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11
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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16
17 JACK GESCHEIDT, et al.,
18 Plaintiffs,

19 v.

20 DEB HAALAND,
Secretary of Interior, et al.,
21 Defendants.

Case No. 21-4734-HSG

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND REPLY IN
SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Date: February 24, 2022
Time: 2:00 p.m.

Hon. Haywood S. Gilliam, Jr.

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INTRODUCTION

1
2 In their opening brief, Plaintiffs demonstrated that the National Park Service (“NPS” or
3 “Park Service”) has a mandatory statutory duty to revise the General Management Plan (“GMP”)
4 for Tomales Point “in a timely manner” and that the agency’s more than forty-one-year delay in
5 doing so is “unreasonable” within the meaning of the Administrative Procedure Act (“APA”), 5
6 U.S.C. § 706(1). Plaintiffs showed that the agency’s failure to revise the GMP has resulted in an
7 untenable situation with respect to the Tule elk who live at Tomales Point and who, as a result of
8 the Park Service’s failure to revise its management of this wildlife and its habitat, are dying
9 horrific deaths by starvation and dehydration because they cannot get access to food and water
10 south of the three-mile-long fence that the Park Service erected in 1980 on the southern border of
11 Tomales Point.

12 In response, the Park Service insists that Plaintiffs lack standing to maintain this case and
13 that the agency is not actually required to revise the GMP. Nevertheless, the day before its brief
14 was due—and clearly in response to this lawsuit—the Park Service announced that it now intends
15 to revise the GMP for Tomales Point—but only as an exercise of purely *discretionary* authority—
16 and on this basis contends that it is entitled to final judgment in this case. While Plaintiffs are
17 encouraged that the Park Service has finally acknowledged that it must undertake a revision to the
18 GMP for this portion of Point Reyes National Seashore (“PRNS”), they have two major concerns.

19 First, the schedule for the GMP revision outlined by the Park Service is far too long in
20 duration. Under that schedule, the NPS would not issue a final Environmental Impact Statement
21 (“EIS”) and Record of Decision for the revised GMP until March 31, 2025, at the earliest.
22 Declaration of Craig Kenkel, ECF No. 57-1 ¶¶ 4–5; *id.* ¶ 6 (stressing that even this schedule “is
23 contingent on ongoing funding”). This schedule is far too drawn out, especially given that we
24 now know—as revealed in an attachment to the Declaration accompanying the Park Service’s
25 opposition brief, but glaringly omitted from the brief itself—that ***another seventy-two elk, more***
26 ***than 25% of the remaining herd, died last year as a result of the drought conditions at Tomales***
27 ***Point.*** This is *in addition to the 152 elk who died in the year prior and the 257 elk who died*
28 *during the previous drought of 2013-2015.* NPS Website, Plaintiffs’ Exhibit (“Pl. Ex.”) A, ECF

1 No. 56-2 (*Point Reyes National Seashore Releases 2020 Population Numbers of Tule Elk across*
2 *the Park*); *id.* (*Tule Elk at Tomales Point FAQ*). In fact, ***more than half of the total population—***
3 ***224 elk of a population of 445—has died during the last two years.***

4 Not only is this wildlife suffering horrific pain and distress from this situation—which
5 clearly could be alleviated by a change in their management, including, for example, removal or
6 relocation of the fence that confines them—but there can be no question that the sheer volume of
7 deaths is seriously depleting any genetic viability of the remaining population. Accordingly, a
8 delay of more than three additional years (if not longer) before the GMP is actually revised poses
9 a serious risk to the preservation of this wildlife. Therefore, any schedule for the revision of the
10 GMP must proceed more rapidly, especially because the Park Service continues to refuse to
11 provide any forage for these animals in the meantime, despite insisting that the lack of *forage* is
12 what has caused this massive number of deaths during drought conditions.¹

13 Even more concerning is the fact that the NPS, which, for over forty years, has failed to
14 revise the GMP for this section of the Seashore, and is now apparently doing so only in response
15 to federal litigation, insists that the Court should not *require* it to conduct this much needed
16 process pursuant to a court-imposed schedule, but should instead simply *trust* that the agency will
17 revise the Plan. In light of the extreme recalcitrance exhibited by the agency to revise the GMP
18 for Tomales Point, its continued insistence that it has no *mandatory* duty to do so, and that, absent
19 a court order, the NPS’s voluntary decision to revise the GMP is not binding on either it or any
20 future Administration, there simply is no valid reason why the Court should accept the agency’s
21 belated announcement that it has now decided to act. Rather, as the law that applies to an
22 agency’s voluntary cessation of unlawful conduct makes absolutely clear, in light of all of these
23 circumstances, the Court should enter judgment for the Plaintiffs and order the Park Service to
24

25
26 ¹ See, e.g., NPS Website, Pl. Ex. A, ECF No. 56-2 (*Tule Elk at Tomales Point FAQ*)
27 (“Investigations of dead elk, observations of living elk, and range assessments . . . suggest *poor*
28 *forage quality is the underlying cause of these population changes*”) (emphasis added); *id.* (NPS
stating it has no intention of providing supplemental forage to prevent further elk population
declines).

1 comply with its mandatory duty to revise the GMP for Tomales Point pursuant to as expedited a
2 schedule as possible.

3 Moreover, if the Court rules in Plaintiffs' favor—i.e., it finds that the Park Service has
4 violated its mandatory duty to revise the GMP—it should also allow Plaintiffs to brief whether
5 additional injunctive relief may be appropriate—i.e., whether the Park Service should be required
6 to provide supplemental water and forage to the elk during the time it takes the agency to
7 complete the process for revising the GMP, specifically during the summer and fall months when
8 the drought conditions are so dire. Absent the opportunity to seek such relief, the Tule elk will
9 continue to suffer and die horrific deaths at alarming rates, and the genetic viability of the entire
10 herd will continue to be jeopardized—meaning that by the end of the GMP revision process, there
11 may be no elk population left to protect.

12 For all of these reasons, and because Plaintiffs have demonstrated sufficient Article III
13 standing, the government's motion for summary judgment should be denied, and judgment should
14 be entered for Plaintiffs.

15 **ARGUMENT**

16 **I. THERE IS NO MERIT TO DEFENDANTS' ASSERTION THAT PLAINTIFFS LACK STANDING.**

17 **A. Plaintiffs Have Amply Demonstrated Sufficient Injuries.**

18 Incredibly, the government argues that the three individual Plaintiffs and the
19 organizational Plaintiff lack Article III standing to maintain this action. Defendants' Cross-
20 Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment
21 ("Def. Opp."), ECF No. 57 at 9-12. In making this argument, the NPS appears to be under the
22 serious misapprehension that the only basis for injury-in-fact for plaintiffs challenging an
23 agency's failure to comply with a statutorily prescribed procedure—such as revising a GMP—is a
24 statutory provision that "provide[s] for public participation" in that process. *Id.* at 10. Thus,
25 apparently the Park Service would have this Court believe that standing law requires a violation
26 of a right to notice and comment to challenge an agency's failure to comply with a statutory
27 command. *Id.* However, that formulation of standing law is incorrect.

28

1 The Supreme Court has made clear that individuals challenging the government’s failure
2 to comply with a procedure required by law have standing if that procedure is designed to
3 “protect [their] concrete interests.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992).
4 In *Defenders of Wildlife*, the example of the quintessential procedural right that would provide the
5 necessary injury-in-fact for standing was an agency’s failure to prepare an EIS with respect to the
6 construction of a federally licensed dam. *Id.* The Court did not suggest that the injury would flow
7 from whether the plaintiffs were provided notice and comment on the construction of the dam, or
8 even with respect to the EIS that was required. Rather, the Court explained that “one living
9 adjacent to the site for proposed construction . . . has standing to challenge the licensing *agency’s*
10 *failure to prepare an environmental impact statement, even though he cannot establish with any*
11 *certainty that the statement will cause the license to be withheld or altered, and even though the*
12 *dam will not be completed for many years.”* *Id.* (emphasis added).

13 Here, Plaintiffs are the proverbial people living adjacent to the proposed dam in *Defenders*
14 *of Wildlife*; i.e., the individual Plaintiffs and the members of organizational Plaintiff Animal
15 Legal Defense Fund (“ALDF”) all live near and routinely recreate in Tomales Point. The
16 procedure at issue here—revision of the GMP for Tomales Point—is designed specifically to
17 protect the public’s interest in ensuring that the Park Service administer this land in a way that
18 “provide[s] for the enjoyment of the scenery, natural and historic objects, *and the wild life* in such
19 manner and by such means as will leave them unimpaired for the enjoyment of future
20 generations.” 54 U.S.C. § 100101(a) (emphasis added). Thus, because Plaintiffs all live near and
21 frequently visit Tomales Point to enjoy its natural wonders and wildlife, such as the Tule elk who
22 live there, this procedure is designed to protect their “concrete interests.” 504 U.S. at 573 n.7.

23 Thus, Defendants’ reliance on a single Wyoming district court decision, Def. Opp., ECF
24 No. 57 at 10, is unfounded. And the other case cited by Defendants, *Utah v. Babbitt, id.*, does not
25 even address an unreasonable delay claim. 137 F.3d 1193, 1200 (10th Cir. 1998). Rather, the
26 claim at issue there was that plaintiffs were denied public participation at a certain stage of a
27 government process, not that the government failed to undertake a required process at all—the
28 issue presented here. Plaintiffs brought this case not because the Park Service failed to provide

1 them with an opportunity to comment on or participate in a revision to the GMP, but because, for
2 over forty-one years, the Park Service has *failed entirely to revise that Plan*, which, in turn,
3 greatly adversely affects the Tule elk confined behind the fence and Plaintiffs' ability to enjoy
4 this wildlife and the National Seashore where it lives and is required to be protected.

5 **Plaintiff Jack Gescheidt**

6 Plaintiff Jack Gescheidt explains in a sworn Declaration that he has lived in California
7 since 1996 and has “been visiting Tomales Point in the Point Reyes National Seashore on a
8 regular basis—on average six times per year—for at least twenty-four years.” Declaration of Jack
9 Gescheidt, Pl. Ex. C, ECF No. 56-4 ¶ 1. He further states that he goes to Tomales Point “for
10 aesthetic enjoyment, recreation, and spiritual renewal” and that he “enjoy[s] photographing the
11 wild lands and wildlife at Tomales Point, including the magnificent Tule elk herd.” *Id.* ¶ 2.

12 However, Mr. Gescheidt recounts that in the summer of 2020, “while enjoying the plants,
13 biodiversity, and wildlife at Tomales Point, [he] saw an elk who was extremely emaciated” and
14 that since then, when he visits Tomales Point, he worries “that [he] will see more elk in the same
15 or worse state, or even find a corpse of an elk who has died from starvation or dehydration
16 because of their inability to access proper water and forage.” *Id.* ¶ 4.

17 **Plaintiff Laura Chariton**

18 Plaintiff Laura Chariton similarly explains in her sworn Declaration that she lives in
19 Marin County within an hour's proximity to the National Seashore; that, for forty-seven years,
20 she has used Tomales Point “for myriad activities that bring [her] aesthetic, recreational, and
21 spiritual enjoyment”; and that she “enjoy[s] observing wildlife throughout the park, but most of
22 all the tule elk at Tomales Point.” Declaration of Laura Chariton, Pl. Ex. D, ECF No. 56-5 ¶ 1.
23 Ms. Chariton further states that Tomales Point “is a very special place to [her]” and that she has
24 “often marked important events in [her] life with a visit to the area to commune with the elk
25 there.” *Id.* ¶ 2. Ms. Chariton also states that she has seen firsthand “the suffering of the tule elk at
26 Tomales Point,” including seeing “elk who were emaciated, dehydrated, and lacking access to
27 appropriate water sources on a number of occasions between 2015 and the present,” and that
28 witnessing such sights “has been horrifically distressing for [her].” *Id.* ¶ 6. She states that the

1 suffering of the elk “completely impairs [her] ability to enjoy Tomales Point and the Seashore”
 2 and that “[d]ue to the actions of the National Park Service in failing to manage this wildlife in a
 3 way that would ensure it has adequate access to food and water, [she] can no longer truly enjoy
 4 visiting [her] favorite place in the world.” *Id.* ¶¶ 7–8.

5 **Plaintiff Skyler Thomas**

6 Plaintiff Skyler Thomas explains in his sworn Declaration that he is a “wildlife
 7 photographer and videographer,” that he has visited Tomales Point “many times as an oasis and
 8 wildlife hotspot,” and that he utilizes this area “for recreational enjoyment” and to further his
 9 photography and videography work. Declaration of Skyler Thomas, Pl. Ex. E, ECF No. 56-6 ¶ 1.
 10 Mr. Thomas further explains that he “love[s]” Tomales Point and that this “special” place is a
 11 “retreat” for him—“aesthetically, emotionally, and spiritually.” *Id.* ¶ 2. He further recounts that
 12 since the summer of 2020, he has personally observed “the carcasses of at least fifteen Tule elk”
 13 who have died from a lack of water and/or forage and that “[t]hese experiences of seeing dead elk
 14 at Tomales Point have had a serious and lasting emotional impact on [him] and have greatly
 15 impaired [his] aesthetic enjoyment of Tomales Point.” *Id.* ¶¶ 4–5. He explains that he is now
 16 “faced with the decision to either forego visiting a place that [he] ha[s] come to love and that so
 17 enriches [his] life or to go there anyway and risk seeing the horrific sight of dead or dying elk”
 18 and that, consequently, “[t]he aesthetic, recreational, and spiritual enjoyment [he] once derived
 19 from Tomales Point is severely impaired.” *Id.* ¶ 8.

20 **Plaintiff Animal Legal Defense Fund**

21 ALDF’s representative, Mark Walden, also explains in his sworn Declaration that ALDF’s
 22 members similarly live near and enjoy Tomales Point and the elk who live there and that their
 23 aesthetic and recreational interests are seriously impaired because the elk have been so poorly
 24 managed by the Park Service. Declaration of Mark Walden, Pl. Ex. F, ECF No. 56-7 ¶¶ 7–10.

25 All of these injuries recounted by Plaintiffs amply satisfy the injury-in-fact test for
 26 standing. *See* Plaintiffs’ Memorandum in Support of their Motion for Summary Judgment (“Pl. SJ
 27 Mem.”), ECF No. 56-1 at 23–25. Thus, because Plaintiffs are quintessential individuals who use
 28 and enjoy the national park land at issue in this case, and whose enjoyment of that land is

1 extremely impaired by the Park Service’s failure to revise the GMP for Tomales Point, they have
 2 demonstrated sufficient procedural injury in this case, regardless of whether they are complaining
 3 about a lack of notice and comment. *See Defenders of Wildlife*, 504 U.S. at 573 n.7. Moreover, as
 4 the NPS itself acknowledges, when the agency *does* revise the GMP for Tomales Point, it will be
 5 required to prepare an EIS, Kenkel Decl., ECF No. 57-1 ¶ 2, which will provide Plaintiffs with a
 6 right to comment, 40 C.F.R. § 1506.6—none of which has occurred to date because the NPS has
 7 failed to carry out this mandatory statutory duty.²

8 **B. Plaintiffs Have Also Demonstrated Sufficient Causation and Redressability.**

9 There also is no merit to the NPS’s assertion that Plaintiffs have failed to show the
 10 necessary causation for standing. Def. Opp., ECF No. 57 at 11. Oddly, the Park Service states that
 11 Plaintiffs assert that their aesthetic injuries are “caused by the GMP.” *Id.* But the current GMP is
 12 not what is causing Plaintiffs’ injuries, and Plaintiffs have never asserted that it is. Rather, it is the
 13 NPS’s *failure to revise* that GMP that is causing Plaintiffs’ injuries—i.e., the elk are continuing to
 14 die of starvation and dehydration due to a lack of humane management because of the agency’s
 15 failure, after so many years, to revisit and amend their management. The current GMP for
 16 Tomales Point, issued in 1980, states that “[r]estoration of historic natural conditions (*such as*
 17 *reestablishment of Tule elk*) will continue to be implemented when such actions will not seriously
 18 diminish scenic and recreational values.” AR 000313 (emphasis added). Therefore, a revision of
 19 that Plan would necessarily include measures that ensure that this protected wildlife does not
 20 continue to die of starvation and dehydration.

21 Indeed, it is odd that the Park Service insists that a revised GMP would “not address elk
 22 management at the implementation level,” Def. Opp., ECF No. 57 at 11, when (a) the original
 23 GMP expressly states that restoration of natural conditions “will continue to be implemented,”

24 _____
 25 ² The NPS’s reliance on cases that stand for the proposition that its own Policies are not
 26 binding, Def. Opp., ECF No. 57 at 10–11, is perplexing. Plaintiffs have not asserted any claim
 27 that relies on the NPS’s Policies—rather, they simply referred to those Policies as further
 28 evidence that a forty-one-year delay is “unreasonable” within the meaning of 5 U.S.C. § 706(1)
 and *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (“TRAC”). Pl. SJ
 Mem., ECF No. 56-1 at 20; *see also* NPS Policies, Pl. Ex. B, ECF No. 56-3 at § 2.3.1.12 (stating
 that “GMP reviews may be needed *every 10 to 15 years, but may be needed sooner if conditions*
change significantly”) (emphasis added).

1 AR 000313; (b) the relevant statute provides that GMPs “shall include . . . measures for the
2 preservation of the area’s resources,” 54 U.S.C. § 100502, which include the Tule elk; and (c) the
3 NPS now tells the Court that it in fact *will incorporate specific elk management measures and*
4 *objectives in the revised GMP that it will voluntarily prepare*, Def. Opp., ECF No. 57 at 23;
5 Kenkel Decl., ECF No. 57-1 ¶ 2 (“The plan will include resource-specific and site-specific
6 analyses to address wilderness and *elk herd management and decisions that can be implemented*
7 *when the plan is final.*”) (emphasis added). Accordingly, there is no valid basis for ruling that the
8 Plaintiffs have failed to show the requisite causation here.

9 Nor is there any merit to the Park Service’s argument that Plaintiffs lack redressability.
10 Def. Opp., ECF No. 57 at 11–12. That matter is also succinctly addressed by the Supreme Court
11 in footnote seven of *Defenders of Wildlife*, where the Court explained that those who are directly
12 affected by government inaction have standing to complain that the government has failed to
13 carry out a procedural duty and that, in such circumstances, those individuals have standing “even
14 though [they] cannot establish with any certainty” that once the government complies with that
15 duty it will necessarily choose a course of action that will cure the plaintiffs’ injuries. 504 U.S. at
16 573 n.7. Thus, again, the Court emphasized that “[t]he person who has been accorded a
17 procedural right to protect their concrete interests can assert that right *without meeting all the*
18 *normal standards for redressability and immediacy.*” *Id.* (emphasis added).

19 Indeed, there is no shortage of case law from this Circuit that reiterates this well-
20 established standing doctrine. For example, in *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th
21 Cir. 2001), the Court of Appeals held that birdwatchers had standing to challenge the
22 development of a terminal that would destroy habitat for various bird species because, before
23 disposing of any surplus real property—a prerequisite to constructing the terminal—the Navy was
24 required to comply with the National Environmental Policy Act (“NEPA”). In finding that the
25 plaintiffs had demonstrated sufficient redressability, the court explained that:

26 to establish standing, the birdwatchers need not show that the revised EIS
27 would result in the abandonment of the plans to build the marine container
28 terminal. Relying on the discussion of procedural standing in footnote seven
of *Defenders of Wildlife*, we have held that *to establish redressability, plaintiffs*
asserting procedural standing need not demonstrate that the ultimate outcome

1 *following proper procedures will benefit them.*
2 *Id.* at 682 (citations omitted) (emphasis added). Rather, the court explained, “[t]he birdwatchers
3 stand in a similar position to the hypothetical plaintiff in *Defenders of Wildlife* who lives adjacent
4 to the construction site of a federally licensed dam; because they are seeking to enforce a
5 procedural right under NEPA to protect their concrete interests, they have standing to challenge
6 the adequacy of the Navy’s [Final] EIS *even though they cannot establish that a revised EIS*
7 *would result in a different reuse plan* for the Naval Station.” *Id.* (emphasis added); *see also*
8 *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995) (finding that the uncertainty as to
9 whether the findings of an EIS would affect the agency’s determination is “not important” under
10 *Defenders of Wildlife*); *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (the fact
11 that redrafting the EIS might not change the agency’s decision is “not relevant” to standing). This
12 procedural injury redressability rule is not limited to NEPA. *See, e.g., Or. Nat. Desert Ass’n v.*
13 *Dombeck*, 172 F.3d 1092, 1094 (9th Cir. 1998) (plaintiffs challenging the Forest Service’s grant
14 of a grazing permit without obtaining requisite certification from the state that the activity would
15 not violate water quality standards need not prove that the state would have denied such
16 certification to satisfy the redressability requirement).

17 The cases cited by Defendants, Def. Opp., ECF No. 57 at 12, do not help their cause. In
18 *Salmon Spawning & Recovery All. v. Gutierrez*, the court held that the plaintiffs lacked
19 redressability because their requested relief—a court order requiring the government to
20 renegotiate the terms of a treaty concerning the number of salmon that could be taken each year—
21 simply could not be obtained. 545 F.3d 1220, 1228 (9th Cir. 2008) (“[t]he court cannot order
22 renegotiation of the Treaty, and discretionary efforts by the agencies are too uncertain to establish
23 redressability”). However, in the same opinion, the Court of Appeals also held that the plaintiffs
24 *did* have standing to challenge the State Department’s failure to re-initiate consultation under
25 Section 7 of the Endangered Species Act (“ESA”) to ensure that continued implementation of the
26 Treaty was not likely to jeopardize the existence of the species. In so ruling, the court stressed:
27 the key difference between asserting substantive and procedural violations of the ESA:
28

1 a plaintiff alleging procedural violations of the ESA must show only that the procedural
2 right *could* protect their interest, whereas a plaintiff alleging a substantive violation
3 must demonstrate that its injury *would likely be redressed* by a favorable court decision.

4 *Id.* (emphasis added).

5 Thus, this decision actually supports *Plaintiffs'* argument. Like the plaintiffs in *Salmon*
6 *Spawning*, Plaintiffs here are complaining about a *procedural* violation of the relevant statute—
7 i.e., the NPS's failure to revise the GMP for Tomales Point as required by 54 U.S.C. § 100502.
8 They are not, at this juncture, asking the Court to rule as to *how* the agency must ultimately
9 decide to revise that management plan; they are simply asking the Court to compel the agency to
10 actually revise this seriously outdated document, pursuant to Section 706(1) of the APA, which
11 authorizes the Court to compel agency action “unlawfully withheld or unreasonably delayed.” 5
12 U.S.C. § 706(1). Once the agency does so, if Plaintiffs or anyone else challenge that ultimate
13 decision as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,
14 they may bring that substantive challenge under Section 706(2) of the APA and will necessarily
15 have to demonstrate the requisite standing to do so.³

16 Nor is *Fernandez v. Brock* helpful to Defendants. Def. Opp., ECF No. 57 at 12. There, the
17 court held that the plaintiff migrant farmworkers failed to show redressability when they
18 requested an order compelling the Secretary of Treasury to issue particular regulations that would
19 provide them with pension benefits, but only because it was entirely speculative as to whether
20 third parties subject to the regulations would even participate in pension plans under such new
21 regulations. 840 F.2d 622, 628 (9th Cir. 1988) (noting that “[i]f the farmworkers prevail, the
22 Secretary will issue regulations governing ERISA plans for seasonal workers. But the
23 farmworkers do not know what the regulations will say and cannot predict whether their
24 employer will continue to offer a pension plan at all”). However, again in a ruling that actually

25 ³ In their “Issues to be Determined” Statement at the beginning of their brief, Defendants
26 assert that this Court must decide “[w]hether NPS acted arbitrarily and capriciously by not
27 revising the General Management Plan for Point Reyes as it relates to Tomales Point.” Def. Opp.,
28 ECF No. 57 at 1. However, while that standard would of course govern judicial review of any
final decision regarding revision of the GMP, *see* 5 U.S.C. § 706(2), it is *not* the standard that
governs the claim at issue here. Rather, Plaintiffs ask the Court to determine whether, under 5
U.S.C. § 706(1), the Park Service's failure to revise the GMP is “unreasonable.” *See In re*
Pesticide Action Network N. Am., 798 F.3d 809, 813–14 (9th Cir. 2015).

1 supports *Plaintiffs'* position, the court held that the plaintiffs *did* have standing to challenge the
 2 agency's failure to issue any regulations at all, in violation of the relevant statute, again
 3 recognizing that "[t]he causation and redressability requirements are satisfied because an order
 4 requiring the Secretary to promulgate some regulations would redress the farmworkers'
 5 procedural injury." *Id.* at 631 (emphasis added).⁴

6 Thus, because Plaintiffs here seek to protect their concrete aesthetic, recreational, and
 7 other interests in protecting the Tule elk from continuing to die from starvation and dehydration,
 8 they need not prove that the revised GMP that is required for this portion of the Seashore would
 9 in fact accomplish this objective in order to establish the requisite redressability. Because
 10 Plaintiffs are complaining that the Park Service has violated its *procedural* obligation to revise
 11 the GMP, under *Defenders of Wildlife* and its progeny, it is enough that the revision to the GMP
 12 may provide relief.

13 **II. THE PARK SERVICE HAS VIOLATED ITS MANDATORY DUTY TO REVISE**
 14 **THE GMP FOR TOMALES POINT.**

15 **A. The Park Service Has a Mandatory Duty to Revise the GMP.**

16 There is no merit to the government's assertion that it does not have a mandatory duty to
 17 revise the GMP for Tomales Point. Def. Opp., ECF No. 57 at 12–15. As Plaintiffs demonstrated
 18 in their opening brief, *see* Pl. SJ Mem., ECF No. 56-1 at 17–18, and as Judge Armstrong has
 19 already held, the fact that the governing statute states that the Park Service "shall . . . revise[]" the
 20 GMP for each unit of the Park System "in a timely manner" imposes a non-discretionary duty on
 21 the agency to revise the GMP. *Res. Renewal Inst. v. Nat'l Park Serv.*, No. 4:16-cv-00688-SBA,
 22 2016 WL 11673179 (N.D. Cal. July 15, 2016), ECF No. 49 at 9 (explaining that "[a]lthough the
 23 NPS has leeway in deciding *when* to revise a GMP, it *remains statutorily obligated to do so in a*
 24 *'timely manner'*") (emphasis added).

25 Defendants' response—that there can be no mandatory duty because there is no statutory
 26 deadline imposed on the agency for revising GMPs, Def. Opp., ECF No. 57 at 13—makes no

27 ⁴ Moreover, in sharp contrast to that case, whatever new measures the Park Service
 28 devises for managing the elk will most likely be implemented by the agency itself and not depend
 on unfettered choices of third parties not before the Court.

1 sense. Contrary to what Defendants would have this Court believe, although the Supreme Court
2 in *Norton v. Southern Utah Wilderness Alliance* (“SUWA”) used a statutory command
3 accompanied by a particular deadline as an *example* of a mandatory duty that may be compelled
4 under 5 U.S.C. § 706(1), the Court certainly did not rule that this was the *only* kind of mandatory
5 duty that would suffice for that purpose. 542 U.S. 55 (2004). Indeed, there are many cases in this
6 Circuit decided post-SUWA where courts have held that agencies unreasonably delayed carrying
7 out mandatory duties where there was no specific timetable for the required action. *See, e.g., In re*
8 *Nat. Res. Def. Council*, 956 F.3d 1134, 1140–41 (9th Cir. 2020) (despite no statutory timetable,
9 the EPA’s ten-year-plus delay in responding to a petition asking the agency to end the use of a
10 dangerous pesticide was unreasonable); *In re A Cmty. Voice*, 878 F.3d 779, 784 (9th Cir. 2017)
11 (finding an eight-year delay in updating lead-dust and lead-paint standards unreasonable despite
12 no statutory deadline); *In re Pesticide Action Network N. Am.*, 798 F.3d at 814 (where there is no
13 congressionally mandated timetable and agency’s proposed timetable representations are a
14 “roadmap for further delay[,]” plaintiff has a viable unreasonable delay claim where agency
15 delayed more than eight years); *Asmai v. Johnson*, 182 F. Supp. 3d 1086, 1095–97 (E.D. Cal.
16 2016) (finding a delay of fifteen years presumptively unreasonable although there was no
17 statutory deadline); *see also In re Pub. Emps. for Env’tl. Responsibility*, 957 F.3d 267, 274 (D.C.
18 Cir. 2020) (“[E]ven the lack of a hard deadline does not give government officials carte blanche
19 to ignore their legal obligations”); *id.* (finding an unreasonable delay of nineteen years).

20 Thus, Defendants conveniently misinterpret the Supreme Court’s reasoning in *SUWA* by
21 asserting that a statute that compels an agency to take a specific, non-discretionary action, but
22 does not impose any particular deadline for *when* the agency must act, is the same as a statute that
23 gives an agency discretionary authority *whether* to act at all. This simply is not correct. Rather, if
24 Congress *has* imposed a strict timetable for completion of a mandatory duty, that fact informs the
25 analysis of whether an agency delay is “unreasonable” within the meaning of Section 706(1) of
26 the APA, *see* Pl. SJ Mem., ECF No. 56-1 at 18–20, not the analysis of whether the agency has
27 any such duty at all. 750 F.2d at 80. In *TRAC*, the D.C. Circuit explained that in an unreasonable
28 delay case, “the time agencies take to make decisions must be governed by a rule of reason.” *Id.*

1 The Court enumerated several factors that inform that determination, observing that “where
2 Congress has provided a timetable *or other indication of the speed with which it expects the*
3 *agency to proceed* in the enabling statute, that statutory scheme *may supply content for this rule*
4 *of reason.*” *Id.* (emphasis added).

5 Here, of course, the “other indication of the speed with which” Congress expected the
6 Park Service to comply with its statutory duty to revise GMPs, *id.*, is the inclusion of the phrase
7 “in a *timely* manner,” 54 U.S.C. § 100502 (emphasis added)—meaning “quickly, rapidly; without
8 delay, promptly,” Oxford English Dictionary (3d ed.) (definition of “timely”), and certainly well
9 before a lapse of forty-one years. Indeed, Plaintiffs were unable to find a single case—and
10 Defendants certainly have not cited any—where a court held that a delay of *over forty years* in
11 carrying out any statutory duty was found to be “reasonable.”

12 The cases relied on by Defendants are easily distinguished, as Judge Armstrong observed.
13 *Res. Renewal Inst.*, 2016 WL 11673179, ECF No. 49 at 8–10. The statute at issue in *ONRC*
14 *Action v. Bureau of Land Mgmt.* merely required that land use plans be revised when
15 “appropriate,” leaving the decision of *whether* to amend such plans to the discretion of the
16 agency. 150 F.3d 1132, 1139 (9th Cir. 1998). The same statutory language was at issue in
17 *Gardner v. Bureau of Land Mgmt.*, 638 F.3d 1217, 1220 (9th Cir. 2011), and similar language—
18 “as appropriate”—was at issue in *Luciano Farms, LLC v. United States*, No. 2:13-cv-02116-
19 KJM-AC, 2014 WL 1912356, at *3 (E.D. Cal. May 13, 2014), upon which Defendants also rely.
20 In *Idaho Rivers United v. U.S. Forest Serv.*, the court held that the statutory language of the Wild
21 and Scenic Rivers Act, which requires the Forest Service to take “such action . . . *as may be*
22 *necessary*” to protect such rivers, did not impose a discrete agency action that could be enforced
23 by the court because the language “as may be necessary” left the agency with a great deal of
24 discretion to decide whether such action was necessary at all. 857 F. Supp. 2d 1020, 1029 (D.
25 Idaho 2012) (emphasis added). And, contrary to what Defendants would have the Court believe,
26 the statute at issue in *Conservation Nw. v. Kempthorne*, No. C04-1331-JCC, 2007 WL 1847143
27 (W.D. Wash. June 25, 2007)—the Endangered Species Act—does not direct the Fish and Wildlife
28 Service to implement recovery measures “in a timely manner.” Def. Opp., ECF No. 57 at 13. On

1 the contrary, the ESA does not say anything at all about the speed with which a Recovery Plan
2 must be implemented. 16 U.S.C. § 1533.

3 Understandably, Defendants want this Court to focus exclusively on the “in a timely
4 manner” language of the relevant statute, and they complain that Judge Armstrong “did not
5 address how the discretion-conferring phrase ‘in a timely manner’ could create a mandatory
6 duty . . .” Def. Opp., ECF No. 57 at 14. But it is not the “in a timely manner” phrase in the statute
7 alone that imposes the duty on the NPS to revise the GMP. Rather, it is Congress’ use of the
8 critical word “shall”—an unequivocal word of *command*, *Me. Cmty. Health Options v. United*
9 *States*, 140 S. Ct. 1308, 1320 (2020) (the word “shall” connotes a “command”)—along with the
10 direction that a “discrete action,” *SUWA*, 542 U.S. at 63, be taken “in a timely manner,” 54
11 U.S.C. § 100502, that imposes that duty.

12 Defendants again either misunderstand or misstate the reasoning behind *SUWA* when they
13 attempt to equate a statutory directive requiring an agency to take specific, concrete action—in
14 this case, requiring that the NPS “shall . . . revise[]” management plans, *id.*—to the type of
15 inexact, overarching “object to be achieved” addressed in *SUWA*, 542 U.S. at 66. Def. Opp., ECF
16 No. 57 at 15. There, the Congressional directive to “continue to manage such lands . . . in a
17 manner so as to not impair the suitability of such areas for preservation as wilderness” was not
18 deemed a sufficient mandatory duty for the Court to compel action, not because it did not include
19 a specific timetable in which the agency must “continue” to do something, but because it did not
20 include the requisite “clarity necessary to support judicial action,” 542 U.S. at 66, i.e. a command
21 to perform a “discrete action,” *id.* at 63—such as the revision of a GMP.

22 **B. The NPS Has Unreasonably Delayed Revising the GMP for Tomales Point.**

23 In their opening brief, Plaintiffs demonstrated that the agency’s over forty-one-year delay
24 in revising the GMP for Tomales Point is clearly “unreasonable,” not only because of the time
25 that has passed since the original GMP was issued in 1980, but also because of the dire
26 consequences this delay in managing the elk has caused—i.e., suffering and death by starvation
27 and dehydration of wildlife that is required to be protected and preserved. Pl. SJ Mem., ECF No.
28 56-1 at 18–23. In response, Defendants make several assertions, none of which has any merit.

1 First, Defendants bizarrely contend that the forty-one-year delay is not “unreasonable”
2 because “the conditions in Tomales Point have not changed substantially since the GMP” was
3 issued in 1980. Def. Opp., ECF No. 57 at 16. However, in light of the fact that since 2013,
4 *hundreds of Tule elk have now died from a lack of sufficient water and forage because they*
5 *cannot get past the NPS’s three-mile-long fence*, this statement is demonstrably incorrect.

6 Second, to support its position that it has not “unreasonably delayed” revising the GMP
7 for Tomales Point, the Park Service relies on several cases where courts have found an agency’s
8 delay of five to six years in carrying out a mandatory duty not unreasonable because of the
9 agency’s “limited resources.” *Id.* at 18. Of course, a delay of forty-one years is significantly
10 longer than one of five or six. Regardless, in stark contrast to those cases, where agencies
11 submitted evidence of competing priorities and a lack of resources, the NPS has not provided any
12 evidence indicating that it has lacked the resources to revise the GMP over the last four decades.⁵

13 Third, in response to Plaintiffs recounting the numerous times since the mid-1980s that
14 experts and others warned the Park Service that a failure to adequately manage the Tule elk
15 confined behind a fence could lead to die-offs and suffering by starvation, Pl. SJ Mem., ECF No.
16 56-1 at 9–13, the agency complains about Plaintiffs’ use of the word “warned.” Def. Opp., ECF
17 No. 57 at 18–20. But regardless of the word used—“warned,” “cautioned,” “instructed,” or even
18 simply “informed”—the point is that the Park Service has *known for decades* that keeping this
19 population of wildlife confined behind a three-mile-long fence that prevents it from gaining
20 access to water and forage would eventually result in the elk dying of starvation unless the
21 population was somehow otherwise controlled or the fence was removed. Pl. SJ Mem., ECF No.
22 56-1 at 9–13; *see also* AR 003725 (NPS’s experts advising it in 1993 that “[t]he long-range goal
23 of elk management at PRNS should be the establishment of free-ranging elk throughout the

24
25 ⁵ Nor could the NPS make such a showing in light of the number of discretionary
26 resources it has available to it. *See, e.g.*, Congressional Research Service, *National Park Service:*
27 *FY2021 Appropriations* (last updated Oct. 12, 2021),
28 <https://crsreports.congress.gov/product/pdf/IF/IF11661> (Congress appropriated \$3.123 billion in
discretionary funding for the NPS for fiscal year 2021). Nor does the NPS argue that these
resources are required to address more important competing priorities or projects, or even detail
what those might be.

1 seashore” and that “[t]his would involve . . . *removal of the fence across Tomales Point.*”) (emphasis added). Yet, instead of acting on this information by revising the GMP to address this
2 problem, the Park Service has allowed the population to be “controlled” de facto by allowing this
3 protected wildlife to die horrific deaths by starvation and dehydration. This ad hoc, inhumane
4 management approach is “unreasonable” by any measure.⁶

5
6 Finally, throughout the background section to its brief—but not in the actual argument as
7 to why its delay is not unreasonable—the Park Service appears to imply that it has not acted
8 unreasonably in failing to revise the GMP because “[t]he Tule Elk Plan continues to guide elk
9 management at Tomales Point up to the present day.” Def. Opp., ECF No. 57 at 7. But this
10 document, also produced decades ago, has no bearing on the agency’s statutory obligation to
11 revise the GMP for this portion of the Seashore. On the contrary, this duty to revise applies to
12 “each” unit of the National Park System, 54 U.S.C. § 100502, which necessarily includes the
13 *entirety* of Point Reyes National Seashore, including Tomales Point. *See, e.g., Rucho v. Common*
14 *Cause*, 139 S. Ct. 2484, 2508 (2019) (noting that proposed legislation requiring “each state” to act
15 “would require *every* state” to act) (emphasis added); *see also* Pl. SJ Mem., ECF No. 56-1 at 16
16 (the Park Service expressly excluded Tomales Point from the scope of the “planning area” for its
17 recent GMP revision for other portions of the Seashore).

18 Furthermore, as Plaintiffs pointed out in their opening brief, the Park Service has failed to
19 implement many of the goals and specific measures outlined in the 1998 Elk Plan. Pl. SJ Mem.,
20 ECF No. 56-1 at 9. Most glaringly, in that Plan the Park Service emphasized the need to maintain
21 “viable populations of tule elk.” AR 003675. And, in the words of the Park Service itself, a
22 healthy, viable population of tule elk “is one that *does not suffer disease or mortality due to*
23 *artificially induced or human caused impacts,*” such as “*the fencing of elk on the peninsula of*
24 *Tomales Point.*” *Id.* (emphasis added). The NPS further observed that these concerns require “that

25
26 ⁶ Defendants’ contention that because these experts and others did not specifically advise
27 the Park Service that to fix the problem it must *revise the GMP*, these warnings are irrelevant,
28 Def. Opp., ECF No. 57 at 18–20, is absurd. As the expert agency responsible for both protecting
this wildlife and revising GMPs under the governing statutes, the Park Service should not have to
be told by others the precise management procedures it must undertake to accomplish its
objectives.

1 management strategies *account for the effect of human altered environments influencing the*
2 *survival of elk on Tomales Point.*” *Id.* (emphasis added). And yet, as Plaintiffs have amply shown,
3 the elk are, in fact, suffering *massive* mortality—*losing over half of their population in only two*
4 *years*—due precisely to the very “human caused impacts” noted by the 1998 Plan that the Park
5 Service has failed for decades to “account for” in its management of the elk.⁷ The Plan goes on to
6 specifically warn that “large numbers of starving elk”—the very situation that the Park Service
7 has been faced with since 2013 and was warned of for decades prior—would be an “unacceptable
8 situation[] that would require the Seashore to intervene.” AR 003682.

9 Nevertheless, by its own terms, that Plan *expired in 2008 at the latest.* AR 003637 (the
10 1998 Plan would guide management of the elk “for the next five to ten years”). And even if the
11 Plan *were* still in effect, not only is it completely outdated, but it simply does not relieve the Park
12 Service of its separate statutory duty to revise the relevant GMP. Indeed, the Park Service clearly
13 recognizes this fact because it explains that its newly contemplated revision of the GMP “*will*
14 *update and replace the 1998 Elk Plan.*” Def. Opp., ECF No. 57 at 23 (emphasis added).

15 **III. BECAUSE THIS CASE IS NOT MOOT, THE PARK SERVICE IS NOT**
16 **ENTITLED TO JUDGMENT BASED ON ITS BELATED DECISION TO REVISE**
17 **THE GMP FOR TOMALES POINT.**

18 The Park Service ends its brief with the audacious assertion that because it has
19 belatedly—and clearly in response to this lawsuit—decided to begin the process to revise the
20 GMP for Tomales Point, “no further relief is necessary” and the agency is somehow entitled to
21 summary judgment. *Id.* at 24–25. Plaintiffs have no idea what this free-floating argument,
22 untethered to any legal context, is intended to be, nor have Defendants cited any cases where a
23 court has awarded judgment to an agency based on any similar argument.

24 _____
25 ⁷ The two actions that the NPS cites as evidence of its implementation of the 1998 Elk
26 Plan and other recommendations made by its own experts—the introduction of three female elk to
27 Tomales Point in 2001 and the relocation of some elk outside of Tomales Point in 1998, Def.
28 Opp., ECF No. 57 at 19–20—were not only taken *over twenty years ago*, but were not
implemented as ongoing strategies, as intended, AR 003675 (“the addition of 2-3 female elk
every elk generation”) (emphasis added); AR 003682 (providing that “additional animals . . . be
moved if the trial is . . . successful”), but were instead discontinued after only one occurrence,
long before they could have any meaningful impact on the health or genetic diversity of the herd.

1 The only possible ground upon which this Court could enter judgment for the agency on
2 this basis would be if the Court were to conclude that, based on the Park Service’s new voluntary
3 undertaking to revise the GMP, Plaintiffs’ unreasonable delay claim is now moot. But the Court
4 cannot possibly find this case moot for two reasons. First, Plaintiffs’ claim is not moot because
5 the NPS has not yet actually revised the GMP for Tomales Point. *Knox v. Serv. Emps. Int’l.*
6 *Union 1000*, 567 U.S. 298, 307 (2012) (“A case becomes moot only when it is impossible for the
7 court to grant any effectual relief whatever to the prevailing party”) (internal citations omitted).
8 Here, because the agency has not yet revised the GMP for Tomales Point—the very relief
9 requested in Plaintiffs’ Complaint, Amended Complaint, ECF No. 33 at 17 (requesting the Court
10 order Defendants “to take immediate measures to . . . revise the 1980 General Management Plan
11 with respect to the Tomales Point portion of the Point Reyes National Seashore”)—the case is not
12 moot.

13 Second, to the extent the Park Service is arguing that the case is moot because the only
14 relief Plaintiffs will obtain from this Court is a schedule for completion of a revised GMP, Def.
15 Opp., ECF No. 57 at 24, the case is also not moot because it falls within the well-established
16 exception to mootness for the voluntary cessation of unlawful conduct. *See, e.g., Friends of the*
17 *Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189–94 (2000). In fact, “[i]t is well
18 settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal
19 court of its power to determine the legality of the practice,” for if it did, “the courts would be
20 compelled to leave [t]he defendant . . . free to return to his old ways.” *Id.* at 189 (internal citations
21 omitted). Therefore, in accordance with this doctrine, voluntary cessation of the challenged
22 conduct will only moot a case if “there is no reasonable expectation . . . that the alleged violation
23 will recur” and “interim relief or events have completely and irrevocably eradicated the effects of
24 the alleged violation.” *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Further, the
25 burden of demonstrating that such conditions exist, which falls on the party asserting so, “is a
26 heavy one.” *Id.* (citations omitted).

27 Here, the Park Service cannot possibly meet its “heavy burden” of demonstrating that
28 ““subsequent events [make] it *absolutely clear that the allegedly wrongful behavior could not*

1 *reasonably be expected to recur.”* *Laidlaw*, 528 U.S. at 189 (quoting *United States v.*
2 *Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)) (emphasis added). This is true
3 not only because the agency has already delayed revising the GMP for over forty years, but
4 especially because the agency continues to insist that it does not have a *mandatory duty* to revise
5 the GMP, but rather is only doing so now as an exercise of *discretion*. Def. Opp., ECF No. 57 at
6 12–15; *id.* at 23–24. In *Knox*, the Supreme Court held that the defendant union had failed to meet
7 its burden that it would not again attempt to collect allegedly unlawful fees from nonunion state
8 employees precisely because, although the union ceased doing so after certiorari was granted, it
9 “continue[d] to defend the legality” of the fees in question. 567 U.S. at 307 (2012). Hence, the
10 Court concluded, “it is not clear why the union would necessarily refrain from collecting similar
11 fees in the future.” *Id.*; *see also Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006)
12 (finding the case not moot because “[n]otably, the Forest Service *has argued throughout this*
13 *litigation that it is not required to meet the monitoring requirements . . . Declaratory judgment in*
14 *favor of Forest Guardians would thus ensure that the Forest Service does not continue to fail to*
15 *meet its monitoring responsibilities in the future . . .*”) (emphasis added).

16 Here, similarly, given the Park Service’s staunch insistence throughout this litigation that
17 it has no statutory obligation to revise the GMP for Tomales Point, it simply cannot meet its
18 “heavy burden” to demonstrate that it is “*absolutely clear*” that it will not simply decide
19 somewhere down the road—as a matter of what it claims is its complete discretion—to abandon
20 the GMP revision process, or delay it indefinitely. *Laidlaw*, 528 U.S. at 189 (emphasis added);
21 *see also Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016) (Bureau of Prisons failed to meet its
22 burden that challenge to confinement practices was moot after prisoners had been removed from
23 those units, when the agency continued to assert that its practices were lawful and therefore
24 prisoners were faced with the possibility of being subjected to the same confinement in the
25 future). Thus, absent a court order directing the Park Service to complete the GMP revision
26 process, not only is there no way to ensure that the agency actually goes through with that
27 revision and does not “return to [its] old ways,” 528 U.S. at 189, but there is also no way to
28 ensure that any *future* Administration will comply with the agency’s (allegedly discretionary)

1 decision. Indeed, although in 1998 the Park Service enumerated several goals and measures it
2 would take to ensure the continued genetic viability of the elk herd at Tomales Point, as Plaintiffs
3 have demonstrated, it has failed to implement those measures or achieve those goals. *See* Pl. SJ
4 Mem., ECF No. 56-1 at 9; *supra* at 16–17. Furthermore, there is no guarantee that the current
5 NPS officials will remain in power, and it is absolutely clear that one agency’s regulatory
6 decisions do not bind those of future Administrations. *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S.*
7 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“an agency changing its course” need
8 only provide a “reasoned analysis for the change”); *Dep’t of Homeland Sec. v. Regents of the*
9 *Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020) (recounting the change in immigration policy from
10 one Administration to the next).

11 The Park Service also cannot meet its equally “heavy burden” of demonstrating that
12 “interim relief or events have completely and irrevocably eradicated the effects of the alleged
13 violation.” *Davis*, 440 U.S. at 631. As Plaintiffs have explained, the effect of the alleged violation
14 here is that, because the Park Service has failed to revise the GMP for Tomales Point—which
15 would include developing a new management approach for the Tule elk so they did not continue
16 to die in large numbers of starvation and dehydration—the elk are continuing to suffer and die,
17 and the genetic viability of the entire population is now severely compromised. The mere fact that
18 the agency has now belatedly embarked on a voluntary GMP revision process does not
19 “completely and irrevocably eradicate[]” those effects. *Id.* Moreover, even despite this
20 announcement, the “effects of the alleged violation” are not only continuing, *but worsening*. In
21 fact, as the Park Service’s most recent population data reveal, the elk are continuing to die by the
22 dozens at Tomales Point, and—absent some drastic action from the Park Service—they will
23 continue to do so during the time it takes the agency to devise a more humane management
24 approach. Thus, for this reason also, this case is not moot. *See, e.g., Nw. Env’tl. Def. Ctr. v.*
25 *Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (finding that the close of the 1986 coho salmon
26 fishing season did not render moot environmental organization’s challenge to federal agencies’
27 management of the salmon because “[t]he 1986 fishery management *measures have continuing*
28

1 effects on the population of Oregon coho salmon, and in particular on the number of coho that
2 will be returning to Oregon waters to spawn . . . and on their progeny”) (emphasis added).

3 **IV. THE PARK SERVICE SHOULD BE ORDERED TO COMPLETE ITS REVISION**
4 **OF THE GMP FOR TOMALES POINT WITHIN ONE YEAR.**

5 The Park Service cannot have it both ways. It cannot on one hand contend that it has no
6 mandatory duty to revise the GMP at issue, but, on the other hand, insist that it is entitled to final
7 judgment in this case on the ground that it has now announced it will begin the process to revise
8 the GMP. Rather, in light of the agency’s insistence that it is not statutorily required to revise this
9 GMP, the only way to ensure that it actually does so is for the Court to order it to do so, pursuant
10 to a court-ordered schedule. *See, e.g., Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985,
11 999–1000 (9th Cir. 2000) (courts generally have broad equitable discretion to fix an appropriate
12 deadline for agencies to meet); *In re Nat. Res. Def. Council*, 956 F.3d at 1143 (ordering EPA to
13 issue a full and final response within ninety days of the court’s final opinion); *In re A Cmty.*
14 *Voice*, 878 F.3d at 788 (ordering EPA to issue a proposed rule within ninety days and a final rule
15 within one year); *In re Pesticide Action Network N. Am.*, 798 F.3d at 815 (ordering EPA to issue
16 either a proposed or final revocation rule or a full and final response within ninety days); *Club v.*
17 *McCarthy*, No. 15-cv-01165-HSG, 2016 WL 1055120, at *7 (N.D. Cal. Mar. 15, 2016) (issuing a
18 court-ordered timeline for EPA to fulfill certain mandatory rulemaking duties under the Clean Air
19 Act); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 35 F. Supp. 3d 1137, 1155 (N.D.
20 Cal. 2014), *aff’d*, 833 F.3d 1136 (9th Cir. 2016) (ordering FWS to complete a recovery plan for an
21 endangered California plant species by a specific date); *In re Int’l Chem. Workers Union*, 958
22 F.2d 1144, 1150 (D.C. Cir. 1992) (ordering OSHA to submit a final rule in under six months);
23 *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1159 (D.C. Cir. 1983) (ordering
24 OSHA to issue a notice of proposed rulemaking within thirty days and to expedite the final rule
25 on a priority basis, significantly in advance of the agency’s estimate of eighteen months).

26 The schedule outlined by the Park Service—under which it does not complete the GMP
27 revision *until March 31, 2025*, if at all—is completely untenable, particularly in light of the
28 agency’s continued refusal to provide any supplemental food for the elk in the meantime, even

1 though it contends that a lack of forage is what has caused these massive die-offs.⁸ Rather, should
2 the Court rule in Plaintiffs’ favor on the unreasonable delay claim, the Court should order the
3 Park Service to complete the GMP revision process for Tomales Point pursuant to a much shorter
4 timetable—i.e., within a year from the Court’s order. *See, e.g., supra* at 21 (cases where courts
5 have ordered agencies to complete mandatory duties in less than a year).

6 The Park Service seems to think that it should not be subject to a court order to revise the
7 GMP as it pertains to Tomales Point for three reasons. First, it argues that this Court should not
8 order it to comply with its mandatory duty to act because it is “entitled to the presumption that it
9 will act expeditiously and in good faith *to continue complying with the relevant statutes.*” Def.
10 Opp., ECF No. 57 at 24 (emphasis added). This assertion strains credulity. To begin with, such an
11 order would only be issued if this Court had *already found that the agency was not, in fact,*
12 *“complying with the relevant statute[.]”* *Id.* Moreover, the sentence that Defendants cite for this
13 premise is followed *immediately* by the highly relevant caveat that any such “presumption is not
14 to shield [an agency] action from a thorough, probing, in-depth review.” *Citizens to Pres. Overton*
15 *Park, Inc. v. Volpe* 401 U.S. 402, 415 (1971).

16 Next, the Park Service argues that NEPA requirements would prevent it from complying
17 with any expedited timeline ordered by this Court. Def. Opp., ECF No. 57 at 24. While current
18 NEPA regulations require agencies to issue a final EIS and Record of Decision for actions
19 requiring an EIS “within 2 years . . . from the date of the issuance of the notice of intent,” 40
20 C.F.R. § 1501.10(b)(2), the NPS has built into its timeline *an additional fifteen months from now*
21 before it even issues that notice of intent for this GMP revision process, Kenkel Decl., ECF No.
22 57-1 ¶ 5. There is no justifiable reason why the agency should take so long to issue such notice.

23 Finally, the Park Service attempts to rely on *San Luis & Delta-Mendota Water Auth. v.*
24 *Jewell*, 747 F.3d 581 (9th Cir. 2014), to suggest that a court-imposed timeline would in fact harm
25 “the interests of the public and the environment.” Def. Opp., ECF No. 57 at 24–25. This idea is
26 completely misplaced. That case—in which the Court of Appeals attributed the sloppiness of a

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28 ⁸ *See supra*, note 1; Kenkel Decl., ECF No. 57-1 ¶¶ 4-5 (describing the agency’s schedule); *id.* ¶ 6 (stressing that even this schedule “is contingent on ongoing funding”).

1 Biological Opinion concerning the impact of “the two largest and most important water projects
2 in the United States” on an endangered species to the one year the district court gave the Fish and
3 Wildlife Service to prepare that document, 747 F.3d at 592—is far different from this one. In
4 contrast to the 2,600 acres at issue here, AR 003651, that case involved “an extremely
5 complicated and technical subject matter covering multiple federal and state agencies and
6 *affecting millions of acres of land and tens of millions of people.*” *Id.* at 605 (emphasis added).
7 Moreover, although the court did complain that the final Biological Opinion was poorly written, it
8 nevertheless *upheld* the Opinion on the ground it was “adequately supported by the record and not
9 arbitrary and capricious.” *Id.* at 606. Accordingly, that case demonstrates that agencies may be
10 required by courts to move incredibly quickly to remedy procedural injuries when serious, lasting
11 impacts on protected species of wildlife are at stake. And it certainly does not stand for the
12 proposition that a court should not impose *any* timeline for completion of a statutorily mandated
13 duty that has already been delayed for over four decades.

14 **V. PLAINTIFFS SHOULD BE GIVEN THE OPPORTUNITY TO DEMONSTRATE
15 THE NEED FOR ADDITIONAL REMEDIAL MEASURES.**

16 Finally, if the Court issues a favorable ruling for Plaintiffs on the merits, in addition to
17 ordering the Park Service to revise the GMP for Tomales Point pursuant to a significantly
18 expedited schedule, the Court should allow Plaintiffs to seek additional injunctive relief to ensure
19 that the Tule elk at Tomales Point do not continue to die in large numbers from starvation and/or
20 dehydration during the time it takes the NPS to complete the GMP. Although the Court ruled that
21 it lacked authority to grant such measures at the preliminary injunction stage, ECF No. 26 at 13,
22 courts are not bound by the relief granted or denied at that stage of the litigation when it decides
23 the final merits of a claim. *See, e.g., Univ. of Tex. v. Caminesth*, 451 U.S. 393, 395 (1981) (“the
24 findings of fact and conclusions of law made by a court granting a preliminary injunction are not
25 binding at a trial on the merits”).

26 Plaintiffs continue to be concerned that, absent a new management approach for the Tule
27 elk, which will be embodied in the new GMP, Def. Opp., ECF No. 57 at 23 (explaining that the
28 new GMP “will update and replace the 1998 Elk Plan for Tomales Point”), the elk will continue

1 to die in large numbers as drought conditions worsen in the summer and fall months, affecting not
2 only the individual elk, but also the genetic viability of the entire herd. *See* Pl. SJ Mem., ECF No.
3 56-1 at 21–23. Therefore, because it will take the NPS some time to finalize the new GMP,
4 Plaintiffs may need to seek additional relief from this Court to ensure that the elk are provided
5 adequate food and water, if necessary, during any ensuing drought conditions. *See, e.g., Gordon,*
6 849 F.2d at 1244 (“[w]e have pointed out that ‘courts of equity have broad discretion in shaping
7 remedies.’”).

8 Plaintiffs’ concern is heightened by the fact that the Park Service recently acknowledged
9 that an additional seventy-two elk died last year, despite insisting to this Court that it was “closely
10 track[ing] conditions and st[ood] ready act if needed to safeguard the viability of the Tomales
11 Point elk population.” ECF No. 15 at 1. This most recent die-off is in addition to the 152 elk that
12 died the previous year, which means that ***more than half the population has died in the last two***
13 ***years alone*** (224/445). Given the fact that the Park Service was already concerned about the
14 genetic viability of this herd in 1998 when the population numbered 465, AR 003644, and the
15 population is now down to only 221 animals, Attachment 1 to Kenkel Decl., ECF No. 57-2, the
16 smallest it has been—according to the Park Service’s own graph—since 1993, Tomales Point
17 Tule Elk Population Graph, Pl. Ex. G; Defendants’ Exhibit 8, ECF No. 16-8 (same), allowing this
18 wildlife to continue to die in such significant numbers while the Park Service revises the GMP
19 could very well mean that by the end of the process it will be entirely too late to do anything to
20 save this population. *See* AR 003675 (explaining that “[t]o ensure long-term success of the herd
21 requires a population size, health, and genetic fitness to maintain a viable population”; that “[t]he
22 Point Reyes elk herd relies on its genetic makeup and diversity to cope with the challenges of its
23 environment”; and that “[t]he population of tule elk at Point Reyes has been estimated *to contain*
24 *the lowest level of genetic variation . . . of all the herds of the state*”) (emphasis added). The mere
25 fact that the statutory requirement at issue here is only procedural in nature—i.e., the Court can
26 order the Park Service to revise the GMP, but cannot dictate how the agency chooses to do so—
27 does not strip the Court of the equitable authority to issue such additional injunctive relief. *See,*
28 *e.g., Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (explaining that the

1 lower court’s conclusion that it lacked jurisdiction to grant plaintiffs injunctive relief while the
2 Forest Service prepared a supplemental EIS on the legal premise that the court was “limited to
3 providing procedural relief” was “plainly erroneous.”) In fact, courts often grant additional
4 injunctive relief after they compel an agency to comply with a procedural requirement. *See, e.g.,*
5 *id.* (explaining that “[w]e have directed or upheld setting aside agency action pending NEPA
6 compliance on numerous occasions”); *Klamath Siskiyou Wetlands Ctr. v. Boody*, 468 F.3d 549,
7 562 (9th Cir. 2006) (enjoining timber sales premised on a policy change that violated NEPA);
8 *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1382 (9th Cir. 1998)
9 (enjoining future logging in the Cuddy Mountain area of Payette National Forest until USFS
10 completes studies in compliance with the NFMA, NEPA, and the Payette LRMP); *Portland*
11 *Audubon Soc’y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993) (upholding injunction against BLM
12 timber sales pending completion of supplemental EIS); *Hoopa Valley Tribe v. Nat’l Marine*
13 *Fisheries Serv.*, 230 F. Supp. 3d 1106, 1146 (N.D. Cal. 2017) (requiring NMFS and Bureau of
14 Reclamation put protective water flows in place to reduce disease rates among salmon while
15 agencies completed formal consultation process); *High Sierra Hikers Ass’n v. Moore*, 561 F.
16 Supp. 2d 1107, 1112–13 (N.D. Cal. 2008) (ordering injunctive relief after ruling that that the
17 Forest Service violated NEPA and the Wilderness Act because of the “strong public interest in
18 maintaining pristine wild areas unimpaired by man for future use and enjoyment”); *Mont.*
19 *Wilderness Ass’n v. Fry*, 408 F. Supp. 2d 1032, 1039–40 (D. Mont. 2006) (suspending gas leases
20 pending full compliance with NEPA, ESA, and the National Historic Preservation Act).

21 Thus, while there is no need for the Court to rule on this matter now, Plaintiffs wish to
22 reserve the opportunity to request additional equitable relief should it become necessary during
23 the inevitable drought conditions that will occur during the time it takes the NPS to revise the
24 GMP for Tomales Point.

25 CONCLUSION

26 For all of the foregoing reasons, as well as those set forth in Plaintiffs’ opening brief, the
27 Court should grant Plaintiffs’ motion for summary judgment and deny Defendants’ cross-motion
28 for summary judgment.

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Respectfully submitted,

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