UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

CASCADIA WILDLANDS, an Oregon nonprofit corporation; and OREGON WILD, an Oregon nonprofit corporation,

Plaintiffs,

vs.

CHERYL ADCOCK, in her official capacity as Field Manager for the Siuslaw Field Office; and UNITED STATES BUREAU OF LAND MANAGEMENT,

Defendants.

Case No. 6:22-cv-1344-MK

FINDINGS AND RECOMMENDATION

KASUBHAI, United States Magistrate Judge:

Cascadia Wildlands and Oregon Wild ("Plaintiffs") filed this action pursuant to the National Environmental Policy Act ("NEPA") 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act ("APA") 5 U.S.C. §§ 701 *et seq.*, against the United States Bureau of Land Management ("BLM") and Cheryl Adcock in her official capacity as Field Manager for the BLM's Siuslaw Field Office (collectively "Defendants"). Plaintiffs allege that Defendants violated NEPA in the preparation of their Siuslaw Harvest Land Base Landscape Plan Environmental Assessment. *See* Compl. 101–147, ECF No. 1. Plaintiffs seek declaratory and

injunctive relief. *Id.* at 148. Defendants filed a motion to dismiss the claim for lack of jurisdiction based on want of Article III standing and ripeness. *See* Mot., ECF No. 10. The Court heard oral argument on March 2, 2023. *See* ECF No. 18. For the reasons set forth below, Defendants' motion to dismiss should be DENIED.

BACKGROUND

The BLM's Siuslaw Field Office manages 166,852 acres of land west of Eugene, Oregon. Defs.' Mot. 4, ECF No. 10. In March 2022 Siuslaw Field Office published the Siuslaw Harvest Land Base ("HLB") Landscape Plan Environmental Assessment (hereinafter "Landscape Plan") and its Decision Record ("DR"). Defs.' Mot., Ex. 1, ECF No. 10. The Landscape Plan is the BLM's programmatic[1] document which prepares to authorize logging within a 13,225-acre area. Compl. 16, ECF No. 1.

The BLM undertook the Landscape Plan pursuant to the Northwest Resource Management Plan ("RMP") which, among other things, determined the volume of timber harvest required on 1.3 million acres of BLM land in Northwest Oregon. Defs.' Mot. 4, ECF No. 10. The Siuslaw Field Office is responsible for contributing to that required timber harvest, and the Landscape Plan lays out its multi-decade strategy, or "management approach" for doing so. Compl. 16, ECF No. 1. In summary, the Landscape Plan selected a checkerboard 13,225 acres as the "Siuslaw Project Area:" parcels of land within which the BLM will authorize the clearcutting of between 1,126–1,361 acres and the commercial thinning of between 278–944 acres in the coming decade. Defs.' Mot., Exs. 1-2, ECF No. 10. Through the Environmental Assessment ("EA"), the BLM made a Finding of No Significant Impact ("FONSI"), meaning the BLM will

[1] The term "programmatic document" describes agency documents that plan for future activity without authorizing any ground-disturbing activities. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992).

not conduct any further environmental review at this scale before moving forward with the Landscape Plan. *See* Pls.' Resp., Ex. A, ECF No. 14.

Plaintiffs filed this action alleging that Defendants violated NEPA in the preparation of the Landscape Plan, DR, and FONSI by failing to establish baseline environmental conditions, failing to consider significant aspects of the project's impacts, failing to take a hard look at site-specific and cumulative impacts, and failing to prepare an EIS. Compl. 101–147, ECF No. 1. In support of standing, Plaintiffs provided declarations from four members who demonstrate aesthetic and recreational interest in the Siuslaw Project Area. *See* Decl. of Doug Heiken, ECF No. 1-1; Decl. of David Barta, ECF No. 1-2; Decl. of Ronna Friend, ECF No. 1-3; Decl. of William Watson, ECF No. 2-3. One of Plaintiffs' members "lives adjacent to BLM parcels that are proposed for logging" and will continue to engage in recreational activities in those areas daily. Decl. of Ronna Friend ¶¶ 5–7, ECF No. 1-3. Another member has been recreating in the Siuslaw Project Area since 1989 and plans to continue doing so indefinitely. Decl. of David Barta ¶¶ 2, 4, 9, ECF No. 1-2. Plaintiffs' members have identified at least ten specific parcels within the Siuslaw Project Area where they routinely recreate. *See* Decl. of Doug Heiken, ECF No. 1-1; Decl. of David Barta, ECF No. 1-2; Decl. of Ronna Friend, ECF No. 1-3; Decl. of William Watson, ECF No. 2-3.

STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction. *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quotation marks omitted). As such, a court is to presume "that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations

omitted); *see also Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

An objection that a particular court lacks subject matter jurisdiction may be raised by any party, or by the court on its own initiative, at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006); Fed. R. Civ. P. 12(b)(1). A court must dismiss any case over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *see also Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (noting that when a court lacks subject-matter jurisdiction—meaning it lacks the statutory or constitutional power to adjudicate a case—the court must dismiss the complaint, even *sua sponte* if necessary).

To survive a motion to dismiss brought under Rule 12(b)(1), a plaintiff must "clearly allege facts demonstrating each element" required to establish they have standing. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citation omitted). To meet this standard, a plaintiff must set forth facts showing they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citations omitted). For a Rule12(b)(1) motion to dismiss based on want of standing, courts must accept as true all material allegations of the complaint and construe the complaint in favor of the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

DISCUSSION

Defendants move to dismiss Plaintiffs' claim for two reasons: (1) Plaintiffs cannot establish standing and (2) Plaintiffs' claim is not yet ripe. The Court addresses each argument in turn.

I. Standing

Defendants move to dismiss Plaintiffs' claims for want of standing. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, (1982) ("*Valley Forge*"). To bring suit in federal court, a plaintiff must establish a "constitutional minimum" of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As noted, to establish standing "(1) the plaintiff must have suffered an 'injury in fact'—*i.e.*, an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent as opposed to conjectural or hypothetical; (2) there must be a causal connection between the injury and the offending conduct; and (3) it must be 'likely' that the injury will be redressed by a favorable decision from the court. *Nat'l Labor Relations Bd. v. Oregon*, No. 6:20-cv-00203-MK, 2020 WL 5994997, at *2 (D. Or. Oct. 9, 2020) (quoting *Lujan*, 504 U.S. at 560–61 (citations omitted)). These constitutional requirements are "rigorous," *Valley Forge*, 454 U.S. at 475, and a plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing each element, *Lujan*, 504 U.S. at 561.

For an association or organization to establish standing, it must show "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 1079 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Deprivation of procedural rights, alone, are not sufficient to establish an Article III injury. *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009). A procedural right that is violated must protect a plaintiff's *concrete interests* to establish standing. *Id.* (emphasis in original).

However, a procedural injury is complete after the procedural violation occurs "so long as it is fairly traceable to some action that will affect the plaintiff's interests." *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1081 (2015).

Defendants argue that Plaintiffs have not demonstrated standing because Plaintiffs' alleged injuries are not imminent. Defs.' Mot. 7, ECF No. 10. Specifically, Defendants assert that because the Landscape Plan and DR are programmatic documents, they cannot cause an imminent injury to Plaintiffs. *Id.* at 8, ECF No. 10. Under Defendants' theory of imminence, Plaintiffs could establish an imminent injury only at a time when the BLM takes further action implementing the Landscape Plan, such as authorizing a timber sale. *Id.* at 9, ECF No. 10. Additionally, Defendants contend that because the Landscape Plan does not decide precisely where within the Siuslaw Project Area the BLM will ultimately log, Plaintiffs cannot prove imminent injury based on the specific parcels identified in their members' declarations. Defs.' Reply 4, ECF No. 15. Plaintiffs argue that their injury is imminent because the Landscape Plan and DR commit the Siuslaw Project Area to being logged, regardless of what later implementation actions the BLM takes. Pls.' Resp. 20, ECF No. 14. Plaintiffs' position is that approval of a specific timber sale is not required to establish an imminent injury. *Id.* at 22–23, ECF No. 14. As for the geographic uncertainty of exactly where BLM will ultimately log, Plaintiffs argue that they have demonstrated an interest in the entire Siuslaw Project Area, and standing doctrine does not require them to establish interest on a unit-by-unit basis. The Court agrees with Plaintiffs.

To establish an injury for the purposes of standing in environmental cases, plaintiffs must demonstrate imminent harm to their recreational or aesthetic use of an area. *Sierra Club v. Morton*, 405 U.S. 727, 734-36 (1972). For an injury to be imminent, it must be "certainly

impending." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). Concerns of hypothetical future harms are not "certainly impending." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 416 (2013). In the Ninth Circuit, plaintiffs can generally establish imminent injuries even when challenging programmatic documents. *See, e.g.*, *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011); *Idaho Conservation League*, 956 F.2d at 1516; *Jayne v. Sherman*, 706 F.3d 994, 999 (9th Cir. 2013). The Ninth Circuit has explained that "if agency action could only be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that [a] plan pre-determines the future[,] it represents a concrete injury that Plaintiffs must, at some point, have standing to challenge." *Idaho Conservation League v. Mumma*, 956 F.2d at 1516.

However, when plaintiffs challenge a programmatic or regulation-phase agency action, in the absence of a "concrete interest that is affected" by the agency action, the plaintiffs do not have standing. *Summers v. Earth Island Institute*, 555 U.S. 488, 501 (2009). In *Summers*, the case Defendants here rely heavily on, the plaintiffs challenged a Forest Service regulation of national applicability, and their standing declarant alleged a general interest in National Forest land but did not establish an interest in any particular National Forest land that he had concrete plans to return to. *Id.* at 495–496. The Court held that there was no concrete injury to the plaintiffs because out of the "190 million acres" of National Forest land to which the regulation will apply, "we are asked to assume not only that [the declarant] will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests." *Id.*

The Ninth Circuit interprets *Summers* to hold that "a vague desire to visit locations that might be harmed by the challenged [agency action is] insufficient to establish a particularized

interest." *Sierra Forest Legacy v. Sherman*, 646 F.3d at 1178. Since *Summers*, the Ninth Circuit does not find standing when plaintiffs have only "someday" intentions to visit and no showing that a declarant is "likely to encounter" an area affected by the challenged agency action. *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010). However, the Ninth Circuit *does* find standing where plaintiffs can show a "concrete interest" in an area that will "surely" be affected. *See Sierra Forest Legacy v. Sherman*, 646 F.3d at 1178-80. An agency need not have authorized an implementation action for a court to find that an area will surely be affected where "there is no real possibility" that agency will not pursue any site-specific projects under the planning framework. *See id.* at 1179. When plaintiffs establish such a "concrete interest," they have standing "even before an implementing project is approved." *Id.* at 1079-80. Most recently, the Ninth Circuit has articulated that it looks for "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact" to find a concrete interest. *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d at 1081.

Here, Plaintiffs have shown a sufficiently concrete application of the agency action they have challenged. The Landscape Plan EA and FONSI are programmatic documents that "pre-determine the future" and there is no real possibility that the BLM will not pursue site-specific projects in places that Plaintiffs have established concrete interests in. The BLM has identified and mapped out specific tracts on which it plans to authorize logging as part of the Landscape Plan, and logging will certainly occur when the BLM implements the Landscape Plan. The BLM itself, in the EA, states that it would not be authorized to elect a non-logging alternative because it "would not be in conformance" with the RMP. Defs.' Mot., Ex. 1 at 8, ECF No. 10. That is, the BLM considers itself to be committed to logging in the Siuslaw HLB and it will do so within

the Siuslaw Project Area.[2] Therefore, Plaintiffs can challenge the documents before BLM takes any particular implementation step because based on the Landscape Plan, there is no real possibility that the BLM will not log in the Siuslaw Project Area.

Defendants contend that even if the injury is temporally imminent, Plaintiffs cannot prove the requisite geographic nexus to establish standing because the BLM has not decided precisely where within the Siuslaw Project Area it will authorize logging. The Court disagrees. Plaintiffs' members have identified over ten different specific parcels within the Siuslaw Project Area where they regularly recreate. In addition, the members demonstrate an interest in the entirety of the Siuslaw HLB. Several of Plaintiffs' members explain that they use and enjoy the Siuslaw Project Area and have done so for decades. These members live near the Siuslaw HLB, and one member in particular lives adjacent to some of the Siuslaw Project Area parcels. While it is true that the BLM will authorize logging on about fifteen percent of the total Siuslaw Project Area in the next decade, and precisely what parcels it will select is undetermined at this stage, Ninth Circuit standing doctrine has never required plaintiffs to show injury on a unit-by-unit basis. Plaintiffs have challenged the BLM's decision to move forward with the Landscape Plan on the 13,225 acres that make up the Siuslaw Project Area. Thus, demonstrating a concrete interest in those 13,225 acres generally is enough to establish the requisite geographic nexus.

This case is not like *Summers*, where the court was asked to assume that the plaintiffs had a concrete interest somewhere in the 150 million acres to which the challenged regulation

[2] In fact, the BLM has already taken steps toward implementing the Landscape Plan in the Siuslaw Project Area. After the BLM published the Landscape Plan, it had, at one point, planned to move forward with a timber sale in the Siuslaw Project Area called the "Power Down Sale." Pls.' Resp. 18, ECF No. 14. However, the BLM has removed the sale from its website. *Id.* Though the sale was taken offline, it demonstrates that logging in the Siuslaw Project Area is more than just a hypothetical, but a plan that the BLM will implement.

applied. Here, there is much more than "a vague desire to visit locations that might be harmed by the challenged" agency action. Plaintiffs have demonstrated that some of their members have regularly recreated in a distinct geographic area for decades, and that area is exactly where the BLM has mapped the plan that is being challenged. The Court here is not asked to assume that Plaintiffs' members will stumble upon an affected area out of a potential 150 million acres, but to find a geographic nexus in the 13,225 acres that Plaintiffs' members live next to and routinely visit. Plaintiffs has established such a nexus.

Accordingly, Plaintiffs have demonstrated the requisite imminent injury to establish standing. Defendants' motion to dismiss on this basis should be denied.

II. Ripeness

Defendants also move to dismiss Plaintiffs' claims as not yet ripe. The ripeness requirement is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967)). Three factors are considered to determine whether a plaintiff's claims are ripe: "(1) whether delayed review would cause hardship to the plaintiff[]; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.* at 733. Defendants contend that the three-factor analysis demonstrates that Plaintiffs' claims are not yet ripe.

The Ninth Circuit, however, treats NEPA procedural challenges differently than substantiative challenges in the context of ripeness. *See Kern v. BLM*, 284 F.3d 1062, 1070 (9th Cir. 2002). The Ninth Circuit has adopted the Supreme Court's dicta that "a person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* at 1070-71 (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. at 732-33 (1998)). This Ninth Circuit ripeness rule is well established. As recently as last year, the Ninth Circuit explained that "the imminence or occurrence of site-specific action is irrelevant to the ripeness of procedural injuries, which are ripe and ready for review the moment they happen." *Environmental Defense Center v. Bureau of Ocean Energy Management*, 36 F.4th 850, 871 (9th Cir. 2022).

Plaintiffs here make procedural NEPA claims. The Ninth Circuit unambiguously regards such challenges as ripe as soon as the alleged procedural failure occurs. While Defendants may "respectfully disagree[]" with the Ninth Circuit's holding on this issue, *see* Def.'s Reply 9, this Court is bound by it. Accordingly, Plaintiffs' claims are ripe, and Defendants' motion to dismiss on this basis should be denied.

RECOMMENDATION

For the reasons above, Defendant's Motion to Dismiss (ECF No. 10) should be DENIED.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) should not be filed until entry of the district court's judgment or appealable order.

The Findings and Recommendation will be referred to a district judge. Objections to this Findings and Recommendation, if any, are due fourteen (14) days from today's date. *See* Fed. R.

Civ. P. 72. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED this 21st day of April 2023.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI (He / Him)
United States Magistrate Judge