

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SIERRA CLUB, et al.,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the  
Department of the Interior, et al.,

Defendants.

No. 12-cv-5669-RBL

ORDER

(Dkt. #17)

In May 2012, the Washington Department of Natural Resources (“DNR”) proposed, and the Fish & Wildlife Service approved, an amendment to a habitat conservation plan governing the logging of forests in southwest Washington. Plaintiffs brought suit alleging that Fish & Wildlife failed to take certain statutory steps under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), before approving the amendment. Plaintiffs sent a notice of intent to sue, which is required by the ESA 60 days before filing suit. However, 35 days later, Plaintiffs filed suit. Plaintiffs argue that they have pled only claims under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (“APA”)—which contains no 60-day notice requirement—rather than the ESA. The Government contends that the claims fall in fact under the ESA, and the suit must be dismissed and re-initiated in 60 days.

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**I. FACTUAL BACKGROUND**

The background to the case is only marginally relevant to the Motion, and only a bare recitation is necessary.

**A. Washington Department of Natural Resources' Habitat Conservation Plan and the Marbled Murrelet**

In 1997, the Washington DNR drafted a habit conservation plan covering approximately 1.8 million acres of land in the state. The conservation plan controls both logging and protection of endangered and threatened species, including the marbled murrelet, a “dove sized bird . . . in the same family as puffins.” (Pl.’s Resp. at 4, Dkt. #36). After reviewing the conservation plan, Fish & Wildlife issued an “incidental take permit,” a permit created by the ESA that allows limited taking of endangered or threatened species.

Although the facts are not entirely clear at this early stage of litigation, DNR set out to study the marbled murrelet and its habit in order to better classify the land, separating areas that are high-quality nesting areas from areas that are less hospitable. This conservation plan already classifies the land into separate management areas, and it is a shift in logging between these areas that is in dispute.

In 2012, Fish & Wildlife approved a “minor amendment” to the conservation plan. The Government argues that the amendment moved logging from higher-quality nesting areas to “marginal habit,” and thus, the logging will decrease incidental taking. Because the amendment decreases take, the Government contends, the statutory requirements for a major amendment do not apply.

Plaintiffs argue that the amendment authorized logging in 60% of the higher-quality habitat in southwest Washington, an area much larger than used in Fish & Wildlife’s biological opinion.

**B. Plaintiffs’ Notice of Intent to Sue**

In their notice letter, Plaintiffs first alleged violations of ESA §§ 7 and 10. Specifically, Plaintiffs alleged that under § 7, Fish & Wildlife should have re-initiated consultation with DNR and completed a new biological opinion before approving the amendment. (Oliphant Decl., Ex.

1 1 at 4-9, Dkt. #18-1.) Second, Plaintiffs alleged that Fish & Wildlife violated § 10 by processing  
2 DNR’s amendment as a “minor” amendment rather than a “major” amendment. (*Id.*, Ex. 1 at 12,  
3 Dkt. #18-1.) Major amendments to conservation plans require public comment and the statutory  
4 findings required of all incidental take permits (i.e., that takings will be incidental, the agency  
5 will minimize impacts and adequately fund the conservation plan, and that the takings will not  
6 appreciably reduce a species’ chance of survival). As it considered the amendment to be minor,  
7 Fish & Wildlife bypassed these steps.

8 According to Plaintiffs, after sending their notice of intent to sue, they concluded that  
9 their § 10 claims were properly pled *not* as ESA claims, but as APA claims. They therefore filed  
10 suit 36 days after the notice letter.

11 The Complaint largely tracks Plaintiffs’ notice letter. In their first claim (the only claim  
12 the Government challenges here), Plaintiffs alleged that Fish & Wildlife violated ESA § 10 and  
13 the APA by approving the amendment without public comment or the statutory findings.  
14 Further, Plaintiffs alleged that Fish & Wildlife approved the amendment “without first evaluating  
15 the effects of the proposed amendment under ESA section 7.” (Pl.’s Compl. ¶ 61, Dkt. #1.)  
16 Plaintiffs later amended their Complaint removing that language—i.e., the reference to § 7.  
17 (Pl.’s Am. Compl. ¶ 61, Dkt. #15.) Despite removing the reference to § 7, the Government here  
18 asserts that Plaintiffs’ first claim is intrinsically tied or analogous to § 7; it is therefore an ESA  
19 claim, and 60-days notice is required.

## 20 II. GOVERNING LAW

21 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
22 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
23 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must allege facts to state  
24 a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949  
25 (2009). A claim has “facial plausibility” when the party seeking relief “pleads factual content  
26 that allows the court to draw the reasonable inference that the defendant is liable for the  
27 misconduct alleged.” *Id.* Although the Court must accept as true a complaint’s well-pled facts,  
28 conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper

1 Rule 12(b)(6) motion. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v.*  
2 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to provide  
3 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a  
4 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be  
5 enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550  
6 U.S. 544, 555 (2007) (citations and footnote omitted). This requires a plaintiff to plead “more  
7 than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949  
8 (citing *Twombly* ).

### 9 **A. Overview of the Endangered Species Act**

10 In order to enforce its provisions, the ESA creates what is called a “citizen suit,” a cause  
11 of action that may be filed for certain violations. Under U.S. Supreme Court precedent,  
12 however, certain causes of action are pled under the APA. This unfortunate return to form  
13 pleading has a crucial impact: the ESA citizen suit requires 60-days notice; the APA claim does  
14 not. If the Court allows the suit to proceed as an APA claim, and the Ninth Circuit later  
15 disagrees, then all the work of the parties and the Court is lost, and the case must begin again.

16 In their notice letter, Plaintiffs alleged violations of two sections of the ESA: § 7 and  
17 § 10. These two sections are the central characters in this Motion; however, a background to the  
18 ESA, and specifically, to §§ 4, 9, and 11, is helpful.

#### 19 **1. ESA § 4: “Determination of Endangered Species and Threatened 20 Species,” 16 U.S.C. § 1533**

21 Under §4, the Secretary of the Interior<sup>1</sup> must create the endangered species list. 16  
22 U.S.C. § 1533(a)(1). The section compels the Secretary to use the “best scientific and  
23 commercial data” in reviewing the status of species and mandates the designation of “critical  
24 habitat.” 16 U.S.C. § 1533 (b)(1)–(2).

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28 <sup>1</sup> The term “Secretary” may sometimes refer to the secretaries of the Department of Commerce or the  
Department of Agriculture, but that point is irrelevant in this case. 16 U.S.C. § 1532(15) (defining  
“Secretary”).

1                                   **2. ESA § 7: “Interagency Cooperation,” 16 U.S.C. § 1536**

2                   Under § 7, all federal agencies must consult with the Secretary to “insure that any action  
3 authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued  
4 existence of any endangered species . . . .” 16 U.S.C. § 1636(a)(2). Thus, any “action agency,”  
5 must coordinate with, for example, Fish & Wildlife, to ensure that its projects do not harm  
6 threatened species.

7                   Section 7 also mandates that the Secretary issue what is called a “biological opinion,”  
8 which details “how the agency action affects the species or its critical habitat.” 16 U.S.C.  
9 § 1536(b)(3)(A).

10                                   **3. ESA § 9: “Prohibited Acts,” 16 U.S.C. § 1538**

11                   Section 9 is the core of the ESA. It prohibits the taking, import, possession, and sale of  
12 endangered species. 16 U.S.C. § 1538(a)(1).

13                                   **4. ESA § 10: “Exceptions,” 16 U.S.C. § 1539**

14                   Despite its bland name, § 10 plays a large role in regulating endangered species—and it is  
15 this section that is at the heart of the dispute. Under § 10, the Secretary may issue a permit for  
16 the taking of endangered species—takings otherwise prohibited by § 9—if the taking is  
17 “*incidental to*, and not the purpose of, the carrying out of an otherwise lawful activity.” 16  
18 U.S.C. § 1539(a)(1)(B) (emphasis added). To issue this permit (an “incidental take permit”), an  
19 applicant must submit a conservation plan (like the one submitted by the Washington DNR) and  
20 detail how agency actions will impact species, how the agency will mitigate harm, and possible  
21 alternative actions. 16 U.S.C. § 1539(a)(2)(A).

22                   Before approving a conservation plan, the Secretary must open the plan to public  
23 comment and make certain findings, including that the applicant’s actions will result in only  
24 “incidental” taking, that the applicant will mitigate impacts, that it will fund the conservation  
25 plan, and that the proposed taking will not “appreciably reduce the likelihood of the survival and  
26 recovery of the species . . . .” 16 U.S.C. § 1539(a)(2)(B). Plaintiffs believe that Fish & Wildlife  
27 needed to make these findings and allow public comment before approving DNR’s amendment  
28 to its conservation plan.

1                   **5. ESA § 11: “Penalties and Enforcement,” 16 U.S.C. § 1540**

2                   Section 11 creates both civil and criminal penalties for violating the ESA. Under § 11,  
3 “[a]ny person who knowingly violates . . . any provision of [the ESA] may be assessed a civil  
4 penalty by the Secretary of not more than \$25,000 for each violation.” 16 U.S.C. § 1540(a)(1).  
5 Additionally, “[a]ny person who knowingly violates any provision of [the ESA] . . . be fined not  
6 more than \$50,000 or imprisoned for not more than one year, or both.” 16 U.S.C. § 1539(b)(1).

7                   Section 11 also creates citizen suits: “any person may commence a civil suit . . . to enjoin  
8 any person, including the United States an any other governmental instrumentality or agency . . .  
9 who is alleged to be in violation of any provision of this chapter . . . .” 16 U.S.C.  
10 § 1540(g)(1)(A). A citizen-suit requires, however, 60 days notice to the Secretary of any alleged  
11 violation before filing. 16 U.S.C. § 1539(g)(2)(A)(i).

12                   At first blush, the citizen-suit appears incredibly broad: *any* person may bring suit against  
13 *any* agency or entity for *any* violation of the ESA. Unfortunately, all is not so simple. The  
14 statute contains a conflicting provision. ESA § 11 also contains a second cause of action,  
15 permitting suits against the Secretary for violations of § 4 (the section mandating, amongst other  
16 things, that the Secretary create the endangered and threatened species list and designate critical  
17 habitat). 16 U.S.C. § 1540(g)(1)(C). It is the interaction between the second cause-of-action  
18 (specific to the Secretary) and the first cause-of-action (which according to its broad language  
19 should include all claims) that gave rise to *Bennett v. Spear*, 520 U.S. 154 (1997).

20                   **B. The Supreme Court’s Interpretation of ESA § 11’s Citizen-Suit**  
21                   **Provision and APA Claims**

22                   The Supreme Court addressed ESA § 11’s citizen-suit and its conflicting provision in  
23 *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, ranchers and irrigation districts challenged a  
24 Fish & Wildlife biological opinion, which found that the Klamath reclamation project (a series of  
25 dams, lakes, and rivers in southern Oregon) would likely jeopardize the lost river and shortnose  
26 sucker fish. *Id.* at 159. The plaintiffs presented claims under two sections: ESA § 4 (challenging  
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1 the implicit finding of “critical habitat”) and ESA § 7 (challenging the scientific basis of the  
2 biological opinion).<sup>2</sup> *Id.* at 160.

3 The government disputed jurisdiction, arguing that the ESA did not permit citizen-suits  
4 against the Secretary. *Id.* at 171. The Court looked at ESA § 11 (the citizen-suit provision),  
5 which provides the two causes-of-action discussed above:

6 Any person may commence a civil suit . . . :

7 (A) to enjoin any person, including the United States an any other governmental  
8 instrumentality or agency . . . who is alleged to be in violation of any provision of  
9 this chapter . . . ; or,

10 . . . .

11 (C) against the Secretary where there is alleged a failure of the Secretary to perform  
12 any act or duty under section 1533 of this title [i.e., ESA § 4, mandating creation  
13 of the endangered species list and critical habitat,] which is *not discretionary*  
14 with the Secretary.

15 16 U.S.C. § 1540(g)(1) (emphasis added); *see Bennett*, 520 U.S. at 171. The Court held that  
16 subsection (C) specifically allows suits under § 1533 (i.e., ESA § 4), and thus, the plaintiffs’  
17 claims under § 4 could go forward. (This was the plaintiffs’ claim that the biological opinion  
18 implicitly designated “critical habitat,” which must be done expressly under § 4.) The plaintiffs’  
19 claims under § 7, however, were more difficult.

20 The Court reasoned that if Congress created a specific cause of action against the  
21 Secretary *only* for violations of non-discretionary duties under § 4—subsection (C)—then  
22 Congress could not have intended the Secretary to be sued under subsection (A)—the broad  
23 cause of action allowing any suit against any agency. In other words, the second cause of action  
24 (subsection (C)) would be unnecessary if the first cause of action (subsection (A)) applied to the  
25 Secretary. *Bennett*, 520 U.S. at 173 (“That provision [subsection (C)] would be *superfluous*—  
26 and worse, its careful limitation to § 1533 would be nullified—if § 1540(g)(1)(A) permitted suit  
27 against the Secretary . . . .” (emphasis added)).

28 Further, the Court reasoned that it was unlikely Congress intended the Secretary or the  
employees of Fish & Wildlife to be subject to civil and criminal penalties if they erred in  
consulting under the ESA. *Id.* at 173–74. Indeed, subsection (A) allows a citizen to sue for “any

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<sup>2</sup> The plaintiffs presented three claims, but the claims fell essentially into the two categories listed.

1 violation” of the ESA, but if the Secretary could “violate” the ESA by, for example, failing to  
2 allow public comment on an incidental take permit, he could also be civilly and criminally liable.  
3 The Supreme Court found it unlikely that the Congress intended the Secretary to be criminally  
4 liable for “violations,” and thus, the Secretary’s failure to abide his duties in administering the  
5 ESA are not “violations” of the ESA. *Id.*

6 Lastly, the Supreme Court reasoned that if the Secretary’s failure in administering the  
7 ESA was a “violation,” then a plaintiff could file suit for any minor procedural error at any time  
8 rather than awaiting “final agency action,” as required by the APA. *Id.* at 174.

9 Given that reasoning, the Court concluded that the plaintiffs’ § 7 claims did not fall  
10 within subsection (A), the citizen-suit provision. Because the claims could not fall under  
11 subsection (C) either (because subsection (C) authorized only § 4 claims), the claims *must* fall  
12 under the APA, which authorizes review only when “there is no other adequate remedy in a  
13 court.” *Bennett*, 520 U.S. at 162 (quoting 5 U.S.C. § 704).

14 In sum, subsection (A) is a “means by which private parties may enforce the *substantive*  
15 provisions of the ESA against regulated parties—both private entities and Government  
16 agencies—but it is not an alternative avenue for judicial review of the Secretary’s  
17 *implementation* of the statute.” *Id.* at 173 (emphasis added).

18 **C. The Ninth Circuit’s Decision in *Environmental Protection Information***  
19 ***Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001)**

20 While *Bennett* holds that a challenge to a completed biological opinion under § 7 is  
21 properly pled under the APA, the Government argues that the Ninth Circuit has clarified that  
22 certain § 7 claims must be pled under the ESA. (*See* Defs.’ Resp. at 17, Dkt. #17)  
23 (distinguishing *Simpson Timber* from *Bennett*). In *Environmental Protection Information Center*  
24 *v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001), the plaintiffs challenged Fish &  
25 Wildlife’s refusal to reinstate consultation on an incidental take permit under § 7 (the same  
26 section at issue in *Bennett* and the same claim listed in Plaintiffs’ notice of intent to sue letter).  
27 *Id.* at 1074–75; *see* Oliphant Decl., Ex. 1 at 6, Dkt. #18-1 (noting violation for failure to reinstate  
28 consultation). *Simpson Timber* had obtained an incidental take permit for northern spotted owl,



1 but after obtaining the permit, Fish & Wildlife listed two additional species as threatened  
2 (including the marbled murrelet). *Id.* at 1075.

3 The Ninth Circuit recognized that under *Bennett*, Fish & Wildlife “could not be sued for  
4 maladministration of the ESA” under the citizen-suit provision—those claims fall under the  
5 APA. *Id.* at 1079. But, the court of appeals stated that *Bennett* “expressly recognized that  
6 citizen suits are a permissible means to enforce the substantive provisions of the ESA against  
7 regulated parties—including government agencies like [Fish & Wildlife] in its role as action  
8 agency.” *Id.* And, according to the Ninth Circuit, the plaintiffs sought to “enforce the  
9 substantive obligation imposed on [Fish & Wildlife] to ensure that no action authorized by it is  
10 likely to jeopardize a threatened species.” *Id.* Because Fish & Wildlife needed to consult  
11 *itself*—to ensure that it was not violating § 7 by failing to re-initiate consultation—the claim  
12 could be pled under the ESA. *Id.*

13 This logic appears again, but perhaps more clearly, in *Turtle Island Restoration Network*  
14 *v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003). In *Turtle Island*, the  
15 Fisheries Service was issuing longline fishing permits under the High Seas Fishing Compliance  
16 Act, 16 U.S.C. §5501 *et seq.* *Id.* at 970. The plaintiffs brought § 7 suits, alleging that longline  
17 fishing “result[ed] in harm to several endangered and protected species . . . .” *Id.* When the  
18 “acting agency is either the Fisheries Service or [Fish & Wildlife], the obligation to consult is not  
19 relieved, instead, the agency must consult within its own agency to fulfill its statutory mandate.”  
20 *Id.* at 973.

21 Thus, in *Turtle Island*, it is easier to see why the Fisheries Service is the action agency. It  
22 was issuing permits not under the ESA, but under the High Seas Compliance Act, and like any  
23 entity authorizing conduct that may jeopardize threatened species, it must consult under ESA § 7.  
24 In contrast, in *Simpson Timber*, Fish & Wildlife is not initially an action agency. The initiating  
25 entity was Simpson Timber—it sought a biological opinion and eventually an incidental take  
26 permit. Throughout that process, Fish & Wildlife is a consulting agency, merely “implementing”  
27 the ESA. Yet, despite being merely an administrator of the ESA, there is a moment when Fish &  
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1 Wildlife becomes the action agency—when it performs a § 7 analysis of its own decision on  
2 whether to re-initiate consultation.

3 Although the confines of *Simpson Timber* are not entirely clear, it appears that at least  
4 some § 7 claims against Fish & Wildlife are pled under the ESA and remain subject to the 60-  
5 day notice requirement.

### 6 III. ANALYSIS

7 The Government acknowledges that Plaintiffs’ claim as stated falls under ESA § 10—  
8 alleging failure to allow public comment and to make statutory findings. As the Government  
9 explains: “[B]y challenging the alleged failure of the agency to follow procedures required of it  
10 under Section 10 of the ESA before issuing a Section 10 permit . . . rather than the adequacy of  
11 its expert analysis and conclusions following formal consultation (with itself) . . . , the First  
12 Claim goes to [Fish & Wildlife] in its role as action agency.” (Defs.’ Mot. to Dismiss at 2, Dkt.  
13 #17.) Thus, while the claim is ostensibly listed under § 10, the Government believes the nature  
14 of the allegations implicates Fish & Wildlife’s role as an action agency—something akin to its  
15 § 7 responsibilities.

16 In the alternative, the Government argues that if the claim falls under the APA, the Court  
17 should preclude Plaintiffs from later amending their Complaint to add § 7 claims that *would*  
18 require 60-days notice.

#### 19 A. Plaintiffs’ ESA § 10 Claims

20 The Court must conclude that Plaintiffs’ claim falls under the APA. First, § 10 is not, as  
21 the *Bennett* court put it, a “substantive provision” rather than an “implementing provision.”  
22 Although *Bennett* failed to clearly divide substantive provisions from mere implementing  
23 provisions, it stated that a “substantive provision” is one that private parties may enforce against  
24 “regulated parties—both private entities and Government agencies.” *Bennett*, 520 U.S. at 173.  
25 But § 10 does not regulate private entities; it pertains only to the Secretary. *See* 16 U.S.C.  
26 § 1539 (allowing Secretary to issue incidental take permits, permits to take for scientific  
27 purposes, allowing hardship exemptions, requiring Secretary to publish applications and permits  
28 in the federal register, and other sections relating to the Secretary).

1           Second, and perhaps more persuasively, the Court cannot imagine that Congress intended  
2 the Secretary’s actions under § 10 to be “violations” of the ESA and give rise to civil and  
3 criminal liability. In other words, for Plaintiffs’ claim to fall under the ESA citizen-suit  
4 provision, it must allege a “violation” of the ESA. 16 U.S.C. § 1540(g)(1)(A). But as *Bennett*  
5 noted, “the ESA uses the term ‘violation’ elsewhere in contexts in which it is most unlikely to  
6 refer to failure by the Secretary . . . to perform [his] duties in administering the ESA.” *Bennett*,  
7 520 U.S. at 173. Thus, if the Government were correct, Plaintiffs might allege that Fish &  
8 Wildlife failed to allow public comment on the DNR amendment, and that claim would give rise  
9 to civil and criminal liability for Fish & Wildlife employees. Such a result is counter to common  
10 sense.

11           Third, *Bennett*’s policy concerns would be undermined. The Supreme Court noted that  
12 “interpreting the term ‘violation’ to include any errors on the part of the Secretary in  
13 administering the ESA” would allow a plaintiff to sue under the ESA citizen-suit provision  
14 immediately for “[a]ny procedural default.” *Id.* at 174. Thus, interpreting § 10 as potentially  
15 giving rise to ESA citizen-suit claims would allow immediate suits for procedural violations (like  
16 failing to allow public comment) before Fish & Wildlife had even issued an incidental take  
17 permit—undermining “the APA’s ‘final agency action’ requirement.” *Id.*

18           Fourth, it is difficult to apply the Ninth Circuit’s reasoning regarding § 7 claims to  
19 Plaintiffs’ § 10 claims. Indeed, the Ninth Circuit itself seems unclear about its reasoning in  
20 *Simpson Timber*. Again, it is easy to see why the Fisheries Service was an action agency in  
21 *Turtle Island*, it was issuing fishing permits under a **completely different** statute (the High Seas  
22 Compliance Act). Thus, all action commenced with the Fisheries Service—it was the original  
23 action agency.

24           But in *Simpson Timber*, the logging company was the original action agent; Fish &  
25 Wildlife was consulted to form a biological opinion and eventually issue an incidental take  
26 permit. Similarly here, the Washington State DNR is the action agent; Fish & Wildlife was  
27 consulted to form a biological opinion and issue an incidental take permit. In both cases, it is  
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1 merely administering the ESA. Under *Simpson Timber*, however, Fish & Wildlife becomes an  
2 action agency when failing to re-initiate consultation under § 7.

3 The Ninth Circuit appears uncertain of this leap. It held that “[e]ven if we were to read  
4 *Bennett* to preclude citizen-suit standing . . . , [the plaintiff] would still have standing to sue  
5 under the APA.” *Simpson Timber*, 255 F.3d at 1079. The Ninth Circuit reasoned that the  
6 plaintiff in *Simpson Timber* had interests that fell “within the zone of interests” protected by § 7,  
7 and therefore had standing to sue under “the APA[] as well as under the citizen-suit provision of  
8 the ESA.” But it cannot be both: “the APA by its terms independently authorizes review *only*  
9 when ‘there is no other adequate remedy in a court.’” *Bennett*, 520 U.S. at 161–62 (citing 5  
10 U.S.C. § 704).

11 Moreover, subsequent Ninth Circuit opinions draw *Simpson Timber*’s holding into  
12 question. In *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008),  
13 the Ninth Circuit held that the ESA citizen-suit provision authorized “suit against the State  
14 Department, as action agency, for failure to comply with its ESA obligations . . . .” *Id.* at 1229.  
15 But as for plaintiffs’ claim against the Fisheries Service, “the failure to reinitiate § 7 consultation  
16 is a final agency action subject to judicial review” under the APA. *Id.* at 1230 (citing,  
17 interestingly, *Env’tl. Prot. Info. Ctr. v. Simpson Timber*, 255 F.3d 1073, 1079 (9th Cir. 2001)).

18 Fifth, other courts have considered § 10 claims under the APA. *See Conservation Force*  
19 *v. Salazar*, 753 F. Supp. 2d 29, 34 (D.D.C. 2010); *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274,  
20 1278–79 (S.D. Ala. 1998); *Loggerhead Turtle v. Volusia County*, 120 F. Supp. 2d 1005, 1019–  
21 1020 (M.D. Fla. 2000).

22 In conclusion, Plaintiffs’ claim under ESA § 10—that Fish & Wildlife wrongly approved  
23 the amendment without public comment and statutory findings—falls properly under the APA  
24 and is therefore not subject to the ESA citizen-suit’s 60-day notice requirement. The Court must  
25 reject the Government’s argument that these allegations go to Fish & Wildlife as an action  
26 agency.

