

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

APPALACHIAN VOICES *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 SAMUEL W. BODMAN *et al.*,)
)
 Defendants.)

No. 1:08-cv-00380-RMU

PLAINTIFFS’ SECOND AMENDED COMPLAINT

INTRODUCTION

1. Plaintiffs, Appalachian Voices and the Canary Coalition, seek declaratory and injunctive relief against the United States Department of Energy (“DOE”) for violating the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370d (2008), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551–596, 601–612, and 701–706 (2008), by failing to evaluate the environmental impacts associated with allocating one billion dollars in tax credits through its pre-application review and certification of nine experimental coal-based energy projects authorized under the Energy Policy Act of 2005.

2. Plaintiffs, Appalachian Voices and the Canary Coalition, seek declaratory and injunctive relief against DOE for violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544 (2008), by failing to consult with the U.S. Fish and Wildlife Service (“FWS”) and the U.S. National Marine Fisheries Service (“NMFS”), prior to allocating one billion dollars in tax credits through its pre-application review and certification of nine experimental coal-based energy projects authorized under the Energy Policy Act of 2005.

3. Plaintiffs, Appalachian Voices and the Canary Coalition, seek declaratory and injunctive relief against the United States Department of the Treasury (“DOT”) for violating the NEPA, 42 U.S.C. §§ 4321–4370d (2008), and the APA, 5 U.S.C. §§ 551–596, 601–612, and 701–706 (2008), by failing to evaluate the environmental impacts associated with certifying one billion dollars in tax credits promoting the construction and operation of nine experimental coal-based energy projects authorized under the Energy Policy Act of 2005.

4. Plaintiffs, Appalachian Voices and the Canary Coalition, seek declaratory and injunctive relief against DOT for violating the ESA, 16 U.S.C. §§ 1531–1544 (2008), by failing to consult with FWS and NMFS prior to certifying one billion dollars in tax credits promoting the construction and operation of nine experimental coal-based energy projects authorized under the Energy Policy Act of 2005.

VENUE & JURISDICTION

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

6. Because this case involves violations of federal law that can be cured by this Court, subject matter jurisdiction is appropriate pursuant to: 28 U.S.C. § 1331 (2008) (federal question); 28 U.S.C. § 1346(a)(2) (2008) (United States as a defendant); 28 U.S.C. § 1361 (2008) (mandamus); 28 U.S.C. § 2201(a) (2008) (declaratory judgments); and 28 U.S.C. § 2202 (2008) (additional relief).

7. On 31 January 2008, Plaintiffs sent a 60-Day Notice of Intent to Sue DOE and DOT pursuant to the citizen suit provisions of the Endangered Species Act. 16 U.S.C. § 1540(g)(1)(A).

THE PARTIES

8. Appalachian Voices is a non-profit, member-based organization headquartered in Boone, North Carolina and is incorporated under the laws of North Carolina.

9. Appalachian Voices brings people together to solve the environmental problems having the greatest impact on the central and southern Appalachian Mountains.

10. Appalachian Voices has members who live near, own property near, reside near, own businesses near, visit and otherwise use and enjoy the areas surrounding, and downwind of, Duke Energy's proposed Cliffside power plant in Rutherford and Cleveland counties in North Carolina.

11. Appalachian Voices' members utilize the areas surrounding, and downwind of, the proposed power plant permanently and regularly to fulfill a variety of legally protected interests including: raising children; residences; owning and operating businesses; swimming; fishing; boating; education; breathing; domestic and municipal water supplies; wildlife viewing, including endangered and threatened species; recreation; and aesthetic and spiritual fulfillment.

12. Members of Appalachian Voices plan to use the area surrounding, and downwind of, the proposed power plant permanently and regularly as they have customarily done well into the foreseeable future.

13. Appalachian Voices has members who live near, own property near, reside near, own businesses near, visit and otherwise use and enjoy the coalfield regions of the central and southern Appalachian Mountains.

14. Appalachian Voices' members utilize the coalfield regions of the central Appalachian Mountains permanently and regularly to fulfill a variety of legally protected interests including: raising children; residences; owning and operating businesses; swimming; fishing; hunting; boating; education; breathing; domestic and municipal water supplies; wildlife viewing, including endangered and threatened species; recreation; and aesthetic and spiritual fulfillment.

15. Members of Appalachian Voices plan to use the coalfield regions of the central Appalachian Mountains permanently and regularly as they have customarily done well into the foreseeable future.

16. Appalachian Voices' members have suffered, are suffering, and are threatened with, actual injury from Defendants' failure to comply with the National Environmental Policy Act.

17. Appalachian Voices' members have suffered, are suffering, and are threatened with, actual injury from Defendants' failure to comply with the Endangered Species Act.

18. Because the interests of Appalachian Voices' members are directly and irreparably injured by the Defendants' violation of federal law, Appalachian Voices brings this action on behalf of these members and itself.

19. The Canary Coalition is a non-profit organization based in Sylva, North Carolina and is incorporated under the laws of North Carolina.

20. The Canary Coalition works to raise public awareness about the air quality crisis in the Smoky Mountains, the Greater Appalachian region, and nationwide, generating a groundswell of public support to reduce or eliminate major sources of air pollution, thereby improving the health and quality of life enjoyed by all those who breathe.

21. The Canary Coalition has members who live near, own property near, reside near, own businesses near, visit and otherwise use and enjoy the area surrounding, and downwind of, Duke Energy's proposed Cliffside power plant in Rutherford and Cleveland counties in North Carolina.

22. The Canary Coalition's members utilize the areas surrounding, and downwind of, the proposed power plant permanently and regularly to fulfill a variety of legally protected interests including: raising children; local residences; owning and operating businesses; swimming;

fishing; boating; education; breathing; domestic and municipal water supplies; wildlife viewing, including endangered and threatened species; recreation; and aesthetic and spiritual fulfillment.

23. Members of the Canary Coalition plan to use the area surrounding, and downwind of, the proposed power plant permanently and regularly as they have customarily done well into the foreseeable future.

24. The Canary Coalition's members have suffered, are suffering, and are threatened by actual injury from Defendants' failure to comply with the National Environmental Policy Act.

25. The Canary Coalition's members have suffered, are suffering, and are threatened by actual injury from Defendants' failure to comply with the Endangered Species Act.

26. Because the interests of the Canary Coalition's members are directly and irreparably injured by the Defendants' violation of federal law, the Canary Coalition brings this action on behalf of these members and itself.

27. Defendant Samuel K. Bodman is the Secretary of the United States Department of Energy.

28. Defendant Henry M. Paulson, Jr., is the Secretary of the United States Department of the Treasury.

29. Defendant Victor K. Der is the Deputy Secretary of Clean Coal within the United States Department of Energy.

30. Defendant Joseph Giove, III, is the Program Analyst for the Office of Clean Energy Systems, within the United States Department of Energy.

THE NATIONAL ENVIRONMENTAL POLICY ACT

31. Plaintiffs re-allege, as though fully set forth herein, every allegation contained in each of the foregoing paragraphs.

32. NEPA, 42 U.S.C. §§ 4321–4370d (2008), was intended to reduce or eliminate environmental damage by requiring all federal agencies to take a hard look at the environmental consequences of their actions and to identify, inter alia, measures aimed at minimizing or mitigating environmental impacts.

33. When any federal agency proposes major federal actions that may significantly affect the quality of the human environment, such as allocating one billion dollars in tax credits essential for the construction, operation and maintenance of experimental coal-fueled energy projects, NEPA controls an agency’s planning and decision-making.

34. Federal agencies have just three options for complying with NEPA: (1) exclude the action from further analysis because the action belongs to a class of actions that normally have insignificant impacts; or (2) prepare an Environmental Impact Statement (“EIS”) because the proposed action normally has significant impacts; or (3) prepare an Environmental Assessment (“EA”) to determine whether the impacts may be significant.

35. If an EA demonstrates that the action will have significant impacts, federal agencies must prepare an EIS that evaluates, inter alia: (1) individual and cumulative impacts of the proposed action; (2) alternatives to the proposed action; and (3) measures to mitigate the action’s unavoidable impacts.

THE ENDANGERED SPECIES ACT

36. Plaintiffs re-allege, as though fully set forth herein, every allegation contained in each of the foregoing paragraphs.

37. The ESA, 16 U.S.C. §§ 1531–1544 (2008), was intended to protect the ecosystems upon which endangered species and threatened species depend and to provide a program for the conservation of such species.

38. Under the ESA and its implementing regulations, an agency must consult with the FWS and the NMFS before taking any action which may affect listed species or critical habitat, such as allocating one billion dollars in tax credits essential for the construction, operation and maintenance of nine different experimental coal-fueled energy projects.

THE ADMINISTRATIVE PROCEDURE ACT

39. Plaintiffs re-allege, as though fully set forth herein, every allegation contained in each of the foregoing paragraphs.

40. Judicial review of Defendants' actions under NEPA and the ESA is governed by the APA which requires a court to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2008).

STATEMENT OF FACTS

41. Plaintiffs re-allege, as though fully set forth herein, every allegation contained in each of the foregoing paragraphs.

42. On or about 30 November 2006, Defendants, jointly announced the approval and allocation of one billion dollars in tax credits for the construction, operation and maintenance of nine experimental coal-fueled energy projects pursuant to the Energy Policy Act of 2005.

43. According to that announcement "[t]he advanced coal technologies being supported by these awards currently face cost, integration and reliability hurdles that must be overcome if they are to be widely deployed. DOE believes deployment incentives, such as tax credits, will accelerate the widespread use of these technologies and assist in driving down their overall cost."

44. That announcement further states: “[t]oday’s tax credit awards promote the wide-scale commercialization of technologies that have been successfully demonstrated, but need support to be cost competitive with currently available technologies.”

45. Defendant, the Department of Energy, identified these facilities as: (A) Duke Energy’s Bituminous IGCC Project in Edwardsport, IN; (B) Tampa Electric’s Bituminous IGCC Project in Polk County, FL; (C) Mississippi Power Company’s Lignite IGCC Project in Kemper County, MS; (D) Duke Energy’s Advanced Coal Project in Rutherford and Cleveland Counties, NC; (E) E.ON U.S. & Louisville Gas and Electric’s Advanced Coal Project in Bedford, KY; (F) Carson Hydrogen Power’s Gasification Project in Carson, CA; (G) TX Energy’s Gasification Project in Longview, TX; and (H) two gasification projects whose proponents “chose not to have their awards announced.”

46. At sometime after 08 August 2005 but prior to 30 November 2006, DOE granted pre-application certification to these nine experimental projects.

47. Representing roughly seven (7) percent of construction costs, the tax credits were at least a substantial factor motivating Duke Energy to construct its North Carolina project (“Cliffside”) and/or to install and operate those types of advanced coal technologies identified in the Energy Policy Act of 2005.

48. In response to the announcement that it would receive tax credits for two of its proposed projects, a Duke Energy executive stated that the tax credits were “particularly important” and “very important” to Duke’s Indiana and North Carolina projects, respectively.

49. Unlike other programs in the Energy Policy Act of 2005, Congress did not exempt these particular tax credit allocations from the requirements of the National Environmental Policy Act.

50. Extracting, processing, transporting, incinerating and disposing the coal used to power these facilities will have significant environmental impacts.

51. At least one of the tax credit recipients, Duke Energy in North Carolina, currently obtains coal extracted by erasing mountaintops from the skyline of the Appalachian Mountains and Duke Energy plans to continue using such coal to fuel its new power plant.

52. Coal-fueled power plants, including those receiving tax credits pursuant to the Energy Policy Act of 2005, are, individually and cumulatively, major sources of air pollution significantly affecting the quality of the human environment.

53. Coal-fueled power plants, including those receiving tax credits pursuant to the Energy Policy Act of 2005, are the principal force driving the market for, and environmental degradation resulting from, mining, processing, transporting, burning and disposing coal.

54. Ignoring the significant environmental impacts associated with coal's cradle-to-grave lifecycle, Defendants approved the allocation of the tax credits without preparing a comprehensive environmental impact statement evaluating the individual and cumulative environmental impacts associated with developing these nine experimental coal-fueled projects.

55. Six of the seven publicly identified projects, ranging from 390–1744 megawatts, far exceed the capacity of facilities for which the Department of Energy normally prepares an environmental impact statement.

56. On 29 June 2007, *via* certified mail, return receipt requested, Appalachian Voices notified the Department of Energy that it was in violation of NEPA for failing to perform any NEPA analysis regarding the impacts of these experimental projects.

57. In an effort to avoid this litigation, Appalachian Voices provided DOE thirty days to correct or explain its violation of NEPA.

58. As of today's date, DOE has failed to respond to Appalachian Voices' notice.

59. On 31 January 2008, *via* certified mail, return receipt requested, Appalachian Voices sent a 60-Day Notice of Intent to Sue, as required for a citizen suit under 16 U.S.C. §§ 1540(g)(1)(A) and 1540(g)(2)(A)(i), to the Secretary of Energy, and Secretary the Treasury for failing to consult with the FWS and NMFS before taking action that could affect protected species and their habitat.

60. As of today's date, Defendants have failed to respond to the notice or take any corrective measures to avoid litigation.

61. Petitioners are aware of endangered and threatened species that inhabit the states potentially affected by the construction, operation and maintenance of Duke Energy's North Carolina facility and those states within regions that produce vast quantities of coal. (MT, ND, WY, UT, CO, AZ, NM, TX, OK, KS, MO, IA, IL, IN, NC, PA, OH, WV, VA, TN and KY).

A. Montana, located in a coal-producing region, is home to fourteen (14) threatened or endangered species: Grizzly Bear, Whooping Crane, Eskimo Curlew, Black-footed Ferret, Canada Lynx, Piping Plover, Pallid Sturgeon, White Sturgeon, Least Tern, Bull Trout, Gray Wolf, Spalding's Catchfly, Water Howellia, and Ute Ladies' tresses.

B. North Dakota, located in a coal-producing region, is home to nine (9) threatened or endangered species: the American burying Beetle, Whooping Crane, Eskimo Curlew, Bald Eagle, Piping Plover, Pallid Sturgeon, Least Tern, Gray Wolf, and Western prairie fringed Orchid.

C. Wyoming, located in a coal-producing region, is home to twenty (20) threatened or endangered species: Grizzly Bear, Bonytail Chub, Humpback Chub, Whooping Crane, Kendall Warm Springs Dace, Black-footed Ferret, Canada Lynx, Preble's meadow jumping

Mouse, Colorado Pikeminnow, Piping Plover, Pallid Sturgeon, Razorback Sucker, Least Tern, Wyoming Toad, Gray Wolf, Colorado Butterfly plant, Ute Ladies'-tresses, Western prairie fringed Orchid, Blowout Penstemon, and Desert Yellowhead.

D. Utah, located in a coal-producing region, is home to forty-two (42) threatened or endangered species: Kanab Ambersnail, Grizzly Bear, Bonytail Chub, Humpback Chub, Virgin River Chub, Eskimo Curlew, Black-footed Ferret, Southwestern willow Flycatcher, Canada Lynx, Mexican spotted Owl, Colorado Pikeminnow, Utah Prairie dog, June Sucker, Razorback Sucker, Desert Tortoise, Lahontan cutthroat Trout, Gray Wolf, Woundfin, Dwarf Bear-poppy, Kodachrome Bladderpod, Autumn Buttercup, San Rafael Cactus, Siler pincushion Cactus, Uinta Basin hookless Cactus, Winkler Cactus, Wright fishhook Cactus, Jones Cycladenia, Maguire Daisy, Ute Ladies'-tresses, Deseret Milk-vetch, Heliotrope Milk-vetch, Holmgren Milk-vetch, Shivwits Milk-vetch, Welsh's Milkweed, Clay Phacelia, Maguire Primrose, Barneby Reed-mustard, Clay Reed-mustard, Shrubby Reed-mustard, Barneby Ridge-cress, Navajo Sedge, and Last Chance Townsendia.

E. Colorado, located in a coal-producing region, is home to thirty-one (31) threatened or endangered species: Grizzly Bear, Uncompahgre fritillary Butterfly, Bonytail Chub, Humpback Chub, Whooping Crane, Eskimo Curlew, Black-footed Ferret, Southwestern willow Flycatcher, Canada Lynx, Preble's meadow jumping Mouse, Mexican spotted Owl, Colorado Pikeminnow, Piping Plover, Pawnee montane Skipper, Razorback Sucker, Least Tern, Greenback cutthroat Trout, Gray Wolf, Penland Beardtongue, Dudley Bluffs Bladderpod, Colorado Butterfly plant, Knowlton Cactus, Mesa Verde Cactus, Uinta Basin hookless Cactus, Ute Ladies'-tresses, Mancos Milk-vetch, Osterhout Milk-vetch, Penland alpine fen Mustard, North Park Phacelia, Dudley Bluffs Twinpod, and Clay-loving Wild-buckwheat.

F. Arizona, located in a coal-producing region, is home to fifty-four (54) threatened or endangered species: Kanab Ambersnail, Lesser long-nosed Bat, Grizzly Bear, Masked (quail) Bobwhite, Yaqui Catfish, Bonytail Chub, Gila Chub, Humpback Chub, Sonora Chub, Virgin River Chub, Yaqui Chub, California Condor, Eskimo Curlew, Northern aplomado Falcon, Black-footed Ferret, Southwestern willow Flycatcher, Chiricahua leopard Frog, Jaguar, Sinaloan Jaguarundi, Loach Minnow, Ocelot, Mexican spotted Owl, Sonoran Pronghorn, Desert Pupfish, Yuma clapper Rail, New Mexican ridge-nosed Rattlesnake, Sonora tiger Salamander, Beautiful Shiner, Spikedace, Little Colorado Spinedace, Mount Graham red Squirrel, Razorback Sucker, Gila (incl. Yaqui) Topminnow, Apache Trout, Gila Trout, Hualapai Mexican Vole, Gray Wolf, Kearney's Blue-star, Arizona hedgehog Cactus, Brady pincushion Cactus, Cochise pincushion Cactus, Nichol's Turk's head Cactus, Peebles Navajo Cactus, Pima pineapple Cactus, Siler pincushion Cactus, Arizona Cliff-rose, Jones Cycladenia, San Francisco Peaks Groundsel, Canelo Hills Ladies'-tresses, Holmgren Milk-vetch, Sentry Milk-vetch, Welsh's Milkweed, Navajo Sedge, and Huachuca Water-umbel.

G. New Mexico, located in a coal-producing region, is home to forty-five (45) threatened or endangered species: Noel's Amphipod, Lesser long-nosed Bat, Mexican long-nosed Bat, Grizzly Bear, Chihuahua Chub, Gila Chub, Eskimo Curlew, Northern aplomado Falcon, Southwestern willow Flycatcher, Chiricahua leopard Frog, Gambusia, Socorro Isopod, Jaguar, Loach Minnow, Grande silvery Minnow, Mexican spotted Owl, Colorado Pikeminnow, New Mexican ridge-nosed Rattlesnake, Arkansas River Shiner, Beautiful Shiner, Pecos bluntnose Shiner, Pecos assiminea Snail, Spikedace, Alamosa Springsnail, Koster's Springsnail, Roswell Springsnail, Socorro Springsnail, Razorback Sucker, Least Tern, Gila (incl. Yaqui) Topminnow, Gila Trout, Gray Wolf, Knowlton Cactus, Kuenzler hedgehog Cactus, Lee

pincushion Cactus, Mesa Verde Cactus, Sneed pincushion Cactus, Zuni Fleabane, Holy Ghost Ipomopsis, Mancos Milk-vetch, Todsens's Pennyroyal, Sacramento prickly Poppy, Pecos Sunflower, Sacramento Mountains Thistle, and Gypsum Wild-buckwheat.

H. Texas, located in a coal-producing region and the site of TX Energy's Gasification Project in Longview, is home to ninety-three (93) threatened or endangered species: Peck's cave Amphipod, Mexican long-nosed Bat, Louisiana black Bear, American burying Beetle, Coffin Cave mold Beetle, Comal Springs dryopid Beetle, Comal Springs riffle Beetle, Helotes mold Beetle, Kretschmarr Cave mold Beetle, Tooth Cave ground Beetle, Whooping Crane, Eskimo Curlew, Fountain Darter, Northern aplomado Falcon, Southwestern willow Flycatcher, Big Bend Gambusia, Clear Creek Gambusia, Pecos Gambusia, San Marcos Gambusia, Ground beetle [unnamed] (*Rhadine exilis*), Ground beetle [unnamed] (*Rhadine infernalis*), Bee Creek Cave Harvestman, Bone Cave Harvestman, Cokendolpher Cave Harvestman, Jaguar, Gulf Coast Jaguarundi, West Indian Manatee, Margay, Braken Bat Cave Meshweaver, Government Canyon Bat Cave Meshweaver, Madla's Cave Meshweaver, Robber Baron Cave Meshweaver, Devils River Minnow, Rio Grande silvery Minnow, Ocelot, Mexican spotted Owl, Brown Pelican, Piping Plover, Attwater's greater Prairie-chicken, Tooth Cave Pseudoscorpion, Comanche Springs Pupfish, Leon Springs Pupfish, Barton Springs Salamander, San Marcos Salamander, Texas blind Salamander, Smalltooth Sawfish, Green Sea turtle, Hawksbill Sea turtle, Kemp's ridley Sea turtle, Leatherback Sea turtle, Loggerhead Sea turtle, River Shiner, Pecos assiminea Snail, Concho water Snake, Government Canyon Bat Cave Spider, Tooth Cave Spider, Least Tern, Houston Toad, Black-capped Vireo, Golden-cheeked Warbler, Finback Whale, Humpback Whale, Gray Wolf, Red Wolf, Red-cockaded Woodpecker, South Texas Ambrosia, Texas Ayenia, White Bladderpod, Zapata Bladderpod, Black lace

Cactus, Chisos Mountain hedgehog Cactus, Lloyd's Mariposa Cactus, Nellie cory Cactus, Sneed pincushion Cactus, Star Cactus, Tobusch fishhook Cactus, Terlingua Creek Cat's-eye, Bunched Cory cactus, Texas prairie Dawn-flower, Ashy Dogweed, Johnston's Frankenia, Navasota Ladies'-tresses, Walker's Manioc, Hinckley Oak, Texas trailing Phlox, Davis' green Pitaya, Little Aguja Pondweed, Texas Poppy-mallow, Slender Rush-pea, Large-fruited Sand-verbena, Texas Snowbells, Pecos Sunflower, and Texas Wild-rice.

I. Oklahoma, located in a coal-producing region, is home to nineteen (19) threatened or endangered species: Gray Bat, Indiana Bat, Ozark big-eared Bat, American burying Beetle, Ozark Cavefish, Whooping Crane, Eskimo Curlew, Leopard Darter, Neosho Madtom, Winged Mapleleaf, Scaleshell Mussel, Piping Plover, Ouachita rock Pocketbook, Arkansas River Shiner, Least Tern, Black-capped Vireo, Gray Wolf, Red-cockaded Woodpecker, and Eastern prairie fringed Orchid.

J. Kansas, located in a coal-producing region, is home to sixteen (16) threatened or endangered species: Gray Bat, Indiana Bat, American burying Beetle, Whooping Crane, Eskimo Curlew, Neosho Madtom, Piping Plover, Arkansas River Shiner, Topeka Shiner, Pallid Sturgeon, Least Tern, Black-capped Vireo, Gray Wolf, Running buffalo Clover, Mead's Milkweed, and Western prairie fringed Orchid.

K. Missouri, located in a coal-producing region, is home to thirty (30) threatened or endangered species: Gray Bat, Indiana Bat, Ozark big-eared Bat, American burying Beetle, Ozark Cavefish, Tumbling Creek Cavesnail, Eskimo Curlew, Niangua Darter, Higgins eye (pearlymussel), Neosho Madtom, Winged Mapleleaf, Pink Mucket, Scaleshell Mussel, Curtis Pearlymussel, Piping Plover, Fat Pocketbook, Topeka Shiner, Pallid Sturgeon, Least Tern, Gray Wolf, Decurrent false Aster, Missouri Bladderpod, Running buffalo Clover, Mead's Milkweed,

Geocarpon minimum (No common name), Eastern prairie fringed Orchid, Western prairie fringed Orchid, Small whorled Pogonia, Pondberry, and Virginia Sneezeweed.

L. Iowa, located in a coal-producing region, is home to nineteen (19) threatened or endangered species: Indiana Bat, American burying Beetle, Eskimo Curlew, Higgins eye, Winged Mapleleaf, Scaleshell Mussel, Orangefoot Pimpleback, Piping Plover, Pocketbook, Topeka Shiner, Iowa Pleistocene Snail, Pallid Sturgeon, Least Tern, Gray Wolf, Prairie Bush-clover, Mead's Milkweed, Northern wild Monkshood, Eastern prairie fringed Orchid, and Western prairie fringed Orchid.

M. Illinois, located in a coal-producing region, is home to thirty-seven (37) threatened or endangered species: Illinois cave Amphipod, Gray Bat, Indiana Bat, American burying Beetle, Tubercled Blossom, Karner blue Butterfly, Catspaw, Clubshell, Eskimo Curlew, Hine's emerald Dragonfly, Fanshell, Higgins eye, Winged Mapleleaf, Pink Mucket, Scaleshell Mussel, Cracking Pearlymussel, Orangefoot Pimpleback, Piping Plover, Fat Pocketbook, Eastern Puma, Northern Riffleshell, Ring pink (mussel), Iowa Pleistocene Snail, Pallid Sturgeon, Least Tern, White Wartyback, Gray Wolf, Decurrent false Aster, Prairie Bush-clover, Running buffalo Clover, Lakeside Daisy, Mead's Milkweed, Eastern prairie fringed Orchid, Small whorled Pogonia, Price's Potato-bean, Leafy Prairie-clover, and Pitcher's Thistle.

N. Indiana, located in a coal-producing region and the site of Duke Energy's Bituminous IGCC Project in Edwardsport, is home to thirty-one (31) threatened or endangered species: Gray Bat, Indiana Bat, American burying Beetle, Karner blue Butterfly, Mitchell's satyr Butterfly, Catspaw, White Catspaw, Clubshell, Eskimo Curlew, Hine's emerald Dragonfly, Fanshell, Winged Mapleleaf, Pink Mucket, Scaleshell Mussel, Cracking Pearlymussel, Rough Pigtoe, Orangefoot Pimpleback, Piping Plover (Great Lakes & non-Great Lakes populations), Fat

Pocketbook, Eastern Puma, Northern Riffleshell, Ring pink, Copperbelly water Snake, Least Tern, White Wartyback, Gray Wolf, Running buffalo Clover, Mead's Milkweed, Eastern prairie fringed Orchid, and Pitcher's Thistle.

O. Pennsylvania, located in a coal-producing region, is home to twenty-four (24) threatened or endangered species: Indiana Bat, American burying Beetle, Karner blue Butterfly, Clubshell, Eskimo Curlew, Fanshell, Pink Mucket, Rough Pigtoe, Orangefoot Pimpleback, Piping Plover, Eastern Puma, Northern Riffleshell, Ring pink, Delmarva Peninsula fox Squirrel, Northeastern beach Tiger beetle, Northern Bog Turtle, Dwarf Wedgemussel, Gray Wolf, Northeastern Bulrush, Smooth Coneflower, Sensitive Joint-vetch, Eastern prairie fringed Orchid, Small whorled Pogonia, and Virginia Spiraea.

P. Ohio, located in a coal-producing region, is home to twenty-nine (29) threatened or endangered species: Indiana Bat, American burying Beetle, Karner blue Butterfly, Catspaw, White Catspaw, Clubshell, Eskimo Curlew, Hine's emerald Dragonfly, Fanshell, Scioto Madtom, Winged Mapleleaf, Pink Mucket, Scaleshell Mussel, Cracking Pearlymussel, Orangefoot Pimpleback, Piping Plover (Great Lakes & non-Great Lakes populations), Fat Pocketbook, Eastern Puma, Northern Riffleshell, Ring pink, Copperbelly water Snake, Lake Erie water Snake, Gray Wolf, Running buffalo Clover, Lakeside Daisy, Northern wild Monkshood, Eastern prairie fringed Orchid, and Virginia Spiraea.

Q. West Virginia, located in a coal-producing region, is home to twenty-three (23) threatened or endangered species: Gray Bat, Indiana Bat, Virginia big-eared Bat, American burying Beetle, Clubshell, Eskimo Curlew, Fanshell, Madison Cave Isopod, Pink Mucket, Eastern Puma, Northern Riffleshell, Ring pink, Cheat Mountain Salamander, Flat-spined three-toothed Snail, James Spiny mussel, Virginia northern flying Squirrel, Gray Wolf, Northeastern

Bulrush, Running buffalo Clover, Harperella, Small whorled Pogonia, Shale barren Rock-cress, and Virginia Spiraea.

R. Virginia, located in a coal-producing region, is home to sixty-six (66) threatened or endangered species: Gray Bat, Indiana Bat, Virginia big-eared Bat, Cumberland Bean, Purple Bean, American burying Beetle, Green Blossom, Slender Chub, Spotfin Chub, Cumberlandian Combshell, Eskimo Curlew, Duskytail Darter, Fanshell, Lee County cave Isopod, Madison Cave Isopod, Roanoke Logperch, Yellowfin Madtom, Appalachian Monkeyface, Cumberland Monkeyface, Pink Mucket, Oyster Mussel, Birdwing Pearlymussel, Cracking Pearlymussel, Dromedary Pearlymussel, Littlewing Pearlymussel, Finerayed Pigtoe, Rough Pigtoe, Shiny Pigtoe, Piping Plover, Eastern Puma, Rough Rabbitsfoot, Tan Riffleshell, Shenandoah Salamander, Green Sea turtle, Hawksbill Sea turtle, Kemp's ridley Sea turtle, Leatherback Sea turtle, Loggerhead Sea turtle, Virginia fringed mountain Snail, James Spinymussel, Delmarva Peninsula fox Squirrel, Virginia northern flying Squirrel, Shortnose Sturgeon, Roseate Tern, Northeastern beach Tiger beetle, Dwarf Wedgemussel, Finback Whale, Humpback Whale, Right Whale, Gray Wolf, Red-cockaded Woodpecker, Seabeach Amaranth, Virginia round-leaf Birch, Small-anthered Bittercress, Northeastern Bulrush, American Chaffseed, Smooth Coneflower, Sensitive Joint-vetch, Peter's Mountain Mallow, Eastern prairie fringed Orchid, Swamp Pink, Small whorled Pogonia, Shale barren Rock-cress, Virginia Sneezeweed, Virginia Spiraea, and Michaux's Sumac.

S. Tennessee, located in a coal-producing region, is home to sixty-six (66) threatened or endangered species: Southern Acornshell, Gray Bat, Indiana Bat, Cumberland Bean, Purple Bean, American burying Beetle, Green Blossom, Turgid Blossom, Yellow Blossom, Catspaw, Slender Chub, Spotfin Chub, Clubshell, Ovate Clubshell, Southern

Clubshell, Cumberlandian Combshell, Upland Combshell, Nashville Crayfish, Eskimo Curlew, Blackside Dace, Amber Darter, Bluemask Darter, Boulder Darter, Duskytail Darter, Goldline Darter, Slackwater Darter, Snail Darter, Appalachian Elktoe, Cumberland Elktoe, Fanshell, Triangular Kidneyshell, Alabama Lampmussel, Pale Lilliput, Conasauga Logperch, Pygmy Madtom, Smoky Madtom, Yellowfin Madtom, Royal Marstonia, Coosa Moccasinshell, Appalachian Monkeyface, Cumberland Monkeyface, Pink Mucket, Oyster Mussel, Scaleshell Mussel, Florida Panther, Birdwing Pearlymussel, Cracking Pearlymussel, Dromedary Pearlymussel, Littlewing Pearlymussel, Cumberland Pigtoe, Finerayed Pigtoe, Rough Pigtoe, Shiny Pigtoe, Southern Pigtoe, Orangefoot Pimpleback, Eastern Puma, Rough Rabbitsfoot, Tan Riffleshell, Ring pink, Anthony's Riversnail, Blue Shiner, Palezone Shiner, Painted snake coiled forest Snail, Spruce-fir moss Spider, Carolina northern flying Squirrel, Pallid Sturgeon, Least Tern, White Wartyback, Gray Wolf, Ruth's golden Aster, Spreading Avens, Spring Creek Bladderpod, Roan Mountain Bluet, American Chaffseed, Tennessee purple Coneflower, American hart's-tongue Fern, Blue Ridge Goldenrod, Tennessee yellow-eyed Grass, Guthrie's Ground-plum, Rock gnome Lichen, Green Pitcher-plant, Small whorled Pogonia, Price's Potato-bean, Leafy Prairie-clover, Braun's Rock-cress, Cumberland Rosemary, Cumberland Sandwort, Large-flowered Skullcap, and Virginia Spiraea.

T. Kentucky, located in a coal-producing region and the site of E.ON U.S. & Louisville Gas and Electric's Advanced Coal Project in Bedford, is home to forty-one (41) threatened or endangered species: Gray Bat, Indiana Bat, Virginia big-eared Bat, Cumberland Bean, American burying Beetle, Catspaw, Clubshell, Combshell, Eskimo Curlew, Blackside Dace, Relict Darter, Cumberland Elktoe, Fanshell, Pink Mucket, Oyster Mussel, Scaleshell Mussel, Cracking Pearlymussel, Dromedary Pearlymussel, Littlewing Pearlymussel, Rough

Pigtoe, Orangefoot Pimpleback, Piping Plover, Fat Pocketbook, Eastern Puma, Northern Riffleshell, Tan Riffleshell, Ring pink, Palezone Shiner, Kentucky cave Shrimp, Pallid Sturgeon, Least Tern, White Wartyback, Gray Wolf, Running buffalo Clover, Short's Goldenrod, White-haired Goldenrod, Price's Potato-bean, Braun's Rock-cress, Cumberland Rosemary, Cumberland Sandwort, and Virginia Spiraea.

U. North Carolina, the site of Duke Energy's Advanced Coal Project in Rutherford and Cleveland Counties, is home to sixty-three (63) threatened or endangered species: Indiana Bat, Virginia big-eared Bat, American burying Beetle, Saint Francis' satyr Butterfly, Cahow, Spotfin Chub, Eskimo Curlew, Appalachian Elktoe, Carolina Heelsplitter, Oyster Mussel, Littlewing Pearlymussel, Brown Pelican, Piping Plover, Eastern Puma, Tan Riffleshell, Smalltooth Sawfish, Green Sea turtle, Hawksbill Sea turtle, Kemp's ridley Sea turtle, Leatherback Sea turtle, Loggerhead Sea turtle, Cape Fear Shiner, Waccamaw Silverside, Noonday Snail, Spruce-fir moss Spider, River Spiny mussel, Carolina northern flying Squirrel, Shortnose Sturgeon, Roseate Tern, Dwarf Wedgemussel, Finback Whale, Humpback Whale, Right Whale, Sperm Whale, Gray Wolf, Red-cockaded Woodpecker, Seabeach Amaranth, Bunched Arrowhead, Spreading Avens, Small-anthered Bittercress, Heller's Blazingstar, Roan Mountain Bluet, American Chaffseed, Smooth Coneflower, Canby's Dropwort, Blue Ridge Goldenrod, Harperella, Dwarf-flowered Heartleaf, Mountain golden Heather, White Irisette, Sensitive Joint-vetch, Rock gnome Lichen, Rough-leaved Loosestrife, Cooley's Meadowrue, Swamp Pink, Green Pitcher-plant, Mountain sweet Pitcher-plant, Small whorled Pogonia, Pondberry, Golden Sedge, Virginia Spiraea, Michaux's Sumac, and Schweinitz's Sunflower.

62. Mining, processing, burning and disposing coal poses significant threats to the health and habitat of these species.

63. According to officials with the National Park Service, Duke Energy's North Cliffside project will increase atmospheric deposition of pollutants, including sulfur, nitrogen, and mercury, to Great Smoky Mountains National Park (GSMNP), leading to acidification of forest soils and streams as well as bioaccumulation of mercury in fish and wildlife.

64. GSMNP is home to eleven ESA-listed species: the Indiana bat, Carolina northern flying squirrel, Red-cockaded Woodpecker, Spotfin Chub, Duskytail Darter, Smoky Madtom, Yellowfin Madtom, Spruce-fir Moss Spider, Spreading avens, Virginia spiarea, and Rock gnome lichen.

65. Ignoring the potentially significant impacts on threatened and endangered species and their habitat associated with coal's cradle-to-grave lifecycle, Defendants approved and allocated the tax credits without consulting the FWS and/or the NMFS.

66. On or about 28 January 2008, Duke Energy received approval to begin construction of its North Carolina project from the North Carolina Division of Air Quality and has commenced construction of that facility.

PLAINTIFFS' CLAIMS

I. Defendants Violated NEPA and the APA by Failing to Assess the Individual and Cumulative Environmental Impacts Associated with Constructing, Operating and Maintaining Duke Energy's Cliffside Project in North Carolina

67. Plaintiffs re-allege, as though fully set forth herein, every allegation contained in each of the foregoing paragraphs.

68. Defendants have violated, and continue to violate, NEPA and the APA by refusing to consider the individual and cumulative environmental effects associated with constructing, operating and maintaining Duke Energy's Cliffside project in North Carolina.

69. Specifically, Defendants have violated NEPA and the APA by refusing to: (1) exclude the action from further analysis because the action normally has insignificant impacts; or (2) prepare an EIS because the impacts normally require such analysis; or (3) prepare an EA to determine whether the impacts may be significant.

70. Moreover, Defendants' violation of NEPA and the APA has resulted in a failure to identify measures aimed at minimizing or mitigating environmental harm – measures which can, and should, be included as conditions precedent for receiving tax credits under the Energy Policy Act of 2005.

71. Defendants' refusal to comply with NEPA is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2008).

II. Defendants Violated the ESA and APA by Failing to Consult with FWS and NMFS Before Taking Actions Likely to Affect Protected Species and Habitats

72. Plaintiffs re-allege, as though fully set forth herein, every allegation contained in each of the foregoing paragraphs.

73. Defendants have violated, and continue to violate, the ESA by refusing to engage in formal consultation with the FWS and the NMFS regarding the effects of constructing, operating and maintaining Duke Energy's Cliffside project on protected species and their habitats and determining whether the project can proceed with or without terms and conditions aimed at protecting listed species and their habitats.

74. Defendants' refusal to comply with the ESA is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2008).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this honorable Court to enter judgment in their favor and:

1. Determine and declare that Defendants have violated NEPA and the APA by failing to prepare either an environmental assessment or an environmental impact statement evaluating the individual and cumulative environmental impacts of the nine facilities for which it allocated one billion dollars in tax credits;

2. Determine and declare that Defendants have violated Section 7 of the ESA by failing to engage in formal consultation with the FWS and NMFS to determine the effects on protected species and their habitats associated with constructing, operating and maintaining the nine facilities for which they approved and allocated one billion dollars in tax credits.

3. Order Defendants to revoke or suspend the tax credits until they fully comply NEPA and the APA by evaluating the individual and cumulative impacts associated with constructing, operating and maintaining these nine facilities, including, *inter alia*: deforestation associated with surface mining; underground mining; endangered, threatened and rare species; blasting (including destruction of aquifers, and drinking water contamination); valley fills; toxic sludge and air pollution created during coal processing; breaches of sludge dams; injection of slurry/sludge into abandoned mines; subsidence above underground mines; transportation of coal by rail, truck and barge; carbon dioxide and other greenhouse gases produced during coal mining, and transport; acid mine drainage; sedimentation in streams, lakes and rivers; landslides; water use and pollution during processing; socio-economic impacts of mining, combusting and disposing of coal; air pollution from combustion (including, all criteria pollutants, greenhouse gases and toxic & hazardous air pollutants); post-combustion waste storage, handling and disposal; water pollution created before, during and after combustion; the additional pollution and costs of retrofitting the proposed integrated gas combined cycle facilities which are currently designed without sequestration; and issues of environmental justice in each community where

the coal used to power these projects will be mined, transported, incinerated and disposed of as air pollution and toxic post-combustion waste.

4. Order Defendants to revoke or suspend the tax credits until they fully comply with the ESA by engaging in formal consultation with the FWS and NMFS.

5. Enjoin Defendants from approving the remainder of the tax credits under the Energy Policy Act of 2005 until Defendants comply with NEPA and the APA.

6. Enjoin Defendants from approving the remainder of the tax credits under the Energy Policy Act of 2005 until Defendants comply with the ESA.

7. Award Plaintiffs costs (including reasonable attorney, witness, and consultant fees) under the Equal Access to Justice Act; under Rule 54 of the Federal Rules of Civil Procedure, and under any statutory authority of this Court.

8. Award such other relief this Court deems appropriate, just, and proper.

Dated at Asheville, North Carolina this 12th day of January 2009.

/s/ Scott Gollwitzer
Scott Gollwitzer

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Certificate of Service

I hereby certify that on 12 January 2009, notice of this filing will be sent via electronic mail to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

/s/ Scott Gollwitzer
Scott Gollwitzer