

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,
378 N Main Avenue,
Tucson, AZ 85701,

Plaintiff,

v.

DANIEL M. ASHE,
Director, U.S. Fish and Wildlife Service,
1849 C Street, NW,
Washington, DC 20240,

SALLY JEWELL,
Secretary, U.S. Department of the Interior,
1849 C Street, NW,
Washington, DC 20240,

U.S. FISH AND WILDLIFE SERVICE,
1849 C Street, NW,
Washington, DC 20240,

Defendants.

Civ. No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Center for Biological Diversity challenges the decision of the U.S. Fish and Wildlife Service (“Service”) to issue an interim final rule regarding the highly imperiled northern long-eared bat (*Myotis septentrionalis*) without complying with the mandates of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347. Once prevalent throughout the Northeast, Appalachia, and the Midwest, northern long-eared bats played an essential role in keeping insect populations in check. Today, northern long-eared bat numbers have plummeted with populations declining as much as 99 percent. The northern long-eared bat decline is due primarily to the spread of a novel fungal bat disease commonly referred to as White-Nose

Syndrome, although habitat loss and environmental contaminants also threaten the species. The Center petitioned in 2010 to list the northern long-eared bat under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, and the species was finally proposed to be listed as endangered in 2013, primarily due to staggering population declines.

2. After facing political backlash generated primarily by the timber and energy industries, in January 2015, the Service back-tracked, and proposed to list the bat as a threatened species, rather than an endangered species, under the ESA – a lower form of protection. At the same time, the Service proposed a host of exemptions from the protections offered under the ESA, pursuant to Section 4(d) of the ESA. On April 2, 2015, the Service issued a final rule to list the northern long-eared bat as threatened and adopted an interim final version of the exemptions called a 4(d) rule. The interim rule exempts a whole host of activities from the ESA’s prohibition on “take” of listed species, 50 C.F.R. § 17.31 – *i.e.*, one of the strongest substantive protections in the Act that is highly effective at preventing extinction. *See* 50 C.F.R. § 17.40(o) (text of rule); U.S. Fish and Wildlife Service Press Release.¹

3. In proposing and adopting the bat 4(d) rule at the eleventh hour, the Service failed to engage in the meaningful public review and disclosure process required by NEPA, including by failing to: consider alternatives to the rule; analyze the rule’s detrimental environmental impacts; engage in an open and informed decision-making process; and otherwise follow NEPA and its implementing regulations. In so doing, the Service violated the Administrative Procedure

¹ U.S. Fish and Wildlife Service Protects Northern Long-eared Bat as Threatened Under Endangered Species Act, Also Issues Interim Special Rule that Tailors Protections to Eliminate Unnecessary Restrictions and Provide Regulatory Flexibility for Landowners. Available at: http://www.fws.gov/mountain-prairie/pressrel/2015/04012015_ServiceProtectsNorthernLongEaredBatAsThreatenedUnderESA.php.

Act (APA), 5 U.S.C. §§ 551-559, 701-706, and NEPA. *In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214, 238 (D.D.C. 2011).

JURISDICTION AND VENUE

4. This action arises under NEPA, 42 U.S.C. §§ 4321-4347, and the APA, 5 U.S.C. §§ 551, 706.

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. § 702.

6. Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391(e), as this civil action is brought against officers and employees of the United States acting in their official capacities and under the color of legal authority, a substantial part of the events giving rise to the claim occurred in the District of Columbia and the species at issue occurs here, no real property is involved in this action, and Plaintiff maintains an office in this judicial district.

PARTIES

7. Plaintiff, CENTER FOR BIOLOGICAL DIVERSITY (the Center), is a non-profit Internal Revenue Service Code Section 501(c)(3) corporation that is headquartered in Tucson, Arizona, with offices in Washington, D.C.; San Francisco, Joshua Tree, and Los Angeles, California; Portland, Oregon; Silver City, New Mexico; Anchorage, Alaska; Richmond, Vermont; Minneapolis and Duluth, Minnesota; and Seattle, Washington.

8. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues and has more than 50,000 members throughout the United States and the world.

9. The Center brings this action on its own institutional behalf, and on behalf of its members who derive scientific, aesthetic, recreational, and spiritual benefits from northern long-eared bats and their habitat.

10. The Center has devoted significant institutional resources in trying to gain ESA protection for the northern long-eared bat. The Center petitioned the Service to list the northern long-eared bat under the ESA in 2010. The Center negotiated and entered into a landmark settlement agreement that requires the Service to make hundreds of overdue findings on whether to list species under the ESA. This agreement set a deadline for the Service to decide whether to list the northern long-eared bat under the ESA. The Center submitted comments on the proposed listing and on the proposed 4(d) rule. The Center has also submitted petitions and engaged in advocacy work to halt the spread of the fungal pathogen known as White-Nose Syndrome in the United States.

11. The Center's members have ongoing interests in the northern long-eared bat and its habitat in the eastern and Midwestern regions of the United States. The Center's members have viewed northern long-eared bats, and have concrete plans to visit bat habitat and try to observe the species in the wild. The interests of the Center and its members in observing, studying, and otherwise enjoying northern long-eared bats and their habitat and in obtaining and disseminating information regarding the survival of northern long-eared bats, and have been harmed by Defendants' decision to establish an interim 4(d) rule for northern long-eared bats that authorizes activities that directly and indirectly harm, injure, and even kill members of the species, and would be redressed by the relief sought in this case.

12. By failing to undertake a NEPA process before adopting an interim 4(d) rule for northern long-eared bats, the Service violated the Center and its members' procedural rights

under NEPA to an adequate NEPA document (either an environmental assessment or environmental impact statement), and to the environmental information that would be developed through the preparation of that NEPA document concerning alternatives to the proposed 4(d) rule and analysis of the direct, indirect, and cumulative effects of the 4(d) rule and possible mitigation measures for those impacts.

13. Unless the requested relief is granted, Plaintiff and Plaintiff's members' interests will continue to be injured by Defendants' failure to undertake an open and informed NEPA process before promulgating a 4(d) rule, which exempts a host of activities from the ESA's "take" prohibition without providing for the conservation of the species. The injuries described above are actual, concrete injuries that are caused by Defendants and presently suffered by Plaintiff and its members, and will continue to occur unless relief is granted by this Court.

14. The relief sought herein, that the court set aside the interim 4(d) rule as contrary to law and order Defendants to engage in a NEPA process and reconsider whether an interim 4(d) rule is necessary for the species, would redress the Center's injuries.

15. The Center has no other adequate remedy at law.

16. Defendant DANIEL M. ASHE is Director of the U.S. Fish and Wildlife Service, a federal agency within the Department of the Interior that is authorized and required by law to protect and manage the fish, wildlife and native plant resources of the United States, including enforcing and implementing the ESA, and for compliance with all other federal laws that apply to the Service. The Service has primary authority for day-to-day administration of the ESA with respect to terrestrial species. The Director signed the 4(d) rule challenged in this lawsuit. Director Ashe is sued in his official capacity.

17. Defendant SALLY JEWELL, United States Secretary of the Interior, is the highest-ranking official within the U.S. Department of the Interior, and in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to terrestrial endangered and threatened species, and for compliance with all other federal laws applicable to the Department of the Interior. Secretary Jewell is sued in her official capacity.

18. Defendant the U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial species, including the northern long-eared bat. The Service's headquarters in Washington, D.C. issued the 4(d) rule that is being challenged in this case.

STATUTORY AND REGULATORY BACKGROUND

A. The National Environmental Policy Act

19. Congress passed the National Environmental Policy Act in 1969 to ensure that federal agencies properly consider the environmental impacts of, and alternatives to, their activities. 42 U.S.C. § 4332. Today, NEPA is the Nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).

20. Among the critical purposes of the statute are to "insure that environmental information is available to public officials and citizens before . . . actions are taken," and to "help public officials make decisions that are based on understanding of environmental consequences." 40 C.F.R. §§ 1500.1(b)-(c). Thus, NEPA is action forcing in that it requires "agencies to consider all environmental consequences of choosing one course of action over another before making a final decision." *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 24 (D.D.C. 1999); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) ("NEPA ensures

that the agency will not act on incomplete information, only to regret its decision after it is too late to correct”).

21. NEPA requires each federal agency to prepare and circulate for public review and comment a detailed Environmental Impact Statement (“EIS”) prior to undertaking any major federal action that may significantly affect the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.4; 1502.5; 1508.3.

22. Major federal actions include “[a]doption of official policy, such as rules, regulations, and interpretations” pursuant to the APA. 40 C.F.R. § 1508.18(b)(1).

23. The Council on Environmental Quality (“CEQ”) has promulgated regulations implementing NEPA, which are binding on all federal agencies. 40 C.F.R. § 1507.1.

24. When a federal agency is not certain whether a federal action will have a significant environmental effect, it must prepare an Environmental Assessment (“EA”). 40 C.F.R. §§ 1501.4(b), 1508.9.

25. If the agency concludes in an EA that a project may have significant environmental impacts on the environment, then an EIS must be prepared. 40 C.F.R. § 1501.4.

26. If an EA concludes that there are no significant impacts to the environment, the federal agency must provide a detailed statement of reasons why the project’s impacts are insignificant and issue a “finding of no significant impact” to accompany its decision on the project. 40 C.F.R. § 1508.13.

27. In determining whether a proposed action may significantly affect the environment, NEPA requires consideration of both the context and intensity of that action. 40 C.F.R. § 1508.27. In considering context, “[s]ignificance varies with the setting of the proposed action.” *Id.* § 1508.27(a).

28. Intensity “refers to the severity of the impact,” including: “[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat”; “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial”; and “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” 40 C.F.R. §§ 1508.27(b)(4), (6), (9).

29. The CEQ regulations also provide that each federal agency shall identify in its NEPA procedures those classes of actions that normally do not require either an EIS or an EA. 40 C.F.R. § 1507.3(b)(2)(ii). These “categorical exclusions” are actions that do not individually or cumulatively have a significant effect on the human environment. If an agency action falls within one of the defined categorical exclusions, then no EIS or EA is required, unless one or more exceptions apply, which are also defined by the agency’s NEPA procedures.

30. As part of the NEPA process, federal agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,” and describe the “underlying purpose and need to which the Agency is responding in proposing the alternatives, including the proposed action.” 40 C.F.R. §§ 1502.13, 1502.14(a). The consideration of alternatives to the proposed action is described by the regulations as the “heart” of proper NEPA analysis. *Id.* § 1502.14.

31. NEPA documents must assess the environmental impacts of the proposed action, including direct effects, indirect effects, and cumulative impacts. 40 C.F.R. §§ 1502.16, 1508.8.

32. In conducting their analyses, federal agencies are directed to use high quality, accurate scientific information and to ensure the scientific integrity of their NEPA document. 40 C.F.R. §§ 1500.1(b), 1502.24.

33. Congress will, in rare circumstances, provide statutory exemptions from NEPA's requirements. For example, Section 7(k) of the ESA, 16 U.S.C. § 1536(k), provides that decisions of the Endangered Species Committee (the so-called "God Squad") exempting federal agency actions found to violate section 7(a)(2) of the Act, *id.* § 1536(a)(2), "shall not be major Federal action" for purposes of NEPA.

34. No similar provision in the ESA exempts the 4(d) rulemaking process from NEPA's requirements, nor is the 4(d) rulemaking subject to any categorical exclusion adopted by the Department of Interior.

B. The ESA and Section 4(d)

35. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978).

36. The Act protects imperiled species by listing them as "endangered" or "threatened." 16 U.S.C. §§ 1533, 1532(6), 1532(20).

37. An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range," and a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6), (20).

38. In deciding whether to list a species as endangered or threatened, the ESA requires consideration of five factors: the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence. 16 U.S.C. §§ 1533(a)(1)(A)-(E).

39. The Service must determine whether the species is endangered or threatened throughout all or a significant portion of its range.

40. In making its listing determinations, the Service must use the “best scientific and commercial data available” 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

41. The ESA and its implementing regulations protect endangered and threatened species in several ways, including by: (1) requiring the Service to develop and implement a recovery plan for listed species, 16 U.S.C. § 1533(f); and (2) requiring all federal agencies to carry out their programs for the conservation of listed species, *id.* § 1536(a)(1).

42. The ESA provides more stringent and far-reaching protections for species that are listed as “endangered” rather than “threatened.” For example, endangered species generally receive higher priority for the preparation and implementation of recovery plans.

43. The listing of a species as endangered under the ESA triggers prohibitions under Section 9 of the Act, 16 U.S.C. § 1538, including the prohibition on the “take” of species, which is defined to include “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(18).

44. The ESA’s take provisions do not automatically apply to species that are listed as threatened. 16 U.S.C. § 1538(a)(1). Instead, Section 4(d) of the Act provides that the Service “may” extend the prohibitions in Section 9 of the Act to threatened species. *Id.* § 1533(d).

45. Section 4(d) further specifies that the Service “shall issue such regulations as [it] deems necessary and advisable to provide for the conservation” of threatened species. 16 U.S.C. § 1533(d).

46. The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the

measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.” 16 U.S.C. § 1532(3).

47. Two years after the ESA was enacted, the Service exercised its authority and responsibility under Section 4(d) to extend the prohibition on “take” in Section 9 of the ESA to all threatened species. 50 C.F.R. § 17.31(a); 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975).

48. Once a species is listed, Section 7 of the ESA requires all federal agencies to “insure” that their actions neither “jeopardize the continued existence” of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16 U.S.C. § 1536(a)(2).

49. Section 7 also affords protections for species proposed for listing providing that “[e]ach Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed” 16 U.S.C. § 1536(a)(4).

FACTUAL ALLEGATIONS

A. The Northern Long-Eared Bat

50. Known for their long ears and secretive roosting and hibernating strategies, the northern long-eared bat is a wide-ranging species found in 37 states and the District of Columbia.

51. The core of the species range in the United States is in the northeast.

52. Northern long-eared bats hibernate in one location and then migrate, typically between 40 and 50 miles, to summer roosting areas.

53. Northern long-eared bats rely primarily upon mature, interior forests to provide their habitat. These forests provide roosting, feeding, and migrating habitat for northern long-eared bats.

54. In the summer, bats rely on trees and snags to serve as roosts where female bats pup.

55. The pup season, when female northern long-eared bats give birth, occurs between June 1 and July 31.

56. Northern long-eared bats switch roost trees during the summer and have been documented to do so as often as every three nights.

57. Northern long-eared bats have been documented to use a .27 and .43 mile radius of habitat around their summer roosts for foraging.

58. Due to their reliance on interior forest habitat, northern long-eared bats are more susceptible than other bat species to impacts from logging and other land clearing activities.

59. Northern long-eared bats hibernate during the winter and use caves and other structures to hibernate in, which are referred to as “hibernacula.”

60. It is common for northern long-eared bats and other species of bats to hibernate in the same hibernacula.

61. Northern long-eared bats move between hibernacula during the winter.

62. Northern long-eared bats may not return to the same hibernacula each year although the species is documented to return to established hibernacula over the long term.

63. Northern long-eared bats are documented to use up to 8.2 miles around their hibernacula for roosting, foraging, and swarming in the fall.

64. Swarming is a rendezvous of bats during the breeding season in late summer that consists of bats flying around in a large, loose aerial mass, and mating on the wing.

65. Swarming precedes hibernation and usually occurs near a cave or mine that is used for that purpose.

66. Like other bat species, northern long-eared bats are susceptible to the fungus *Pseudogymnoascus destructans* (Pd), which is commonly referred to as White-Nose Syndrome.

67. White-Nose Syndrome is currently documented in 25 out of the 37 states in the northern long-eared bat's range.

68. Within the core range of the northern long-eared bats in the northeastern U.S., White-Nose Syndrome is close to saturation in hibernacula.

69. Northern long-eared bats have suffered a 99 percent decline in hibernacula count data in eight states. Summer data corroborate and confirm this 99 percent decline.

70. In the winter of 2014-15, White-Nose Syndrome continued to spread to states in the Midwest and South.

71. In the Midwest, bat mortalities are being documented in Michigan and Wisconsin after White-Nose Syndrome was first documented in these states last year.

72. All models agree that White-Nose Syndrome will spread throughout the U.S.

B. Protecting the Northern Long-Eared Bat Under the ESA

73. In 2010, the Center petitioned the Service to protect northern long-eared bats under the ESA due to the threats the species faces from White-Nose Syndrome, logging,

hydraulic fracturing and other forms of energy development, environmental contaminants (such as pesticide and herbicide applications), and other impacts to the species' habitat.

74. On September 9, 2011, Judge Emmet G. Sullivan, U.S. District Court Judge for the District of Columbia issued an order approving a settlement agreement between the Center and the Service, which among other things, required the Service, by September 30, 2013, to submit to the Federal Register either a proposed rule to list the northern long-eared bat or a determination that listing the northern long-eared bat is not warranted, in response to the Center's petition and according to the listing process that is set forth in the ESA.

75. On October 2, 2013, the Service proposed to list the northern long-eared bat as an endangered species.

76. In response, members of the timber industry, energy industry, and others raised complaints about the proposed listing to the Service and to state officials within the range of the bat – prompting political pressure from state and congressional officials on the Service to not protect the species under the ESA.

77. On January 6, 2014, the Service issued an interim guidance document for planning and conducting conferences under Section 7(a)(4) of the ESA.

78. The interim guidance determined that bats can be negatively impacted by human activities that: (1) impact the bats and/or their hibernacula; (2) impact the bats and/or their summer habitat; or (3) impact migrating bats.

79. The guidance specified that bats are threatened by the following:

- a. the use of clothing, footwear, or equipment that was used in a White-Nose Syndrome-affected state or region in a cave or mine in an unaffected state or region;

- b. impacts to hibernacula openings, which may restrict bat flight and movement and/or may modify air flow or microclimate, reducing suitability of the hibernaculum for bats or decreasing survivorship;
- c. entry into hibernacula;
- d. clearing trees within five miles of caves or mines where NLEB hibernate, reducing staging/swarming habitat;
- e. permanent or temporary removal of forested habitat available for roosting, foraging, or travel;
- f. types of timber management (*e.g.*, clear-cutting) which reduce the viability of NLEB populations if key areas of a home range are removed;
- g. lethal bat removal from occupied homes or structures;
- h. Blasting or drilling within a half-mile of caves or mines where NLEB hibernate during the winter, which may disturb hibernating bats;
- i. Use of pesticides and herbicides in a way that exposes NLEBs (*e.g.*, aerial application at night) or significantly reduces their prey; and
- j. Loss of clean water sources (*e.g.*, through fill or water quality degradation), which can reduce NLEB water sources, foraging habitat, and/or prey.

80. On June 30, 2014, the Service took a six-month extension for making its listing decision, citing “disagreement regarding the sufficiency or accuracy of the available data relevant to our determination”

81. As a result of this extension, the Service’s final decision for the northern long-eared bat was due on April 2, 2015.

82. On January 16, 2015, the Service proposed a 4(d) rule for the northern long-eared bat.

83. The proposed 4(d) rule would extend the prohibitions in Section 9 of the ESA to the bat, but at the same time would create a number of exemptions from the prohibition on take.

84. The proposed 4(d) rule divided the northern long-eared bat's range in the U.S. into areas with White-Nose Syndrome and buffers around those areas, and areas without the disease.

85. Outside the White-Nose Syndrome areas and buffers, the proposed rule authorized all incidental take of the species during otherwise lawful activities.

86. Outside the White-Nose Syndrome areas and buffers, the proposed rule also authorized purposeful take of northern long-eared bats during removal of the bats from human dwellings and purposeful take for one year during scientific research.

87. Inside the White-Nose Syndrome areas and buffers, the proposed rule authorized incidental take of bats from: forest management, maintenance and expansion of existing rights-of-way and transmission corridors, native prairie management, and minimal tree removal projects.

88. These activities are authorized subject to these restrictions:

- a. Occur more than 0.25 mile (0.4 km) from a known, occupied hibernacula.
- b. Avoid cutting or destroying known, occupied maternity roost trees during the pup season (June 1–July 31).
- c. Avoid clearcuts within 0.25 (0.4 km) mile of known, occupied maternity roost trees during the pup season (June 1–July 31).

89. The proposed rule also authorized removal of hazardous trees for the protection of human life and property, but without any required measures.

90. Inside the White-Nose Syndrome areas and buffers, the proposed rule also authorized purposeful take of northern long-eared bats during removal of the bats from human dwellings and purposeful take for one year during scientific research.

91. The Service provided a 60-day comment period on the proposed 4(d) rule.

92. The Service did not undertake a NEPA process or review for the proposed 4(d) rule.

93. The Service did not issue a draft environmental assessment or draft environmental impact statement for the proposed 4(d) rule.

94. The Service did not propose any alternatives to the proposed 4(d) rule.

95. The proposed 4(d) rule does not contain any measures designed to slow the spread of White-Nose Syndrome.

96. The proposed 4(d) rule does not contain any measures that protect northern long-eared bats and their prey from environmental contaminants.

97. The proposed 4(d) rule does not contain any measures that protect water sources for northern long-eared bats, such as wetlands.

98. On March 17, 2015, the Center and other organizations submitted comments to the Service objecting to the listing of the northern long-eared bat as a threatened instead of endangered species, objecting to the proposed 4(d) rule, and among other things asking the Service to undertake a NEPA review before adopting a 4(d) rule for the northern long-eared bat.

//

C. The Listing Decision and Interim 4(d) Rule

99. On April 2, 2014, the Service listed the northern long-eared bat as a threatened species.

100. On April 2, 2014, the Service adopted an “interim final” 4(d) rule for the northern long-eared bat. 50 C.F.R. § 17.40(o).

101. In so doing the Service stated it was “establishing an interim rule under the authority of section 4(d) of the Act” and “seeking public comments on this interim rule” and would “publish either an affirmation of the interim rule or a final rule amending the interim rule after we consider all comments we receive.”

102. The Service did not comply with NEPA before adopting the final interim 4(d) rule.

103. The final interim 4(d) rule contains the same provisions as the proposed 4(d) rule.

104. The measures in the final interim 4(d) rule may be adopted by the Service as the final 4(d) rule for the northern long-eared bat.

CLAIM FOR RELIEF

Failure to Undertake a NEPA Review for the interim 4(d) Rule

(Violations of NEPA, 42 U.S.C. §§ 4321-4347, the CEQ’s Implementing Regulations, 40 C.F.R. §§ 1500.1-1508.28, and the APA, 5 U.S.C. § 706)

105. Plaintiff re-alleges and incorporates by reference all the allegations set forth in this Complaint, as though fully set forth below.

106. NEPA is designed to “insure that environmental information is available to public officials and citizens *before* . . . actions are taken,” and to “help public officials make decisions that are based on understanding of environmental consequences.” 40 C.F.R. §§ 1500.1(b), (c) (emphasis added).

107. The Service's promulgation of the interim 4(d) rule authorizing take of northern long-eared bats is a major federal action significantly affecting the quality of the human environment.

108. The Service's adoption of an interim final 4(d) rule that authorizes activities that the Service previously identified as adversely affecting or posing a threat to northern long-eared bats has an environmental impact that at least requires review in an environmental assessment.

109. The Service's failure to prepare an environmental assessment or an environmental impact statement prior to adopting the interim 4(d) rule authorizing take of northern long-eared bats is a violation of NEPA, 42 U.S.C. §§ 4321-4347.

110. The northern long-eared bat interim 4(d) rule is unlawful because the Service failed to carry out the environmental analysis and process required under NEPA, 42 U.S.C. §§ 4321-4347, and the CEQ's implementing regulations, 40 C.F.R. §§ 1500.1-1508.28, before adopting the rule, including by failing to engage in a public NEPA process, consider and evaluate alternatives to the proposed 4(d) rule, or analyze the rule's environmental impacts.

111. The northern long-eared bat interim 4(d) rule is unlawful because, before promulgating a rule authorizing take of northern long-eared bats, the Service failed to prepare an environmental assessment or an environmental impact statement as required by NEPA which is arbitrary, capricious, and not in accordance with law as required by Section 706(2) of the APA, and is subject to judicial review under the APA, 5 U.S.C. §§ 701-706.

112. The northern long-eared bat 4(d) rule is unlawful because, before promulgating a rule authorizing take of northern long-eared bats, the Service failed to prepare an environmental assessment or an environmental impact statement as required by NEPA, which constitutes

agency action that is unreasonably delayed and/or unlawfully withheld as provided by § 706(1) of the APA, and is subject to judicial review under the APA, 5 U.S.C. §§ 701-706.

113. The Service cannot cure its violations of NEPA and the APA without vacatur of the interim 4(d) rule and a new rulemaking process to ensure the agency has before it all the relevant information when making its decision and to protect against a predetermined outcome for the NEPA process and final rulemaking.

114. Defendants' violations of law pose actual and imminent harm to the protected interests of Plaintiff and Plaintiff's members, and it is likely that a favorable judicial decision will prevent or redress such injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court:

- 1) Declare that the Service's failure to engage in a public process and prepare either an environmental assessment or environmental impact statement analyzing the potential environmental impacts of, and alternatives to, the interim 4(d) rule, prior to adopting it, violated NEPA and is unlawful;
- 2) Vacate the interim 4(d) rule and remand it to the Service;
- 3) Award Plaintiff its fees and costs; and
- 4) Grant Plaintiff such other relief as the Court deems just and proper.

DATED: April 2, 2015.

Respectfully submitted,

/s/ Tanya M. Sanerib

Tanya M. Sanerib (D.C. Bar No. 473506)
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211
Telephone: (971) 717-6407

tsanerib@biologicaldiversity.org

Attorney for Center for Biological Diversity