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**Clerk, U.S. District and
Bankruptcy Courts**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL)
DIVERSITY,)
5268 Watson St, NW)
Washington, DC 20016)
Plaintiff,)

Case: 1:09-cv-00090
Assigned To : Kennedy, Henry H.
Assign. Date : 1/15/2009
Description: Admin. Agency Review

vs.

Dirk Kempthorne, in his official capacity)
As Secretary of the U.S. INTERIOR)
DEPARTMENT, 1849 C Street, NW,)
Washington, D.C. 20240; Carlos Gutierrez, in his)
Official capacity as Secretary of the U.S.)
Commerce Department, 1401 Constitution Ave,)
NW, Washington, D.C. 20230; Robert Gates, in)
His official capacity as Secretary of the)
U.S. Defense Department, 1000 Defense Pentagon,)
Washington, D.C. 20301-1000; Mary Peters)
In her official capacity as Secretary of the)
U.S. Transportation Department, 1200 New Jersey)
Ave, S.E., Washington, D.C. 20590; Edward)
Schafer, in his official capacity as Secretary)
Of the Agriculture Department, 1400)
Independence Ave., SW, Washington, D.C.)
20250; and Stephen Johnson, in his official)
capacity as Administrator of the Environmental)
Protection Agency, Ariel Rios Building,)
1200 Pennsylvania Ave., NW)
Washington, D.C. 20004,)
Defendants.)

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

STATEMENT OF THE CASE

1. This case concerns the failure of six federal agencies to lawfully reply and/or respond to an administrative petition by plaintiffs and other groups under the Administrative Procedure Act, 5 U.S.C. § 500 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq.
2. Plaintiff Center for Biological Diversity (“Center”) brings this action pursuant to the waiver of sovereign immunity and judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704, and 706, against defendants for unlawfully withholding and unreasonably delaying a reply and/or response to plaintiff’s petition regarding global warming’s impact upon endangered species. See also APA, 5 U.S.C. § 555.
3. Plaintiff seeks declaratory and injunctive relief on defendants’ violation of the APA as described in this Complaint. Plaintiffs seek an Order requiring defendants to reply and respond to its petition.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346 because this action involves the United States as a defendant and arises under the laws of the United States, including the APA, 5 U.S.C. § 701 et seq., and the ESA, 16 U.S.C. § 1531 et seq. The requested relief is proper under 5 U.S.C. §§ 705-706; 28 U.S.C. §§ 1361, 2201, 2202.
5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

PARTIES

6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a non-profit corporation dedicated to the preservation, protection and restoration of biodiversity, native species, and ecosystems. The Center has more than 40,000 members in the United States and worldwide. The Center has offices in Tucson and Phoenix, Arizona; New Mexico; Washington, D.C.; San Francisco, Los Angeles, and San Diego, California; Vermont; Minnesota, Illinois and Oregon. Through science, law and creative media, the Center advocates on behalf of all imperiled species and their habitat, combating a range of threats to life on Earth including habitat loss, global warming and toxics. The Center has a well-established endangered species and biodiversity program that regularly issues reports, action alerts, and updates to policy-makers and the public, including its members.
7. The Center also has a long-established global warming program that examines and attempts to address climate change’s deleterious impact upon imperiled species of plants and animals, including those listed under the Endangered Species Act (ESA). The Center, for example, was successful in gaining listing of the polar bear under the ESA, necessary because of a melting Arctic ecosystem. The Center, further, advocate on behalf of many other species, both listed and unlisted under the ESA, that need additional assistance to deal with anthropomorphic climate warming and other causes of decline. The Center and its members are injured by the complete failure of six federal agencies to lawfully reply and respond to a petition to address improvements

to the federal endangered species program that would advance conservation of specific species, as well as the overall program itself.

8. Defendant Dirk Kempthorne, and any successor, is Secretary of the U.S. INTERIOR DEPARTMENT. The Interior Department is responsible for millions of acres of federal public lands managed by the National Park Service, Bureau of Land Management and Fish and Wildlife Service. It is responsible for water conservation through the Bureau of Reclamation. It is responsible for implementation of the Endangered Species Act. It is the nation's primary land, wildlife and healthy habitat steward.
9. Defendant Carlos Gutierrez, and any successor, is Secretary of the Commerce Department. The Commerce Department possesses several critical conservation and scientific research agencies under it, including the National Oceanic and Atmospheric Administration. The National Marine Fisheries Service regulates fishing in U.S. waters, co-implements the Endangered Species Act (ESA), and takes a lead on most Marine Mammal Protection Act programs. The Department of Commerce implements the Coastal Zone Management Act and other aquatic conservation programs.
10. Defendant Edward Schafer, and any successor, is Secretary of the Agriculture Department. The Agriculture Department is responsible for several conservation programs, primarily though not solely pursuant to the Under Secretary for Natural Resources and the Environment. The Forest Service and Soil Conservation Service are two important agencies in Agriculture.

Both these agencies are important to endangered species and combating global warming.

11. Defendant Mary Wells, and any successor, is Secretary of the Transportation Department. This department authorizes and/or funds many transportation projects throughout the United States, including damaging new roads or other projects that harm endangered species and contribute to global warming.
12. Defendant Robert Gates, and any successor, is Secretary of the Defense Department. The Department of Defense is responsible for protecting the American people with regard to armed conflict. As such, it manages large amounts of plant and animal habitat, including those species listed under the ESA, and also contributes to global warming with its huge infrastructure maintenance and needs.
13. Defendant Stephen Johnson, and any successor, is Administrator of the Environmental Protection Agency (EPA). The EPA implements many environmental and conservation statutes including the Clean Water Act, Clean Air Act, Federal Insecticide, Fungicide and Rodenticide Act, Toxics Substance Control Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act, and others. The EPA also possesses a significant role with regard to environmental impact statements (EIS) and the National Environmental Policy Act. Through many of its programs, it has significant influence over projects that impact federally listed species under the ESA.

SUMMARY OF FACTS AND GENERAL ALLEGATIONS

The Petition

14. On February 1, 2007, almost two years ago (“two years ago”) plaintiff and conservation organizations from Arizona, Colorado, Oregon, Pennsylvania, Washington, Maine, Idaho, Florida, California, Arkansas, Louisiana and New Mexico filed a petition entitled “Endangered Species and Global Warming Initiative: An Administrative Procedure Act Petition Before the Secretaries of Interior, Commerce, Energy, Agriculture, Transportation, Defense and EPA to Enhance the Recovery of Endangered Species and Address the Growing Impacts of Global Warming on Imperiled Species.”
15. Human-induced global warming is already playing a significant role in habitat loss and the spread of invasive species, and has contributed to the extinction of numerous species. Parmesan, C., *Ecological and Evolutionary Responses to Recent Climate Change*, Annual Review of Ecology, Evolution and Systematics 37:637-69 (2006).
16. Continuation of current greenhouse gas emission trends are projected to raise the average global temperature by 3-4 degrees Celsius, leading to catastrophic extinction events. Hansen, J. et al., *Global Temperature Change*, Proceedings of the National Academy of Science 103(39):14288-14293 (2006).
17. The petition proposes ten sets of regulatory additions, revisions and clarifications for advancing the purposes and policies of the ESA, including one suggesting federal agencies “consider the impact of global warming in decisions affecting imperiled species and their recovery.”

18. Other specific proposals in the petition include adoption of timely ESA recovery plans, implementation of ESA recovery plans, and cooperation with all parties in furtherance of conservation under the Act from all threats.
19. The petition requested an initial response within ninety days from the seven agencies.
20. Members and employees of plaintiff group have discussed the contents of the petition after filing, particularly as it relates to global warming and recovery, to officials at the U.S. Department of the Interior and maybe other agencies.

The Agencies' Replies and Responses

21. On March 6, 2007, defendant E.P.A. sent plaintiff a one paragraph letter from Robert W. Hargrove of the Environmental Protection Agency that stated "The EPA is in receipt of the Center for Biological Diversity's February 1, 2007 Endangered Species and Global Warming Initiative, which suggests modifications to regulations implementing the Endangered Species Act to enhance the recovery of endangered species and to address the impacts of global warming on listed species. EPA understands that the Fish and Wildlife Service and National Marine Fisheries Service (the lead agencies for ESA oversight) are currently reviewing the suggestions outlined in the initiative." There is no indication of when EPA will take any action of any kind in this communication by EPA to plaintiff.
22. On June 13, 2007, defendant Department of Energy sent plaintiff a letter, signed by General Counsel David Hill that concluded, "For these reasons,

your request that DOE initiate rulemaking pertaining to the protections and procedures mandated by the [Endangered Species] Act is denied.”

23. The other five departments – Interior, Commerce, Transportation, Agriculture and Defense – have not replied with a letter, phone call or other communication of any kind. Nor have these five department responded with any procedural or substantive response of any kind to the petition.
24. In this Complaint, plaintiff makes a distinction between simply “replying” to an APA petition, here defined as acknowledging receipt of a petition and an indication of when a response will be forthcoming, versus “responding” to a petition, here defined as some form of answer by the agency.

The U.S. Supreme Court, Global Warming and Endangered Species

25. On April 2, 2007, just two months after plaintiff filed its petition, the Supreme Court issued a historic decision on global warming, Massachusetts v. E.P.A., 127 S.Ct. 1438 (2007). This decision, *inter alia*, recognized the urgent threat to human well-being and the environment as a result of climate change, and permitted advocacy groups to petition and sue federal agencies that do not dispense of their statutory duties as they relate to global warming. Id.
26. In TVA v. Hill, the Supreme Court explained that the “plaint intent” of the Endangered Species Act, reflected “in literally every section of the statute,” is to “halt and reverse the trend toward species extinction, whatever the cost.” 437 U.S. 153, 184 (1978). Further, “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7.” Id. at 173; 16 U.S.C. § 1536.

STATUTORY AND REGULATORY BACKGROUND

The ESA

27. Finding that “fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,” Congress enacted the ESA in order to “provide a program for the conservation of ... endangered species and threatened species,” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(a)(1), (b). “Conservation” is defined, in turn, 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.” *Id.* § 1532(3).
28. Accordingly, the primary purpose of the ESA is not simply to prevent the extinction of imperiled species, but to recover them to the point where the protections of the Act are no longer necessary. Under ESA regulations, FWS has been delegated responsibility for administering the Act as it pertains to terrestrial species such as the woodland caribou. 50 C.F.R. §402.01(b).
29. The ESA provides for the listing of imperiled species as “threatened” or “endangered.” 16 U.S.C. § 1533. The Act defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range,” and a threatened species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20). In determining whether a species is threatened or endangered, FWS is directed to list based

on the presence of any one of the following 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. Id. § 1533(a)(1)(A)-(E).

30. The Secretary of Interior and the Secretary of Commerce are the two department heads tasked with implementing the Endangered Species Act and its conservation mandate. Id. § 1532(15).
31. The Departments of Transportation, Agriculture and Defense, as well as E.P.A., share conservation responsibilities with Interior and Commerce. Id. § 1536(a)(1) – (a)(2).
32. The recovery programs of the ESA begin with the recovery plan itself. Id. § 1533(f). They also include, *inter alia*, critical habitat designation Id. § 1533(a)-(b), consultation Id. § 1536(a)(2), release of species Id. § 1539(j), and state cooperation Id. § 1535, and various other sections of the ESA.

The APA

33. The APA provides “interested person[s] the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). Upon receipt of such Petition, the APA obligates federal agencies to “conclude [the] matter presented to it” within a “reasonable time,” and in the event the agency denies the Petition, “[p]rompt notice shall be given in whole or in part.” Id. § 555(b), (e).

34. In the event an agency fails to make a final agency action approving or denying the Petition, the APA provides the Petitioner with the right to seek judicial review in order to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 704, § 706(1).

FIRST CLAIM FOR RELIEF
(Violation of Administrative Procedure Act,
5 U.S.C. §§ 555, 706 – Failure to Reply or Respond)

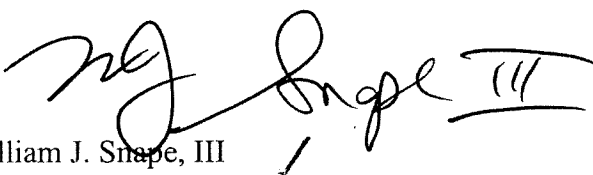
35. Plaintiff incorporates herein by reference ¶¶ 1- 34.
36. Five of the seven federal agencies that received plaintiff’s global warming and endangered species petition two years ago have not replied or responded in any type or in any fashion to plaintiff.
37. The sixth of the seven agencies, the E.P.A., told plaintiffs it was “in receipt” of the petition but gave no indication of its disposition of the petition.
38. The seventh agency, the Department of Energy, which is not a party to this Complaint, “denied” the petition.
39. Failure to “conclude” a decision in two years on whether or how to reply or respond to the petition is not “reasonable” pursuant to APA, 5 U.S.C. § 555(b).
40. Two years is an unreasonable delay under the APA, 7 U.S.C. § 706(1), for an agency to completely fail to reply and/or respond to a petition, particularly one on a topic as urgent as global warming and its impact upon plant and animal species threatened with extinction.
41. There has been no notice, and certainly no “prompt notice,” about “the denial in whole or in part of a written ... petition.” 5 U.S.C. § 555(e).

42. Defendants' actions have injured and continue to injure plaintiff in the manner described in ¶¶ 6-7.

PRAYER FOR RELIEF

- A. Declare that Defendants have violated Section 555(b), 555(e) and 706(1) of the Administrative Procedure Act by unreasonably delaying a reply and a response to plaintiff's rulemaking petition, and failing to give prompt notice to any denial;
- B. Order Defendants to reply to plaintiff's rulemaking petition within 60 days, with an indication in that reply of when an agency response will be forthcoming and, in any event, prompt notice of denial if that is the agency decision;
- C. Award plaintiffs their costs and reasonably attorneys' fees in this action pursuant to the Equal Access to Justice Act and other sources; and
- D. Grant such further and other relief as the Court deems just and proper.

Respectfully Submitted,

/s/ 

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Dated: January 15, 2009