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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 AMERICAN SMALL BUSINESS)
12 LEAGUE,)
13)
14 Plaintiff,)
15 v.)
16 U.S. SMALL BUSINESS)
ADMINISTRATION, et al.,)
17)
18 Defendants.)

CASE NO. 16-2410 VC
FEDERAL DEFENDANTS' NOTICE OF
MOTION AND MOTION TO DISMISS
PLAINTIFF'S COMPLAINT

Date: September 1, 2016
Time: 10:00 a.m.
Courtroom: 4, 17th Floor

Hon. Vince Chhabria

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on September 1, 2016 at 10:00 a.m., or as soon thereafter as the
3 matter may be heard in the above-entitled Court, before the Honorable Vince Chhabria, United States
4 District Judge, Courtroom 4, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San
5 Francisco, California, 94102, Defendants Small Business Administration and Maria Contreras-Sweet
6 will and hereby do move the court for an order dismissing this action. The motion is based on the lack of
7 subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and the failure to state a claim
8 upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

9 The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and
10 Authorities, and the pleadings and papers filed herewith.

11 **RELIEF REQUESTED**

12 Federal Defendants seek to have all claims against them dismissed.

13 **ISSUE TO BE DECIDED**

14 Does Plaintiff’s Complaint allege “final agency action” within the meaning of the Administrative
15 Procedure Act, thus invoking this Court’s jurisdiction?

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18 Plaintiff American Small Business League sues the U.S. Small Business Administration (SBA)
19 and Maria Contreras-Sweet, in her capacity as the agency’s Administrator, based on the claim that
20 SBA’s annual goaling reports rely on inflated data to show that the government met or exceeded its
21 small business contracting goals under the Small Business Act. Plaintiff accuses SBA of using “creative
22 accounting” to avoid publishing agency remediation plans, which are required by statute when goals are
23 not met. Plaintiff alleges this action is arbitrary and contrary to statute, and that small businesses may
24 not be receiving a large enough share of government contracts because of it.

25 Plaintiff’s Complaint should be dismissed because this Court lacks federal subject-matter
26 jurisdiction. Specifically, Plaintiff alleges no “final agency action” that would invoke a waiver of
27 sovereign immunity under the Administrative Procedure Act (APA). The goaling report does not amount

1 to agency action, which must be analogous to “rule, order, license, sanction, relief, or the equivalent or
2 denial thereof, or failure to act” as defined by the APA. 5 U.S.C. § 551(13). Even if the goaling report
3 constitutes agency action, it is not final agency action because the report does not consummate any SBA
4 decision making process, and because it does not directly result in legal consequences for either party.

5 SBA’s requirement to publish agency remediation plans stems directly from the Small Business
6 Act. Though the implementation of this requirement is tied to the outcomes published in the goaling
7 reports, it is the statute—not the reports—which binds SBA to act. Moreover, the alleged legal
8 consequences for Plaintiff are speculative and result not from SBA’s actions but from individual
9 contracting decisions across multiple federal agencies.

10 Plaintiff’s claims should be dismissed under Rules 12(b)(1) and/or 12(b)(6) of the Federal Rules
11 of Civil Procedure.

12 **II. FACTUAL BACKGROUND**

13 **A. Statutory Background**

14 **1. Small Business Act**

15 The Small Business Act created the Small Business Administration (SBA) in order to aid,
16 counsel, assist, and protect the interests of small business concerns through financial, contractual, and
17 business development assistance. 15 U.S.C. § 631(a); 13 C.F.R. § 101.100. Part of SBA’s mandate, with
18 the Administrator for Federal Procurement Policy, is to ensure that at least “23 percent of the total value
19 of all prime contract awards for each fiscal year” is awarded to small business concerns. 15 U.S.C.
20 § 644(g)(1). In order to meet this and other contracting goals, SBA works with other federal agencies to
21 establish realistic targets specific to each agency. *Id.* § 644(g)(1)(B)-(g)(2)(C).

22 Each agency submits a report to the SBA Administrator at the end of each fiscal year indicating
23 whether the agency achieved its goals, any justifications for failure, and a remediation plan. *Id.*
24 § 644(h)(1). The SBA Administrator then submits a report to the President and Congress (and made
25 available on a public website) that includes copies of the agency reports, determines whether the
26 government-wide small business contracting goal was met, determines whether each agency goal was
27 met, and includes any reasons for failure to achieve either the overall or agency-specific goals and a

1 description of remediation plans by the agencies, as well as any comments or recommendations from the
2 Administrator. *Id.* § 644(h)(2)(A)-(h)(2)(E).

3 To assist in these reporting requirements, SBA is granted access to information collected through
4 the Federal Procurement Data System (FPDS). *Id.* § 644(h)(3)(A). The FPDS is created and maintained
5 by the General Services Administration (GSA) to “provide information on Government procurement to
6 the public,” and includes information reported by agencies as required by the Federal Acquisition
7 Regulation (FAR), i.e., Title 48 of the Code of Federal Regulations. 48 C.F.R. §§ 1.101, 504.605–70.
8 “The FAR is prepared, issued, and maintained” by the Department of Defense, the GSA, and NASA
9 under their statutory authorities. 48 C.F.R. § 1.103.

10 Whether a business qualifies as a “small business concern” depends on industry-specific size
11 standards established by SBA, considering factors such as average firm size, barriers to entry, and
12 growth trends. *Id.* § 632(a)(2)-(3); 13 C.F.R. § 121.102. Agencies covered by the Small Business Act
13 include each authority of the United States, but do not include Congress, federal courts, the governments
14 of U.S. territories or possessions, the government of the District of Columbia, the U.S. Postal Service, or
15 the Government Accountability Office. 5 U.S.C. § 551(1); 15 U.S.C. § 632(b).

16 **2. Administrative Procedure Act**

17 A federal court may not adjudicate a claim against a federal agency unless the United States has
18 waived its sovereign immunity from suit for that claim. *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103
19 (9th Cir. 2007) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). The APA permits suit against
20 an agency when a person has suffered a “legal wrong because of agency action” or has been “adversely
21 affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702.
22 “[A]gency action” is limited to “the whole or a part of an agency rule, order, license, sanction, relief, or
23 the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Where, as here, suit is brought
24 pursuant to the APA rather than a specific authorization in a relevant substantive statute, the agency action
25 must be “final agency action.” *See* 5 U.S.C. § 704 (“Agency action made reviewable by statute and final
26 agency action for which there is no other adequate remedy in a court are subject to judicial review.”);
27 *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990); *Rattlesnake Coal.*, 509 F.3d. at 1103; *see also*

1 *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990) (“finality [is] . . . a jurisdictional
2 requirement.”).

3 **B. Factual Background**

4 At the end of each fiscal year, SBA requests a report from the Federal Procurement Data Center
5 that tabulates small business contracting achievements for each agency and the government overall. Pyle
6 Decl. Ex. 1 (*Statutory Goals Established by Federal Executive Agencies*, SBA,
7 [https://www.sba.gov/contracting/contracting-officials/goaling-program/statutory-goals-established-
8 federal-executive-agencies](https://www.sba.gov/contracting/contracting-officials/goaling-program/statutory-goals-established-federal-executive-agencies) (last visited July 27, 2016)).¹ This annual goaling report is published on the
9 Federal Procurement Data System (FPDS) website and compares the actual small business share of
10 government contracts with the small business contracting goals under title 15, section 644(g). Pyle Decl.
11 Ex. 2 (*Small Business Goaling Report*, FPDS, https://www.fpds.gov/fpdsng_cms/index.php/en/reports
12 (last visited July 27, 2016)). According to the fiscal year 2015 goaling report, government-wide small
13 business contracts as a share of total eligible contracts were 25.75 percent, exceeding the statutory goal
14 of 23 percent. Compl. ¶ 8; Pyle Decl. Ex. 3 at 1 (*Small Business Goaling Report: Fiscal Year 2015*,
15 FPDS, https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2015.pdf (last visited
16 July 27, 2016)). SBA uses the goaling report data in its annual goaling scorecards, which grade each
17 agency and the government overall based on the extent to which small business contracting goals were
18 achieved; the scorecards are available on the SBA website. Pyle Decl. Ex. 4 (*See Agency Small Business*
19 *Scorecards*, [https://www.sba.gov/contracting/finding-government-customers/see-agency-small-business-
20 scorecards](https://www.sba.gov/contracting/finding-government-customers/see-agency-small-business-scorecards) (last visited July 27, 2016)).

21 Plaintiff alleges that “for years,” SBA has wrongly reported that the government met or exceeded
22 its 23 percent small business contracting goal. Compl. ¶ 11. Plaintiff accuses SBA and its reporting
23 agencies of engaging in “creative accounting” to inflate the share of government contracts going to
24

25 ¹ Defendants request that the Court take judicial notice of the documents attached to Mr. Pyle’s
26 declaration, pursuant to Federal Rule of Evidence 201. These documents are found on government
27 websites, which are cited in parenthesis. *See, e.g., Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-
28 99 (9th Cir. 2010) (taking judicial notice of information made publicly available on government
websites where authenticity and accuracy not in dispute). These documents would be included in the
administrative record if Defendants’ motion were denied.

1 small businesses and thus avoid publishing agency remediation plans as required by the Small Business
2 Act. *Id.* ¶ 12. Plaintiff alleges that “failed goals are not reported, no analysis is done, [and] no
3 remediation plans are created.” *Id.* Contrary to Plaintiff’s Complaint, the goaling reports and goaling
4 scorecards show that government-wide small business contracts fell short of the 23 percent goal in fiscal
5 years 2006-2012, reaching a low of 20.5 percent in fiscal year 2008. *See* Pyle Decl. Exs. 2, 4.

6 Plaintiff further alleges that SBA engages in two specific practices in order to inflate the small
7 business share of government contracts. First, Plaintiff alleges that SBA exceeds its statutory authority
8 by excluding certain government contracts from total contract awards for the purpose of calculating the
9 small business share in the goaling reports. Compl. ¶ 8, 15. Plaintiff claims that for fiscal year 2015, the
10 goaling report excluded “contracts performed outside the United States, acquisitions by agencies on
11 behalf of foreign governments, entities or international organizations,” and all contracts involving
12 twenty-seven specified agencies. *Id.* ¶ 9. Indeed, certain contracts are excluded from the FPDS
13 calculations; these “goaling exclusions” are described in each goaling report. *E.g.*, Pyle Decl. Ex. 3 at 2.

14 Second, Plaintiff also alleges that SBA “has adopted a practice of identifying contracts awarded
15 to large businesses as going to small businesses, thus further misrepresenting the percentage of
16 contracting dollars actually received by small businesses.” Compl. ¶ 13. Specifically, Plaintiff alleges
17 that “[i]n FY 2015, SBA characterized 151 Fortune 500 companies as ‘small businesses,’” and points to
18 four examples of small business contracts awarded to Verizon Communications, Lockheed Martin,
19 Raytheon, and Johnson Controls. *Id.* Contrary to Plaintiff’s allegation of an SBA “practice” of
20 misclassifying contracts, the Department of Defense, GSA, and NASA—through the FAR, and under
21 guidance from the Office of Management and Budget—make each agency individually responsible for
22 submitting and certifying the veracity of its contracting data to FPDS. 48 §§ C.F.R. 1.103, 4.600-4.607;
23 Pyle Decl. Ex. 5 (Leslie A. Field, Improving Acquisition Data Quality for Fiscal Years 2009 and 2010,
24 OMB Memorandum for Chief Acquisition Officers and Senior Procurement Executive, Oct. 7, 2009,
25 [https://www.whitehouse.gov/sites/default/files/omb/assets/procurement_memo/data_quality_guidance_1](https://www.whitehouse.gov/sites/default/files/omb/assets/procurement_memo/data_quality_guidance_100709.pdf)
26 [00709.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/procurement_memo/data_quality_guidance_100709.pdf)).

1 **C. Plaintiff’s Legal Action**

2 Plaintiff filed suit on May 3, 2016, and alleges one cause of action under the APA. Compl. ¶ 3;
3 5 U.S.C. § 702. Plaintiff claims that the exclusion of certain agencies from the annual goaling reports,
4 and the alleged misclassification of certain large business contracts, are arbitrary and contrary to the
5 Small Business Act, and therefore exceed SBA’s authority. Compl. ¶ 15-16. Plaintiff alleges that as a
6 result of SBA’s actions, small businesses may not be receiving the appropriate share of government
7 contracts; the President, Congress, and the public are not receiving accurate information as required by
8 the Small Business Act; and Plaintiff has no adequate remedy at law. *Id.* ¶ 17-18. Plaintiff seeks
9 injunctive relief to prevent SBA “from excluding any prime contract” in the goaling reports, to bar SBA
10 from misclassifying contracts as small business contracts, and to require SBA to amend its fiscal year
11 2015 goaling report. *Id.* ¶ A-C.

12 **III. LEGAL STANDARDS**

13 **A. Pleading Standards**

14 **1. Rule 12(b)(1)**

15 A 12(b)(1) challenge is either “facial,” disputing the formal sufficiency of the pleadings to
16 establish federal jurisdiction, or “factual,” disputing the substance of the jurisdictional allegations
17 despite their formal sufficiency. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
18 Where a challenge is facial, the district court determines whether a pleading’s allegations are “sufficient
19 on their face to invoke federal jurisdiction.” *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 793 (N.D.
20 Cal. 2011) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Where a challenge is factual, the district
21 court determines whether it can hear the case before it by resolving factual disputes as to the existence of
22 jurisdiction; in doing so the court “need not presume the truthfulness of the plaintiff’s allegations” and
23 may review evidence beyond the complaint without converting a motion to dismiss into one for
24 summary judgment. *Id.* (quoting *Safe Air for Everyone*, 373 F.3d at 1039).

25 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S.
26 375, 377 (1994). “Once a party has moved to dismiss for lack of subject matter jurisdiction under Rule
27 12(b)(1), the opposing party bears the burden of establishing the Court’s jurisdiction.” *Fraley*, 830 F.

1 Supp. 2d at 793. (citing *Kokkonen*, 511 U.S. at 377; *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598
2 F.3d 1115, 1122 (9th Cir. 2010)). Until a plaintiff satisfies this burden, a district court presumptively
3 lacks subject matter jurisdiction. *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778-79 (9th
4 Cir. 2000) (citing *Kokkonen*, 511 U.S. at 377). In sum, a plaintiff must prove that jurisdiction exists in
5 order to survive a 12(b)(1) motion to dismiss.

6 **2. Rule 12(b)(6)**

7 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal
8 theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*,
9 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a motion to dismiss for failure to state a claim under
10 Rule 12(b)(6), a complaint must contain sufficient factual assertions, accepted as true, to “state a claim
11 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). “A
12 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
13 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.
14 662, 678 (2009).

15 **VI. ARGUMENT**

16 **A. SBA’s Reporting of Small Business Contracting Achievements Is Not “Agency 17 Action” Because It Is Not Equivalent to a Rule, Order, License, or Sanction**

18 The Supreme Court in *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004), made clear that
19 all of the APA’s review provisions, including sections 702 and 704, “insist upon an ‘agency action’” as
20 that term is defined in section 551(13) of the APA. “Agency action” is there defined as “the whole or a
21 part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to
22 act.” 5 U.S.C. § 551(13). “While this definition is ‘expansive,’ federal courts ‘have long recognized that
23 the term [agency action] is not so all-encompassing as to authorize [courts] to exercise judicial review
24 over everything done by an administrative agency.’” *Wild Fish Conservancy v. Jewell*, 730 F.3d 791,
25 800-01 (9th Cir. 2013) (first alteration in original) (quoting *Fund for Animals, Inc. v. U.S. Bureau of
26 Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006)). In fact, “[m]uch of what an agency does is in
27 anticipation of agency action. Agencies prepare proposals, conduct studies, meet with members of

1 Congress and interested groups, and engage in a wide variety of activities that comprise the common
2 business of managing government programs.” *Fund for Animals*, 460 F.3d at 19-20 (D.C. Cir. 2006)
3 (citing *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004)).

4 Accordingly, federal courts confine “agency action” to those acts that fit the statutory description
5 of at least one of the terms listed in section 551(13). *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465
6 F.3d 977, 983 (9th Cir. 2006) (“[A]gency action is limited to the specific categories defined by the
7 APA.” (quoting *S. Utah Wilderness All.*, 542 U.S. at 55)); see also *Indus. Safety Equip. Ass’n v. EPA.*,
8 837 F.2d 1115, 1119 (D.C. Cir. 1988) (“[W]e first canvass the APA’s definition of agency actions to
9 ascertain whether the Guide qualifies under another category that would justify judicial review.”)

10 **1. Goaling Report Is Not a “Rule” Within the Meaning of the APA Because It**
11 **Does Not Affect Law or Agency Policy**

12 “Rule” is defined by the APA to include “an agency statement of general or particular
13 applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. §
14 551(4). Other courts have held that agency reports do not fit within the APA definition of a rule where
15 the reports themselves do not impose or implement a change in law or policy. See *Indus. Safety Equip.*
16 *Ass’n*, 837 F.2d at 1120; *Fund for Animals*, 460 F.3d at 20 (D.C. Cir. 2006). In *Industrial Safety*
17 *Equipment*, the EPA had published a report—pursuant to its statutory authority—that recommended the
18 disuse of certain respirators that were nonetheless certified under existing regulations. 837 F.2d at 1116-
19 17. Despite the potential impact on the plaintiff’s respirator sales, the court held that the report was
20 merely advisory and did not “change any law or official policy presently in effect.” *Id.* at 1120. In *Fund*
21 *for Animals*, the court held that an agency’s budget request, even if approved by Congress, “may serve
22 as a useful planning document, but it is not a ‘rule’ It does not ‘implement, interpret, or prescribe’
23 any ‘law or policy.’ And it is not an ‘order,’ or a ‘license,’ or a ‘sanction,’ or ‘relief.’ The most that can
24 be said is that it outlines the goals and methods of an administrative program.” 460 F.3d at 20 (quoting
25 5 U.S.C. § 551(13)) (internal citations omitted).

26 Other circuits have also held that plaintiffs cannot challenge an agency report that interprets law
27 or policy if the report “simply restates an established interpretation.” *Golden & Zimmerman, LLC v.*

1 *Domenech*, 599 F.3d 426, 431 (4th Cir. 2010); *Indep. Equip. Dealers Ass’n*, 372 F.3d at 428 (citing
2 *Indus. Safety Equip. Ass’n*, 837 F.2d at 1120). As then Judge Roberts explained for the D.C. Circuit in
3 *Independent Equipment Dealers Ass’n v. EPA*, an established interpretation “‘tread[s] no new ground’
4 and ‘le[aves] the world just as it found it, and thus cannot be fairly described as implementing,
5 interpreting, or prescribing law or policy.’” *Golden & Zimmerman*, 599 F.3d at 432 (quoting *Indep.*
6 *Equip Dealers Ass’n*, 372 F.3d at 428). Applying Judge Roberts’ reasoning, the Fourth Circuit in *Golden*
7 *& Zimmerman* found that questions and answers published in an agency reference guide that interpreted
8 compliance provisions of the Gun Control Act “were not designed to be enforceable rules . . . [and] do
9 not “impose new legal requirements,” but rather “attempt[ed] to restate or report what already exists in
10 the relevant body of statutes, regulations, and rulings.” 599 F.3d at 432.

11 Here, the annual goaling report leaves “the world just as it found it.” *Indep. Equip Dealers Ass’n*,
12 372 F.3d at 428. The criteria used to determine which contracts qualify as small business, and which
13 contracts qualify as goaling exclusions, are already determined by existing laws and policies that govern
14 the SBA and other agencies. Further, the goaling report merely reflects past contracting achievements,
15 and does not itself bind the SBA or Plaintiff to further action; that SBA’s mandate to publish agency
16 remediation plans is tied to information produced in the goaling report does not change the fact that this
17 mandate was already prescribed by the Small Business Act.

18 Though SBA is also directed by statute to publish the information found in the goaling reports,
19 the reports *themselves* do not “implement” the law, nor do they have “future effect.” 5 U.S.C. § 551(4).
20 To hold otherwise would make the content of every agency report mandated by Congress subject to
21 judicial review, contrary to courts’ limited application of the APA. *See Fund for Animals*, 460 F.3d at 20
22 (“It is impossible to believe that the APA opened [the agency budget process] to judicial scrutiny as a
23 reviewable “agency action.”); *Indep. Equip Dealers Ass’n*, 372 F.3d at 427 (“Here, common sense, basic
24 precepts of administrative law, and the Administrative Procedure Act itself all point to the conclusion
25 that the EPA Letter to IEDA is not reviewable agency action.”)

1 **2. Goaling Report Is Not a “Sanction” or Any Other Agency Action Within the**
2 **Meaning of the APA**

3 Since the D.C. Circuit in *Hearst Radio, Inc. v. FEC*, 167 F.2d 225 (D.C. Cir. 1948), held that
4 defamatory agency publications were immune from judicial review, several federal courts have
5 continued to hold that allegedly false agency reports—whether a press release, *Trudeau v. FTC*, 456
6 F.3d 178, 189 (D.C. Cir. 2006); internal investigation, *Jefferson v. Harris*, No. 14-1247 (JEB), 2016 WL
7 1091063 at *19 (D.D.C. Mar. 21, 2016); or advertising campaign, *Invention Submission Corp. v. Rogan*,
8 357 F.3d 452, 459 (4th Cir. 2004)—do not fit the statutory definition of “sanction” or any other agency
9 action under the APA. Though courts have suggested judicial review may be warranted where an agency
10 acts with the intent to penalize a party through adverse publicity, *Trudeau*, 456 F.3d at 189, Plaintiff has
11 alleged no such intent on behalf of SBA, nor has Plaintiff alleged any defamation at all. Even if, as
12 Plaintiff alleges, small businesses are adversely impacted by the tabulations in the goaling reports,
13 adverse impacts are not enough to characterize an agency act or omission as agency action within the
14 meaning of the APA. *See Jewell* 730 F.3d at 801 (despite “immediate physical consequences,” agency’s
15 dam operations not analogous to “rule, order, license, sanction, [or] relief.” (quoting 5 U.S.C.
16 § 551(13))).

17 **3. Goaling Report Represents All Government Contracting Actions and Is Not**
18 **Itself Discrete Agency Action**

19 Challenge under the APA requires “circumscribed, discrete agency actions.” *S. Utah Wilderness*
20 *All.*, 542 U.S. at 62. In particular, the Supreme Court has held that entire agency programs are not
21 discrete agency actions and cannot be challenged under section 706. *Id.* at 64 (citing *Lujan*, 497 U.S.
22 871). “Except where Congress explicitly provides for our correction of the administrative process at a
23 higher level of generality, we intervene in the administration of the laws only when, and to the extent
24 that, a specific “final agency action” has an actual or immediately threatened effect.” *Lujan*, 497 U.S. at
25 894.

26 In *Lujan v. National Wildlife Federation*, the plaintiff sued the Department of Interior, its
27 Secretary, and the Secretary of the Bureau of Land Management, challenging the administration of a
28 “land withdrawal review program” which comprised many agency operations related to public land

1 management. *Id.* at 877-79. The plaintiff alleged that the agencies failed to take certain actions as
2 required by statute, such as maintain an inventory of public lands, conduct reviews, revise land use
3 plans, and report recommendations to the President. *Id.* The Court held that even if the agencies violated
4 the law, the plaintiff could not use the courts to challenge an “entire ‘program’—consisting of many
5 individual actions” *Id.* at 891, 893; *see also Fund for Animals*, 460 F.3d at 20 (finding that the
6 remedial strategy in agency’s budget proposal “represents the sum of ‘many individual actions,’
7 including some ‘yet to be taken.’” (quoting *Id.* at 893)). Similarly, the goaling reports and remediation
8 plans mandated by the Small Business Act comprise past and planned contracting activities undertaken
9 by several individual agencies. The reports themselves are not “circumscribed, discrete agency actions.”
10 *S. Utah Wilderness All.*, 542 U.S. at 62.

11 Nor does the methodology behind the goaling reports “fit[] within any of the categories for
12 agency action under the APA.” *See Quicken Loans v. United States*, No. 15-cv-11408, 2015 WL
13 9583391, at *6 (E.D. Mich. Dec. 31, 2015), *appeal filed*. The Eastern District of Michigan recently held
14 that an agency’s use of sampling methodology to determine whether mortgage lenders were in
15 compliance with lending guidelines was too “opaque” to be considered agency action: “Put simply, the
16 particular type of methodology employed by HUD (or by the DOJ or HUD-OIG) does not constitute an
17 agency rule, order, license, sanction, or relief, or some equivalent to these sanctions.” *Id.*

18 **B. SBA’s Reporting Is Not “Final” Because It Does Not Consummate Any**
19 **Decisionmaking Process, Nor Directly Affect Legal Rights or Consequences.**

20 Even if the goaling reports amount to agency action, these reports are not “final agency action”
21 within the meaning of the APA. 5 U.S.C. § 704. For an agency action to be considered “final,” two
22 conditions must be met: “First, the action must mark the consummation of the agency’s decisionmaking
23 process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one
24 by which rights or obligations have been determined, or from which legal consequences will flow.”
25 *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591 (9th Cir. 2008) (quoting
26 *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). “[T]he core question is whether the agency has
27 completed its decisionmaking process, and whether the result of that process is one that will directly
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1 affect the parties.” *Oregon Nat. Desert Ass’n*, 465 F.3d at 982 (quoting *Indus. Customers of NW Utils. v.*
2 *Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005)). In assessing finality, courts look to
3 whether the agency action “‘amounts to a definitive statement of the agency’s position’ or ‘has a direct
4 and immediate effect on the day-to-day operations’ of the subject party, or if ‘immediate compliance
5 [with the terms] is expected.’” *Id.* (quoting *Indus. Customers of NW Utils.*, 408 F.3d at 646). Courts
6 interpret the finality requirement pragmatically, considering the effect of the agency action. *Id.* at 985.

7 The challenged goaling reports fail both prongs of the *Bennett* finality test. 520 U.S. at 177-78.
8 First, there is no decisionmaking process which SBA could consummate. Rather, the goaling reports
9 compile existing data that other agencies submit directly to the FPDS. And, much like courts’
10 interpretation of a “rule” under the APA, an agency’s restatement of existing law or policy is not the
11 consummation of a decisionmaking process. *Golden & Zimmerman*, 599 F.3d at 432.

12 To satisfy the second prong of the *Bennett* test, the action must affect the agency’s legal regime
13 or otherwise have legal force. *Oregon Nat. Desert Ass’n*, 465 F.3d at 986. Yet the goaling reports neither
14 “impose an obligation, deny a right, [nor] fix some legal relationship.” *Fairbanks*, 543 F.3d at 591
15 (quoting *Ukiah Valley Med. Ctr.*, 911 F.2d at 264). In *Fairbanks*, a determination by the Army Corps of
16 Engineers that the plaintiff’s land was subject to Clean Water Act regulations failed this second prong of
17 the *Bennett* finality test because, even though this action determined the plaintiff’s next step in the
18 permitting process, “[i]t [did] not itself command Fairbanks to do or forbear from anything.” *Id.* at 593.
19 Here, too, the annual goaling report itself binds neither party; even if the goaling report were to show
20 that small business contracts fell short of the statutory goal, SBA’s mandate to publish agency
21 remediation plans comes from the statute, not the report. *See id.* at 594 (“Fairbanks’ legal obligations
22 arise directly and solely from the [Clean Water Act], and not from the Corps’ issuance of an approved
23 jurisdictional determination.”).

24 Indeed, for an action to alter an agency’s legal regime, it must itself impose a new agency
25 requirement or authorize additional agency action. *See Bennett*, 520 U.S. at 178. In *Bennett*, plaintiffs
26 challenged the Department of Interior’s compliance with formal findings of the Fish and Wildlife
27 Service that the Department’s operation of a water reservoir could adversely impact endangered species.

1 *Id.* at 159. The Court held that these findings altered the Department’s legal regime, as the findings
2 themselves recommended alternative methods of operation which the Department was required to follow
3 by statute. *See id.* at 158, 178. Here, the goaling reports contain no recommendations and impose no
4 obligations on SBA beyond the reporting requirements already set forth in the Small Business Act.

5 Additionally, agency action is not final where legal consequences require further action. *See,*
6 *e.g., Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (finding lack of finality where agency report
7 containing recommendations required Presidential approval, and thus imposed “no direct consequences”
8 and was “more like a tentative recommendation than a final and binding determination.”); *Fund for*
9 *Animals*, 460 F.3d at 22 (noting D.C. Circuit’s “consistent refusal to review agency orders ‘that do[] not
10 [themselves] adversely affect complainant but only affect[] his rights adversely on the contingency of
11 future administrative action.’” (alterations in original) (quoting *DRG Funding Corp. v. Sec’y of Hous.*
12 *and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996)); *Jefferson*, No. 14-1247 (JEB) at *19 (finding
13 lack of finality where agency investigative report of employee misconduct made no concrete remedial
14 suggestions and required further agency action) (citing *Franklin*, 505 U.S. at 798-99)).

15 Even if, as Plaintiff alleges, “small businesses may not be receiving the percentage of total
16 government prime contract awards which they would otherwise receive,” federal courts have held that
17 legal consequences must flow directly from the agency action itself, not from actions by third parties.
18 *Invention Submission Corp.*, 357 F.3d at 460 (“[I]ndirect impact does not transform the agency’s
19 conduct into final agency action under the APA.”); *Flue-Cured Tobacco Coop. Stabilization Corp. v.*
20 *EPA*, 313 F.3d 852, 860 (4th Cir. 2002) (“[T]he consequences complained of by plaintiffs stem from
21 independent actions taken by third parties.”); *see also City of Oakland v. Holder*, 901 F. Supp. 2d 1188,
22 1195 (N.D. Cal. 2013) (DOJ civil forfeiture complaint not final agency action because “legal
23 consequences will flow from the Court’s and jury’s findings and decisions, not a decision by the DOJ.”).

24 In *Flue-Cured Tobacco*, for example, the EPA was required by statute to collect data on indoor
25 air quality and evaluate potential government actions to reduce health risks associated with indoor air
26 pollution. 313 F.3d at 855. Pursuant to this requirement, EPA published a report on the harms of
27 secondhand smoke which persuaded another agency to promulgate regulations imposing tobacco

1 restrictions. *Id.* at 856, 858. The Fourth Circuit held that the report itself was not final agency action,
2 because other agency acts “are not direct consequences of the Report, but are the product of independent
3 agency decision making.” *Id.* at 860. Analogizing to cases where the Supreme Court held that advisory
4 reports were not final agency action, the court observed that the EPA report did “not trigger the
5 mandatory creation of legal rules, rights, or responsibilities.” *Id.* (citing *Dalton v. Specter*, 511 U.S. 462
6 (1994); *Franklin*, 505 U.S. 788).

7 Here, whatever legal consequences might accrue to Plaintiff would be the result of further
8 contracting decisions by other federal agencies, not the goaling reports or agency remediation plans. The
9 data contained in the goaling reports does not create SBA’s responsibility to publish remediation plans,
10 which already exists under the Small Business Act. Nor does it bind other agencies to certain contracting
11 goals or decisions. Moreover, Plaintiff’s allegation that small businesses might receive a larger share of
12 government contracts if the goaling reports were corrected is necessarily speculative and too far
13 downstream of the goaling reports to constitute legal consequences. *See Fund for Animals*, 460 F.3d at
14 22 (noting the “considerable legal distance” between the fulfillment of an agency’s budget proposal and
15 actual implementation of the proposal) (quoting *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 730
16 (1998)).

17 C. Plaintiff’s Complaint Should be Dismissed for Failure to Allege Final Agency Action

18 Even if final agency action is not a jurisdictional requirement to bringing federal suit under the
19 APA, Plaintiff’s Complaint should be dismissed because final agency action is required to state a claim
20 under the APA. *Trudeau*, 456 F.3d at 345-46; *see also Reliable Automatic Sprinkle Co. v. Consumer*
21 *Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (“If there was no final agency action here,
22 there is no doubt that appellant would lack a cause of action under the APA. Therefore, even though
23 there was no basis for dismissal under Rule 12(b)(1), we may properly affirm the District Court’s
24 judgment pursuant to Rule 12(b)(6).”).

25 V. CONCLUSION

26 SBA’s reporting of small business contracting achievements is not final agency action within the
27 meaning of the APA, and thus cannot be challenged in federal court. While SBA is required by statute to
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1 report these achievements and agency remediation plans, the reports themselves do not affect the law or
2 SBA policy, nor impose direct, legal consequences for either party. For these reasons, Plaintiff's
3 Complaint should be dismissed.

4 Date: July 28, 2016

Respectfully Submitted,

5 BRIAN J. STRETCH
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6 */s/ Michael T. Pyle*

7 MICHAEL T. PYLE
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