before adoption of new rules.
12 Defendants argue that the ETL sets forth "guidelines" to steer
13 future decisionmaking and is not a substantive rule that must
14 comply with the APA's notice and comment procedures. Plaintiffs
15 respond that the ETL, interim rule, and PGL are substantive rules
16 because they are designed to implement and prescribe Corps
17 procedures and requirements for vegetation management on and near
18 levees throughout the United States.

19 Under the APA, an agency "'is required to follow prescribed
20 notice-and-comment procedures before promulgating substantive
21 rules.'" Sacora v. Thomas, 628 F.3d 1059, 1069 (9th Cir. 2010)
22 (quoting Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112,
23 1124 (9th Cir. 2009), cert. denied, 132 S. Ct. 152 (Oct. 3, 2011)).
24 Notice and comment requirements are only for substantive rules, not
25 "'interpretive rules, general statements of policy, or rules of
26 agency organization, procedure, or practice.'" Id. (quoting Mora-
27 Meraz v. Thomas, 601 F.3d 933, 939 (9th Cir. 2010)). "The
28 definition of a substantive rule is broad and includes action that

1 is legislative in nature, is primarily concerned with policy
2 considerations for the future rather than the evaluation of past
3 conduct, and looks not to the evidentiary facts but to policy-
4 making conclusions to be drawn from the facts.” Coal. For Common
5 Sense in Gov’t Procurement v. Sec’y of Veterans Affairs, 464 F.3d
6 1306, 1317 (Fed. Cir. 2006) (internal quotation omitted).

7 Here, Plaintiffs allege that the Corps adopted a new
8 vegetation management policy that supersedes prior guidance and the
9 Corps published in the Federal Register an interim rule that
10 explicitly revokes all prior variances. Plaintiffs further allege
11 that the ETL does far more than reiterate and clarify the
12 vegetation management standards previously stated in EM 1110-2-301.
13 Defendants reply that the ETL is not binding because there is a
14 chance for a waiver or modification demonstrating that the policies
15 were only intended to provide guidance within the Park Service.
16 This argument, however, is a factual challenge concerning whether
17 the ETL is a substantive rule or a guideline, and the Court cannot
18 resolve this issue without the full administrative record. Thus,
19 the Court is unable to decide this rulemaking issue until it has
20 had the opportunity to review the full administrative record.

21 4. Ripeness

22 Defendants contend that in the alternative to their “no final
23 agency action” argument, this Court lacks jurisdiction because none
24 of Plaintiffs’ claims are ripe. Defendants argue that Plaintiffs
25 have not targeted a concrete application of any of the Corps’
26 policies. Defendants contend that they are still considering
27 revisions to their variance policy, and the Corps and California
28 state and local agencies are jointly developing a comprehensive,

1 long term program to upgrade and manage vegetation on Central
2 Valley flood management systems, including levees eligible for the
3 Rehabilitation and Inspection Program ("RIP"). Defendants argue
4 that Plaintiffs cannot show they will suffer "immediate, direct, or
5 significant hardship" if judicial review is delayed because it has
6 not been determined which sponsors of levee systems now enrolled in
7 the RIP might act to remove vegetation in order to comply with the
8 ETL's vegetation standard. Those decisions, according to
9 Defendants, depend on any number of future decisions by the Corps
10 and the individual levee sponsors. Furthermore, Defendants claim
11 that Plaintiffs have not articulated any hardship from delaying
12 judicial review until it becomes clear whether and how the ETL's
13 vegetation standards will be applied to any particular levee
14 system, especially the levees in the Central Valley, and how that
15 specific application of the vegetation standard causes tangible
16 harm to Plaintiffs. Moreover, judicial intervention at this stage
17 would, in Defendants' view, inappropriately interfere with ongoing
18 administrative action on both national and local bases. Finally,
19 Defendants argue that the effects and application of the ETL and
20 the Corps' policies are speculative on the existing record;
21 Plaintiffs do not challenge the application of the Corps' policies
22 to any particular levee system, but rather they challenge the
23 policies on a programmatic basis and in their potential
24 application.

25 Plaintiffs respond that Defendants' argument on ripeness
26 ignores the tangible procedural injuries alleged by Plaintiffs due
27 to the Corps' failure to undertake timely NEPA and ESA review.
28 Plaintiffs further argue that environmental plaintiffs need not

1 wait for environmental damage to occur to challenge an agency's
2 NEPA compliance.

3 The basic rationale of ripeness is "to prevent the courts,
4 through avoidance of premature adjudication, from entangling
5 themselves in abstract disagreements over administrative policies,
6 and also to protect the agencies from judicial interference until
7 an administrative decision has been formalized and its effects felt
8 in a concrete way by the challenging parties." Abbott Labs. v.
9 Gardner, 387 U.S. 136, 148-49 (1967). In assessing ripeness, a
10 court considers: "(1) whether delayed review would cause hardship
11 to the plaintiffs; (2) whether judicial intervention would
12 inappropriately interfere with further administrative action; and
13 (3) whether the courts would benefit from further factual
14 development of the issues presented." Ohio Forestry Ass'n, Inc. v.
15 Sierra Club, 523 U.S. 726, 733 (1998).

16 Defendants primarily rely on Ohio Forestry Ass'n, Inc. v.
17 Sierra Club, 523 U.S. 726 (1998) to argue that the case is not
18 ripe. However, as Plaintiffs point out, Ohio Forestry is
19 distinguishable from the current case because Plaintiffs allege
20 procedural injuries due to the Corps' alleged failure to undertake
21 timely NEPA and ESA review. The plaintiffs in Ohio Forestry
22 alleged a substantive statutory violation; they did not allege a
23 procedural NEPA violation. The Plaintiffs in this case, however,
24 allege that Defendants violated NEPA, ESA, and APA for failure to
25 comply with the procedural requirements. As the Supreme Court
26 explained in Ohio Forestry, "NEPA, . . . simply guarantees a
27 particular procedure, not a particular result. . . . [A] person
28 with standing who is injured by a failure to comply with the NEPA

1 procedure may complain of that failure at the time the failure
2 takes place, for the claim can never get riper.” Id. at 737. “The
3 rights conferred by NEPA [and the ESA] are procedural rather than
4 substantive, and plaintiffs allege a procedural rather than
5 substantive injury.” Kern v. U.S. Bureau of Land Mgmt., 284 F.3d
6 1062, 1071 (9th Cir. 2002). “If there was an injury under NEPA, it
7 occurred when the allegedly inadequate EIS was promulgated. That
8 is, any NEPA violation (and any procedural injury) inherent in the
9 [alleged lack of an EA or EIS] ha[s] already occurred.” Id.
10 Furthermore, adjudicating the NEPA and ESA claims now will not
11 “inappropriately interfere with further administrative action”
12 because Defendants allegedly have already surpassed the stage in
13 which they should have issued the EA, EIS, or engaged in their ESA
14 consultation. Id.

15 Furthermore, the Ninth Circuit has repeatedly held that
16 environmental plaintiffs need not wait for environmental damage to
17 occur to challenge an agency’s NEPA compliance. See Cal. ex. Rel.
18 Lockyer v. U.S. Dept. of Agric., 575 F.3d 999, 1011 (9th Cir. 2009)
19 (finding matter ripe for adjudication where it would be plaintiffs
20 only opportunity to challenge a rule on a nationwide, programmatic
21 basis); Kern, 284 F.3d at 1078 (warning against the “tyranny of
22 small decisions” by holding that “[a]n agency may not avoid an
23 obligation to analyze in an EIS environmental consequences that
24 foreseeably arise from [a program] merely by saying that the
25 consequences are unclear or will be analyzed later when an EA is
26 prepared for a site-specific program”); Idaho Conservation League
27 v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992) (“[I]f the agency
28 action could be challenged at the site-specific development stage,

1 the underlying programmatic authorization would forever escape
2 review. To the extent that the plan pre-determines the future, it
3 represents a concrete injury the plaintiffs must, at some point,
4 have standing to challenge.”); Salmon River Concerned Citizens v.
5 Robertson, 32 F.3d 1346, 1355 (9th Cir. 1994) (finding NEPA
6 challenge to regional EIS on herbicide use ripe for review).

7 Accordingly, Plaintiffs’ claims are ripe for review.

8 D. Standing

9 Defendants argue that Plaintiffs lack standing to challenge
10 the ETL, PGL, or the program they allege arises from the two
11 policies because there is no live dispute over a specific concrete
12 application of those particular policies. Defendants argue that
13 Plaintiffs’ alleged procedural injuries are not concrete injuries
14 and that Plaintiffs do not aver any concrete and immediate injury
15 because they fail to identify any particular situation where the
16 Corps is applying the challenged policies to compel the removal of
17 all vegetation from any levee system.

18 Plaintiffs argue that where procedural violations are at
19 issue, they do not need to demonstrate any actual environmental
20 harm to establish standing; an increased risk of harm resulting
21 from Defendants’ action or omissions is sufficient. Plaintiffs
22 argue that the Ninth Circuit has repeatedly recognized “increased
23 risk” of injury as supporting standing in NEPA cases and harm
24 cognizable for the purposes of standing in ESA cases is found where
25 there is added risk to species when an agency makes a decision in
26 violation of the ESA’s consultation requirements.

27 Where procedural violations are at issue, in order “to show a
28 cognizable injury in fact, [Plaintiffs] must allege that

1 (1) [Defendants] violated certain procedural rules; (2) these rules
2 protect [Plaintiffs'] concrete interests; and (3) it is reasonably
3 probable that the challenged action will threaten their concrete
4 interests." Citizens for Better Forestry v. U.S. Dep't. of Agric.,
5 341 F.3d 961, 969-70 (9th Cir. 2003). Plaintiffs do not have the
6 burden to show that harm will in fact occur or already has occurred
7 from the challenged actions. See id. at 972 (explaining that if a
8 plaintiff's standing under NEPA depended on "'proof' that the
9 challenged federal project will have particular environmental
10 effects, we would in essence be requiring that the plaintiff
11 conduct the same environmental investigation that he seeks in his
12 suit to compel the agency to undertake.").

13 Plaintiffs allege that the Corps has not complied with the
14 procedural requirements of NEPA and the APA rulemaking statutes or
15 the procedural and substantive mandate found in ESA Section 7, and
16 that these statutes protect plaintiffs' concrete interests.
17 Plaintiffs' members also testify to their interests in NEPA and ESA
18 compliance. See Second Decl. of Jeffrey Miller ("Second Miller
19 Decl.") (Doc. #47-3) ¶¶ 10, 11; Decl. of Kelly L. Catlett in Supp.
20 of Pls.' Opp'n to Defs.' Mot. to Dismiss ("Catlett Decl.") (Doc.
21 #47-2) ¶ 11. Plaintiffs' members testify that they use and enjoy
22 affected rivers and levees for aesthetic and recreational purposes,
23 fishing, boating, bird watching, rafting, biking, enjoying the
24 scenic beauty the river and trees provide, and observing species
25 and that their interests at stake include the prevention of
26 environmental damage to these areas as well as the preservation of
27 endangered and threatened species that are found there. See Second
28 Miller Decl. ¶ 10; Catlett Decl. ¶¶ 3-4. They also testified that

1 the Corps' action has, and may in the future, destroy the values
2 they derive from the rivers, levees, and species that inhabit these
3 areas. See, e.g., Second Miller Decl. ¶ 11; Catlett Decl. ¶¶ 5-10.
4 Therefore, Plaintiffs have shown it is reasonably probable that the
5 challenged actions will threaten Plaintiffs' concrete interests.

6 Defendants' objection centers on the merits of the claims and
7 whether or not NEPA, ESA, or APA's statutory requirements are
8 applicable to the Corps' challenged action, which, Defendants
9 contend, are part of a program or policy. However, the Ninth
10 Circuit has long recognized standing to challenge NEPA compliance
11 for programmatic decisions. See, e.g. Pac. Rivers Council v. U.S.
12 Forest Serv., 668 F.3d 609, 617-21 (9th Cir. 2012) (finding
13 standing to challenge programmatic forest plan); Sierra Forest
14 Legacy v. Sherman, 646 F.3d 1161, 1179-80 n.2 (9th Cir. 2011)
15 (finding standing to bring a facial challenge without challenge to
16 site specific implementation and explaining procedural injury under
17 NEPA was ripe for facial challenge); Salmon River Concerned
18 Citizens v. Robertson, 32 F.3d 1346, 1355 (9th Cir. 1994) (finding
19 standing where a vegetation management plan failed to comply with
20 NEPA).

21 Furthermore, Plaintiffs have demonstrated concrete interests
22 that meet the geographical nexus requirement for standing. The
23 Ninth Circuit has described the concrete interests test as
24 requiring a geographic nexus between the individual asserting the
25 claim and the location suffering an environmental impact." Western
26 Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir.
27 2011) (citations omitted). "[E]nvironmental plaintiffs must allege
28 that they will suffer harm by virtue of their geographic proximity

1 to and use of areas that will be affected by the [challenged]
2 policy.” Citizens for Better Forestry, 341 F.3d at 971 (holding
3 plaintiffs met the geographic nexus requirement where they
4 “properly alleged, and supported with numerous affidavits” their
5 members’ use and enjoyment of a “vast range of national forests”).

6 Plaintiffs have alleged that the Corps’ actions may affect a
7 very large number of rivers, levees, and species throughout
8 California including the places which Plaintiffs use and enjoy and
9 many of the species in which Plaintiffs have alleged concrete
10 interests. Plaintiffs’ members testify to their use of specific
11 areas that have been or may be affected, their interests in
12 vegetation on levees, the health of the riparian areas, and species
13 that depend on riparian areas, and species that depend on riparian
14 areas and many of the river systems with levees which may be
15 affected by the Corps’ challenged actions. See, e.g., Catlett
16 Decl. ¶¶ 3, 5-10 and Second Miller Decl. ¶¶ 4-6. While Defendants
17 argue that that Plaintiffs must identify the imminent projects that
18 threaten harm to their concrete interests at the outset of the
19 litigation, as Plaintiffs point out, the full extent of the harm
20 and injury to Plaintiffs’ members is unknown due to the Corps’
21 alleged failure to comply with NEPA or the APA rulemaking
22 procedures, and to formally consult with wildlife agencies on
23 potential impacts to endangered species pursuant to the ESA, prior
24 to adopting the ETL and interim rule. Plaintiffs “need not assert
25 that any specific injury will occur in any specific [levee] that
26 their members will visit. ‘The asserted injury is that
27 environmental consequences might be overlooked’ as a result of
28 deficiencies in the government’s analysis under environmental

1 statutes.” Citizens for Better Forestry, 341 F.3d at 971-72
2 (quoting Salmon River Concerned Citizens v. Robertson, 32 F.3d
3 1346, 1355 (9th Cir. 1994)); see also Res. Ltd., Inc. v. Robertson,
4 35 F.3d 1300, 1302-03 (9th Cir. 1993) (holding that plaintiffs had
5 standing to challenge a forest plan even though they could not
6 point to any specific site where the injury is likely to occur).

7 Defendants’ reliance on P.E.T.A. v. U.S. Dep’t of Health &
8 Human Services, 917 F.2d 15, 17 (9th Cir. 1990), where plaintiffs’
9 allegations were found wanting at the summary judgment stage, is
10 distinguishable. In that case, the court found failure to
11 establish standing on a summary judgment motion based on
12 declarations which failed to adequately assert personal injury or
13 harm from grant of funds to research institutions. Here, to
14 survive this motion to dismiss, Plaintiffs must plead “enough facts
15 to state a claim to relief that is plausible on its face.” Bell
16 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Plaintiffs
17 provide declarations sufficiently asserting injury and harm
18 stemming from Defendants’ actions.

19 The types of harm and injury Plaintiffs’ members testify to
20 are cognizable for purposes of standing. Plaintiffs have standing
21 because the alleged injury “is geographically specific, is caused
22 by the regulations at issue, and is imminent.” Ctr. for Biological
23 Diversity, 588 F.3d at 708.

24 Finally, Plaintiffs have demonstrated causation and
25 redressability. In a procedural challenge, Plaintiffs can assert
26 their right to protect a concrete interest “without meeting all the
27 normal standards for redressability and immediacy.” Lujan, 504
28 U.S. at 572 n.7. Plaintiffs “must show only that they have a

1 procedural right that, if exercised, could protect their concrete
2 interest." W. Watersheds Project v. Kraayenbrink, 632 F.3d, 485
3 (9th Cir. 2011) (citations omitted). Plaintiffs seek an order
4 requiring the Corps to comply with NEPA, the ESA, and APA
5 rulemaking procedures, any of which may relieve some or all of
6 Plaintiffs' injuries. To satisfy the causation and redressability
7 requirement for procedural injury purposes, Plaintiffs need not
8 show that compliance with ESA, APA, and NEPA will ultimately
9 redress their injuries, only that compliance with these
10 requirements may redress the injury. Accordingly, Plaintiffs have
11 sufficiently alleged standing.

12
13 IV. ORDER

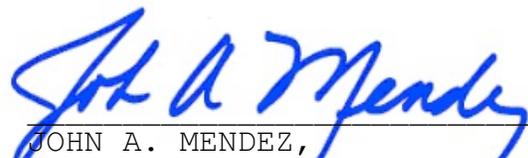
14 For the reasons set forth above,

15 The Court DENIES Defendants' Motion to Dismiss.

16 Defendants shall file their Answer to Plaintiffs' First
17 Amended Complaint within twenty (20) days of the date of this
18 Order.

19 IT IS SO ORDERED.

20 Dated: April 27, 2012

21 
22 _____
23 JOHN A. MENDEZ,
24 UNITED STATES DISTRICT JUDGE
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