

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

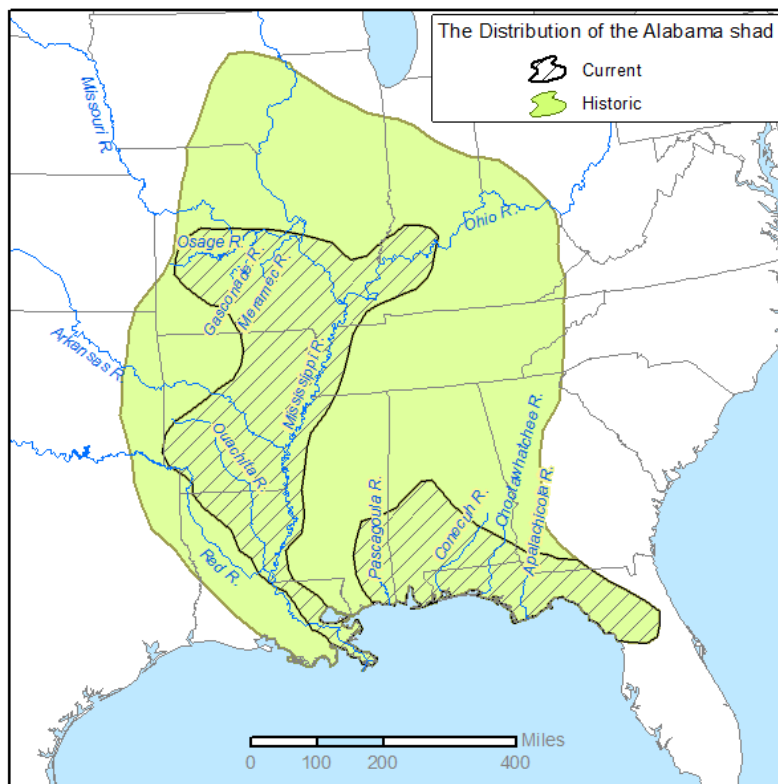
| | | |
|---|---|----------------------------------|
| CENTER FOR BIOLOGICAL |) | |
| DIVERSITY , a nonprofit corporation; |) | |
| 1333 N. Oracle Rd. |) | |
| Tucson, AZ 85705, |) | |
| |) | Case No: |
| Plaintiff, |) | |
| |) | COMPLAINT FOR DECLARATORY |
| v. |) | AND INJUNCTIVE RELIEF |
| |) | |
| GARY LOCKE, SECRETARY OF THE U.S. |) | |
| DEPARTMENT OF COMMERCE; |) | |
| 1401 Constitution Ave., NW |) | |
| Washington, DC 20230, |) | |
| |) | |
| and |) | |
| |) | |
| NATIONAL MARINE FISHERIES |) | |
| SERVICE; |) | |
| 1315 East-West Highway |) | |
| Silver Spring, MD 20910, |) | |
| |) | |
| Defendants. |) | |
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I. INTRODUCTION

1. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) brings this action against GARY LOCKE, Secretary of the Department of Commerce, and the NATIONAL MARINE FISHERIES SERVICE (“Service”) to remedy the Service’s violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). Plaintiff challenges the Service’s determination that listing of the Alabama shad (*Alosa alabamae*) as “endangered” or “threatened” under the ESA is “not warranted.” *Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List Alabama Shad as Threatened or Endangered Under the Endangered Species Act (ESA)*, 76 Fed. Reg. 9320 (Feb. 17, 2011) (“90-Day Finding”).

2. The Alabama shad is an anadromous fish that was once so abundant that it

supported commercial fisheries in the American Southeast. Yet, the shad has suffered steep declines from its historic range, is rarely found today due to habitat loss and degradation, and faces ongoing and new threats even where it still occurs. The Alabama shad and a map of its historic and current ranges are represented by the image and map below:



3. In the 90-Day Finding, the Service denied a “citizen petition” that was submitted by the Center to the Service on April 20, 2010 (“Petition”), which formally petitioned the Service to list the Alabama shad as “endangered” or “threatened” pursuant to the ESA’s statutory petition process.

4. The 90-Day Finding is inconsistent with substantial information presented in the Petition, including new information about the shad’s drastic decline from its prior abundance and ongoing as well as new threats, the determinations of several scientific professional organizations and Southeastern states that the shad is imperiled, and the Service’s own long-standing acknowledgement that the Alabama shad may be a “candidate” for ESA protection and is a “species of concern” due to losses in its range and ongoing threats to its continued existence.

5. The 90-Day Finding violates the ESA’s low threshold at the 90-day finding stage, which requires the Service to assess simply whether the Petition presents substantial information that would lead a “reasonable person” to find that ESA protections for the shad “*may be*” warranted. 16 U.S.C. § 1533(b)(3)(A) (emphasis added); 50 C.F.R. § 424.14(b).

6. Therefore, by this action, the Center challenges the Service’s 90-Day Finding under the ESA and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2) (“APA”), because the 90-Day Finding runs counter to the evidence that was before the Service, is based on improper legal standards, ignores relevant factors, is contrary to the ESA, and is without observance of the procedures required by law. 5 U.S.C. §§ 706(2)(A), (D).

7. The Center seeks judicial relief declaring that the Service failed to lawfully determine whether the Petition presented substantial information indicating that the shad may warrant listing, and asks that the Court vacate and remand the 90-Day Finding. Such relief is

necessary to afford the shad the full protections of law to which it is entitled and needs in order to survive and recover from the threat of extinction.

II. JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1346 (United States as a defendant); 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act).

9. The relief sought is authorized by 28 U.S.C. §§ 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

10. As required under the ESA, the Center provided the Service with written notice of the Center's intent to sue more than 60 days ago. 16 U.S.C. 1540(g)(2). Because the Service has not remedied the violations of law, there exists an actual justiciable controversy between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

11. The Center has no other adequate remedy at law. The Service's failure to comply with the ESA will injure and result in irreparable harm to the shad, the Center, the Center's members, and the public. No monetary damages or other legal remedy can adequately compensate the Center, its members, or the public, for this harm.

12. The federal government has waived sovereign immunity in this action pursuant to the ESA. 16 U.S.C. § 1540(g), and the APA, 5 U.S.C. § 702.

13. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e), because the Defendants reside in this district and a substantial part of the events and omissions, which gave rise to this action, occurred in this district.

III. PARTIES

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a nonprofit corporation that 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 dedicated to the preservation, protection, and restoration of biodiversity and ecosystems throughout the world. The Center has over 36,800 members and is headquartered in Tucson, Arizona, with additional offices in Alaska, Arizona, California, Minnesota, Nevada, New Mexico, New York, Oregon, Vermont, and Washington, D.C.

15. Center members and staff use and enjoy areas vital to the survival of the Alabama shad for recreation, research, aesthetic enjoyment, and other scientific, conservation, spiritual, or educational activities. Center members and staff are aesthetically, spiritually, and scientifically concerned with the continued existence of the Alabama shad.

16. For example, Center member Steve Shepard resides on the West Pascagoula River, in Mississippi where the Alabama shad is thought to still persist. He fishes the estuary daily, and enjoys drawing images inspired by the area. He is harmed by the ongoing decline of the Alabama shad and the Service’s failure to implement federal protection for this imperiled species. The injury he suffers are aesthetic, spiritual, moral, and recreational, and could be cured by a favorable ruling by the Court.

17. The Center’s members’ recreational, aesthetic, educational, scientific, spiritual, professional, and conservation interests are being adversely affected and irreparably injured by the Service’s continued violations of the ESA.

18. The Center brings this suit on its own behalf and on the behalf of its adversely affected members and staff who have been, and will continue to be, harmed by the Service’s

denial of the listing Petition and failure to protect the Alabama shad and its habitat. The above-described recreational, aesthetic, educational, scientific, spiritual, professional, and conservation interests of the Center and its members and staff have been – and, unless this Court grants the requested relief, will continue to be – adversely affected and irreparably injured by Defendants’ violations of the ESA.

19. Defendant GARY LOCKE is Secretary of the Department of Commerce and is responsible for the administration and implementation of the ESA with regard to the Alabama shad, and for compliance with all other federal laws applicable to the Department of Commerce. Mr. Locke is sued in his official capacity.

20. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency within the National Oceanic and Atmospheric Administration and a division of the Department of Commerce. It is authorized and required by law to protect and manage the marine wildlife of the United States, including by administering, implementing, and enforcing the ESA. The Secretary of Commerce has delegated the Service the authority to implement the ESA for the Alabama shad, including the responsibility for making decisions and promulgating regulations, including proposed and final listing decisions and the processing of petitions for such actions.

IV. THE RELEVANT STATUTORY AND REGULATORY SCHEME

A. The Endangered Species Act

21. The ESA is the nation’s preeminent wildlife protection law, and is designed to conserve endangered and threatened species and the ecosystems upon which those species depend. 16 U.S.C. § 1531(b).

22. To achieve the ESA’s purposes, the Service is required to protect imperiled species by listing them as either “threatened” or “endangered” if they are facing the threat of

extinction due to any one, or any combination of the following factors under ESA. These five “listing factors” are:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) over-utilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The presence of any one or more of these five listing factors supports decision to list a species as endangered or threatened under the ESA. 50 C.F.R. § 424.11(c).

23. A species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it 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(20). Species that are listed as endangered or threatened are known as “listed” species.

24. A species receives the substantive protections of the ESA only if it is listed. The ESA’s substantive protections include, *e.g.*: (1) Section 4(A)(3)(A)(i), which requires the Service to designate areas as “critical habitat” for the species, which are those areas that are “essential to the conservation of the species”, 16 U.S.C. §§ 1532(5); 1533(A)(3)(A)(i); (2) Section 4(f), which requires the Service to develop and implement a plan for the recovery of listed species, *id.* § 1533(f); (3) Section 7(a)(2), which requires all federal agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species, and are not likely to destroy or adversely modify listed species’ critical habitat, *id.* § 1536(a)(2); and (4) Section 9, which prohibits the unlawful “take” of listed species. *Id.* § 1539(a). Thus, listing is the essential first step in the ESA’s system of species protection and recovery.

25. Any interested person can initiate the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

26. Upon receipt of a petition to list a species, the Secretary has 90 days to make a finding (to the maximum extent practicable) as to whether the petition “presents substantial scientific or commercial information indicating that the potential action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). “Substantial information” is “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b)(1). This determination is known as a 90-day finding.

27. In evaluating, at the 90-day finding stage, whether a citizen petition presents substantial information that listing a species may be warranted, the Service must assess whether the petition: (1) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references. 50 C.F.R. § 424.14(b)(2).

28. The Service must evaluate the petitioner’s request based upon the information in the petition and the information readily available in the Service’s own files. *See, e.g., 90-Day Finding*, 76 Fed. Reg. at 9321.

29. A petition need not establish a strong likelihood or high probability that the species is in fact threatened or endangered to support a positive 90-day finding. The Service

must accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles. *Id.* at 9321-9322.

30. If it makes a positive 90-day finding in response to a petition, the Service must conduct a "status review" of the species. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.14(b)(2)(iii). During the status review, the Service is not limited to the information presented in the listing petition and its own files, but must consider the "best scientific and commercial information available." *Id.* A positive 90-day finding does not predetermine the outcome of a status review.

31. Based on the results of the status review, the Service must make one of three findings within 12 months of receipt of the petition, known as a "12-month finding": (1) the petitioned action is "not warranted"; (2) the petitioned action is "warranted"; or (3) the petitioned action is warranted, but the Service's issuance of a proposed rule is presently "precluded by work on other pending proposals for listing species of higher priority" (this is known as a "warranted but precluded" finding). 16 U.S.C. § 1533(b)(3)(B)(iii).

32. If the Service issues a 12-month finding that listing the species is "not warranted", that finding is immediately subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii).

33. If the Service issues a 12-month finding that listing the species is "warranted", it must publish a proposed rule to list the species as endangered or threatened in the Federal Register. *Id.* § 1533(b)(5). Within one year of the publication of a proposed rule to list a species, the Service must issue a final rule listing the species along with a final designation of critical habitat for the species (to the maximum extent prudent and determinable). *Id.* §§ 1533(a)(3), 1533(b)(6)(A), 1533(b)(6)(C).

34. If the Service issues a 12-month finding that listing a species “warranted but precluded”, it must “promptly publish [that] finding in the Federal Register” together with the reasons and data supporting its position that issuance of a proposed rule is in fact “precluded” by higher-priority listing actions, and that it is making “expeditious progress” in adding qualified species to, and removing recovered species from, the endangered and threatened species lists. 16 U.S.C. § 1533(b)(3)(B)(iii).

35. Notwithstanding the citizen petition process, the Service may on its own initiative designate species as “candidates” for listing under the ESA. 50 C.F.R. § 424.15(b). A “candidate” is defined by regulation to mean a species that is “being considered by the [Service] for listing as an endangered or threatened species, but not yet the subject of a proposed rule.” 50 C.F.R. §§ 424.02(b); § 424.15(b). The Service’s designation of a species as a candidate is published in the Federal Register and is subjected to public comment. *Id.* § 424.15(c). Designation as a candidate species does not confer any procedural or substantive protections of the ESA. *Id.* § 424.15(b).

36. The Service also maintains a list of “species of concern” – *i.e.*, species “about which [the Service] has some concerns regarding status and threats” but for which there is “insufficient information” to list under the ESA. *See, e.g., Endangered and Threatened Species; Establishment of Species of Concern List, Addition of Species to Species of Concern List, Description of Factors for Identifying Species of Concern, and Revision of Candidate Species List Under the Endangered Species Act*, 69 Fed. Reg. 19,976 (Apr. 15, 2004). As with candidate species, the Service publishes its list “species of concern” in the Federal Register from time to time and invites public comment on the species of concern list. *Id.* Also like candidate species, species of concern receive none of the ESA’s substantive protections. *Id.*

B. The Administrative Procedure Act

37. Although the ESA provides for judicial review of a negative 90-day finding, 16 U.S.C. §§ 1533(b)(3)(C)(ii), 1540(g), the APA governs the standard and scope of judicial review for negative 90-day findings. The APA states that a reviewing court “shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law” or “without observance of procedure required by law”. 5 U.S.C. §§ 706(2)(A), (D).

V. FACTUAL AND PROCEDURAL BACKGROUND

A. The Alabama Shad

38. The Alabama shad is a short-lived, anadromous fish that spawns in flowing rivers from the Mississippi River drainage to the Suwannee River in Florida. At one time, the shad supported a commercial fishery and was found in freshwater systems as far inland as eastern Oklahoma, Iowa, and West Virginia, but it is now rarely found only as far inland as central Missouri and eastern Arkansas.

39. The State of Mississippi lists the shad as a “species of greatest conservation need”, meaning that it is “in need of immediate conservation action and/or research because of extreme rarity, restricted distribution, unknown or decreasing population trends, specialized habitat needs and/or habitat vulnerability.” This designation provides no regulatory protection for the shad.

40. The shad is listed by the State of Alabama as a “high conservation concern taxa”. Alabama provides no specific regulatory protections for the shad.

41. The shad is listed as a species of special concern by the State of Georgia. This designation does not provide any regulatory protection for the shad.

42. In 1996, the International Union for Conservation of Nature (“IUCN”), a membership organization made up of more than 1,000 organizations and 10,000 individual scientists and experts, classified the Alabama shad as “endangered”, meaning that the shad was considered to be at “a very high risk of extinction in the wild”. In 2010, the IUCN changed this designation to “data deficient”, but still recognized that “[t]here has been a widespread decline in this species throughout much of its range” and that “[i]t is now thought to be extirpated from much of its former range with large-scale declines in abundance also reported.”

43. NatureServe, an international network of biological inventories that collects and manages detailed local information on plants, animals, and ecosystems, determined in 2008 that the Alabama shad is critically-imperiled in major portions of its range. NatureServe recommended the creation of “fishways” so that shad “can migrate through or around locks and dams.”

44. The American Fisheries Society, which is the largest organization of fisheries professionals in the world, classified the shad as “threatened” in 2008. The Fisheries Society made this determination based on factors that closely parallel the five listing factors that are set forth in Section 4(a)(1) of the ESA for determining whether a species is threatened or endangered. 16 U.S.C. § 1533(a)(1). The Fisheries Society specifically found that the shad is threatened by the “present or threatened destruction, modification, or reduction of a taxon’s habitat or range” and “over-exploitation for commercial, recreational, scientific, or educational purposes.”

B. The Service’s Pre-Petition Actions Regarding the Shad

45. Recognizing that the Alabama shad is in poor biological condition and faces a relatively severe and/or imminent degree of threat, in 1997 the Service added the shad to its

“candidate” species list. *Endangered and Threatened Species; Revision of Candidate Species List under the Endangered Species Act*, 62 Fed. Reg. 37,560 (July 14, 1997). By designating the shad as a “candidate” species, the Service stated that it was “notify[ing] the public that [it] has concerns” regarding the shad. *Id.*

46. In 2004, the Service moved the shad, along with 24 other candidate species, to a newly-created “Species of Concern” list, due to the agency’s concerns about the shad’s status. 69 Fed. Reg. 19,975.

47. In designating the shad as a species of concern in 2004, the Service indicated that it would conduct a “status review” of the shad and other species of concern. 69 Fed. Reg. at 19,976.

48. Under the ESA, a status review is required if the Service makes a positive – *i.e.*, “may be warranted” – 90-day finding in response to a citizen petition. 16 U.S.C. § 1533(b)(1)(A).

49. The Service has never initiated or completed a status review of the shad.

50. From 2004 to present, the Service has found that many of the 24 other species from its original 2004 Species of Concern list “may” warrant listing under the ESA, and in many of those cases has ultimately listed the species. *See, e.g., Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. 26,852 (May 9, 2006); *Endangered and Threatened Species: Endangered Status for the Cook Inlet Beluga Whale*, 73 Fed. Reg. 62,919 (Oct. 22, 2008); *Endangered and Threatened Wildlife and Plants; Proposed Listing Determinations for Three Distinct Population Segments of Atlantic Sturgeon in the Northeast Region*, 75 Fed. Reg. 61,872 (Oct. 6, 2010); *Endangered and Threatened Wildlife and Plants; Proposed Listings for Two Distinct Population Segments of Atlantic Sturgeon*

(Acipenser oxyrinchus oxyrinchus) in the Southeast, 75 Fed. Reg. 61,904 (Oct. 6, 2010); *Listing Endangered and Threatened Species: Threatened Status for the Oregon Coast Coho Salmon Evolutionarily Significant Unit*, 76 Fed. Reg. 35,755 (June 20, 2011); *Endangered and Threatened Wildlife and Plants; Endangered Status for the Largetooth Sawfish*, 76 Fed. Reg. 40,822 (July 12, 2011).

51. In 2006, the Service published a revision of its Species of Concern list in the Federal Register, and removed and added species from the list. *Endangered and Threatened Species; Revision of Species of Concern List, Candidate Species Definition, and Candidate Species List*, 71 Fed. Reg. 61,022 (Oct. 17, 2006). The Service reaffirmed that it considers the shad to be a species of concern due to losses in its range. *Id.* at 61,023.

52. From 2006 to 2010, the Service took no additional action to list or evaluate the shad's status.

C. The Center's 2010 Petition to List the Shad under the ESA

53. On April 20, 2010, the Center formally petitioned the Service to list the shad as endangered or threatened pursuant to the ESA.

54. The Petition clearly identified itself as a petition to list the Alabama shad under the ESA.

55. The Petition was accompanied by a bibliography of supporting documentation for every factual statement made.

56. The Petition explained that the Alabama shad warrants the ESA's protections due to steep declines from historic abundance caused by habitat modification and degradation from dams, dredging, and pollution; overutilization in historical commercial fisheries with continued indirect effects from fishing and eradication programs; the inadequacy of existing regulatory

mechanisms associated with current status classifications; and other natural or manmade factors including pollution, sedimentation, and drought.

57. The Petition explained how the shad once supported a commercial fishery but that the shad fishery has crashed. The Petition described how the shad has suffered dramatic, long-term declines from its historic abundance as far north as Keokuk, Iowa in the Mississippi River drainage, at Louisville, Kentucky in the Ohio River, and in eastern Oklahoma. The Petition explained how these declines have been caused by habitat loss – in particular, because the shad has been cut off from many of its historical spawning areas by dams and locks – and by habitat degradation from pollution, dredging and other factors. The Petition also explained how today, the shad is likely extirpated in Oklahoma, Tennessee, Iowa and Louisiana and severely reduced in Alabama, with surveys for the shad in the Arkansas and Mississippi rivers yielding no individuals. The only known extant spawning runs occur in a handful of rivers in the Florida Panhandle and southern Alabama, and in two areas of the Mississippi River system (specifically, in the Apalachicola, Choctawhatchee, Conecuh, Pascagoula, Ouachita, Missouri, Gasconade, Osage, and Meramec rivers). The Petition discussed how the shad is considered very rare in large portions of its historic range, and where it does persist, populations are small.

58. In developing the Petition to list the shad, the Center met with fisheries professionals from the Southeast Fishes Council, including individuals with expertise in the status of the Alabama shad, who unanimously recommended a threatened listing for the shad under the ESA. The Petition contained this information.

59. The Petition also informed the Service of the determinations of several professional societies and States that the shad is vulnerable, including many such determinations that have been made since the Service added the shad to its Species of Concern list in 2004.

60. The Petition further explained how currently, reservoirs are being proposed in areas where the shad still persists, and that these reservoirs will create additional restrictions to the shad's range, and thus, present new threats to shad's continued existence.

D. The Service's 90-Day Finding for the Petition

61. The Service's 90-Day Finding was published in the Federal Register on February 17, 2011. 90-Day Finding, 76 Fed. Reg. 9320.

62. In the 90-Day Finding, the Service acknowledged that respected scientific organizations and the States of Mississippi and Alabama have ranked the Alabama shad as "vulnerable", "endangered", or "threatened" due to the shad's limited distribution in its former range and ongoing threats. However, the Service dismissed these threats due to uncertainty about the shad's precise "rate" of decline and a perceived lack of "consensus" among them about the precise magnitude and severity of threats.

63. The Service recognized that the Petition documented the reasons for Service's own long-standing concerns about the Alabama shad – as made evident, *e.g.*, by the Service's designation of the shad as a "candidate" species in 1997 and as a "Species of Concern" in 2004 – but dismissed this information out of hand on the basis that it is not "new." *Id.* at 9326-27. The Service also dismissed other information in the Petition about threats to the Alabama shad's existence on the basis that it is not "new" information.

64. In the 90-Day Finding, the Service dismissed published, peer-reviewed studies that documented the Alabama shad's widespread decline and ongoing threats on the basis that these studies are not "specific" about the "nature" or "degree" of such threats and do not include precise locations where such threats either have occurred or are occurring. *Id.* at 9325-26.

65. Although the Petition documented new information, including the recommendations of professional societies that the shad is vulnerable to extinction, the Service also dismissed this information on the basis that it is not conclusive.

66. Although the Petition explained that there are major geographical areas in which the shad is no longer found, the Service did not assess in the 90-Day Finding the shad's steeply-reduced distribution in its former range or otherwise assess threats to the shad in a "significant portion of its range."

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violations of the ESA and APA: The 90-Day Finding is Arbitrary, Capricious, an Abuse of the Service's Discretion, Not in Accordance with the ESA, and Without Procedures Required by Law

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

68. The ESA provides a low threshold for determinations on ESA listing petitions at the 90-day finding stage. The Service must simply determine "whether the petition presents substantial scientific or commercial information indicating that [listing] *may* be warranted." 16 U.S.C. § 1533(b)(3) (emphasis added). Substantial information is "information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b).

69. In the 90-Day Finding, the Service determined that the Center's Petition to list the Alabama shad under the ESA did not provide substantial "new" information that would lead a reasonable person to believe that the listing of the shad may be warranted. The Service's determination is arbitrary, capricious, an abuse of agency discretion, contrary to the ESA, and without observance of the procedures required by law, in violation of Section 706(2) of the APA,

because: it runs counter to the substantial information before the Service in the Petition and in other sources; conflicts with the Service's own long-standing concerns about the Alabama shad; supplants the ESA's low threshold for 90-day findings with a heightened standard; and requires a showing of "new" or precise information that is not required by the ESA and in any event, was met by the Petition.

SECOND CLAIM FOR RELIEF

Violations of the ESA and APA: Failure to Consider Risk of Extinction Throughout a Significant Portion of the Alabama Shad's Range

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

71. Under the ESA, an "endangered" species is one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The ESA defines a "threatened" species as one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). A species can be extinct throughout a "significant portion of its range" if there are major geographical areas in which it is no longer viable but once was. In making listing determinations under the ESA, the Service must at least explain why the area in which the species can no longer live is not a "significant portion of its range."

72. Although the Petition documented how scientific organizations, affected states, and the Service itself acknowledge there are major geographical areas in which the shad once occurred but is no longer found, the Service did not consider whether any of these areas constitute a "significant portion" of the shad's range, let alone explain why those geographical areas do not comprise a "significant portion" of the shad's range.

73. In addition to drastic reductions from its historic range, the Alabama shad is rarely documented, and faces ongoing and new threats to its continued existence, even in those areas where it is still found. Yet, the Service never considered whether those areas where the shad persists constitute a “significant portion of its range”, and whether its threatened status in those areas may warrant ESA protection for the shad.

74. The Service’s failure to consider whether any of the areas where the shad persists or once occurred constitute a “significant portion” of the shad’s range, or at least explain why these geographical areas do not comprise a “significant portion” of the shad’s range, is arbitrary, capricious, an abuse of the Service’s discretion, contrary to the ESA, and without observance of the procedure required by law, in violation of Section 706(2) of the APA.

VII. PRAYER FOR RELIEF

For the reasons stated above, Plaintiff respectfully requests that the Court grant the following relief:

1. Issue a Declaratory Judgment that Defendants are in violation of the law as alleged herein;
2. Declare unlawful and set aside the Service’s 90-Day Finding on the Center’s listing Petition for the Alabama shad;
3. Order Defendants to conduct a new 90-day finding for the Alabama shad consistent with the law;
4. Award Plaintiff its attorney fees and costs pursuant to 16 U.S.C. § 1540(g)(4); and
5. Grant Plaintiff such other relief as the Court deems just and proper.

DATED: January 10, 2012.

Respectfully submitted,

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