

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK**

CENTER FOR BIOLOGICAL DIVERSITY,  
a non-profit organization,

Plaintiff,

v.

UNITED STATES COAST GUARD; PAUL F.  
ZUKUNFT, in his official capacity as  
Commandant of the United States Coast Guard;  
GINA MCCARTHY, in her official capacity as  
Administrator of the United States  
Environmental Protection Agency; and the  
ENVIRONMENTAL PROTECTION  
AGENCY.

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1. In this civil action for declaratory and injunctive relief, Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) challenges the failure of the Defendants U.S. Coast Guard, Admiral Paul F. Zukunft, Commandant of the Coast Guard (collectively “Coast Guard”), Gina McCarthy, Administrator of the Environmental Protection Agency, and the Environmental Protection Agency (collectively “EPA”) to comply with the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA” or “Act”) for actions and inactions related to the failure to complete consultation and otherwise ensure that oil spill response planning in the New York Harbor and lower Hudson River will not result in jeopardy to a listed species or destruction or adverse modification of critical habitat. 16 U.S.C. § 1536.

2. The Port of New York and the lower Hudson River are experiencing an unprecedented boom in the transport of oil through the region by rail and barge. This increased transport happens in the context of a past history of catastrophic barge accidents in the area and a

very recent history of deadly rail accidents throughout North America involving oil and petroleum products that have resulted in several fiery derailments and hundreds of thousands of gallons of crude oil being spilled into waterways.

3. These accidents, and the subsequent fires and environmental damage resulting from crude oil releases, pose an imminent hazard of death, serious illness, and substantial endangerment to the environment, including adverse impacts to species protected under the ESA.

4. Multi-agency prevention of and response to oil and hazardous waste spills in the New York Harbor and lower Hudson River are governed by the New York and New Jersey Area Contingency Plan (“Plan,” “2011 NY/NJ ACP,” or “ACP”), developed by Defendants.

5. The Defendants play a critical role in preventing and responding to inevitable future rail and barge accidents to minimize oil spill impacts. Only through careful advance planning can Defendants prevent impacts to endangered species and minimize further harm from their response efforts. Defendants, however, have failed to ensure that oil spill clean-up measures will not jeopardize the continued existence of listed species or destruction or modification of their critical habitat as required by the ESA. 16 U.S.C § 1536(a)(2).

6. Oil spill response measures have the potential to harm listed species in the ACP planning area, such as the Atlantic Sturgeon listed as endangered in 2010, which may be jeopardized if spill response activities disturb the few remaining feeding and spawning sites in the Hudson River, one of the healthiest remaining in the species’ range. Toxic exposure from the use of dispersants may further harm listed sturgeon and whale species. Similarly, beach cleanup operations can destroy protected loggerhead turtle, piping plover and roseate tern nests. Vehicle activity can crush nests and eggs, cause harassment of birds, and leave tire ruts that that inhibit movement of turtle hatchlings to sea.

7. The 2011 NY/NJ ACP was developed without formal or informal consultation pursuant to the Endangered Species Act. Furthermore, the Plan predates the Deepwater Horizon oil spill, and therefore does not incorporate the lessons learned from that event regarding the impacts of oil spill response measures to wildlife and the environment. It is critical that

consultation occur as part of contingency planning because once an accident occurs, there is little time to consider impacts to listed species.

8. Therefore, the Center brings suit to compel the EPA and Coast Guard to complete consultation regarding the oil spill clean-up measures authorized by the 2011 NY/NJ ACP and to ensure that oil spill response actions are not likely to jeopardize listed species or destroy or adversely modify their critical habitat.

## **II. JURISDICTION AND VENUE**

9. This court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) (actions under the ESA); 16 U.S.C. § 1540(g) (ESA citizen suit provision); 5 U.S.C. § 702 (Administrative Procedure Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1346 (action against the United States); 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty); and 28 U.S.C. § 2201-02 (power to issue declaratory judgments in cases of actual controversy).

10. By written notice sent by electronic mail and certified mail on February 19, 2014, Plaintiff informed the EPA and the Coast Guard of their violations more than sixty days prior to the filing of this Complaint, as required by the Endangered Species Act. 16 U.S.C. § 1540(g). The EPA and Coast Guard have failed to remedy their violations of the Act.

11. Plaintiff demanded that the EPA and Coast Guard satisfy their statutory obligations to undertake consultation regarding the potential impacts of oil spill clean-up measures authorized under the 2011 NY/NJ ACP. The EPA and Coast Guard have failed to remedy the alleged violations, and therefore an actual, justiciable controversy exists within the meaning of 28 U.S.C. § 2201(a).

12. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(e), as a substantial part of the events or omissions giving rise to the claim occur in this District as this is the area covered by the ACP and the Defendants have offices in this District.

### III. PARTIES

13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) corporation with offices in California, Washington, Oregon, Arizona, Nevada, New Mexico, Illinois, Minnesota, Vermont, and Washington, D.C. Through science, policy, and law, the Center works to secure a future for all species, great or small, hovering on the brink of extinction. The Center has over 50,000 members throughout the United States and the world. These members include those who have viewed, photographed, and otherwise appreciated threatened and endangered species that may be affected by oil spill clean-up measures authorized under the 2011 NY/NJ ACP, who live near these species, habitats, and ecosystems, and who intend to visit and enjoy these species, habitats and ecosystems in the future.

14. Plaintiff has members with concrete interests in the conservation of endangered marine and coastal species and the protection of their habitat. Plaintiff's members and staff have researched, studied, observed, and sought protection for endangered species at risk of harm from oil spills and oil spill responses. In addition, the Plaintiff's members and staff have visited and observed, or sought out, threatened and endangered marine and coastal species. The Plaintiff's members also enjoy recreating in unspoiled coastal areas. They enjoy visiting beaches, surfing, kayaking, swimming, and wading in the ocean, bays and rivers covered by the 2011 NY/NJ ACP. The ability to view endangered species in these habitats enriches these experiences.

15. The Plaintiff's members and staff intend to continue to visit and observe, or attempt to visit and observe, these species in the near future. These members derive scientific, recreational, conservation, and aesthetic benefits from rare species' existence in the wild. Plaintiff's staff and members' use and enjoyment of the lands, coastline, waters, and species inhabiting these areas is entirely dependent on the continued existence of healthy, sustainable, and accessible ecosystems and populations. Any activities, such as oil spill response actions, that destroy, degrade, or diminish these areas, or that kill, injure, harm, harass, or displace populations, also interfere with the Plaintiff's staff and members' use and enjoyment of the areas and species. As such, activities authorized by Defendants directly and irreparably injure Plaintiff's interests.

The EPA and Coast Guard's failure to comply with ESA requirements delays protections that insure the future benefits of the existence of endangered species and their critical habitat.

16. The Plaintiff has also suffered informational and procedural injuries from Defendants' failure to comply with the ESA in permitting oil spill clean-up measures authorized under the 2011 NY/NJ ACP without full and adequate analysis of the environmental impacts. These injuries are connected to the Plaintiff's substantive conservation, recreational, scientific, and aesthetic interests. The Plaintiff's members and staff rely on Defendants to comply with the requirements of the ESA and prepare adequate environmental analyses as required by the statute, including biological assessments. The Plaintiff's rely on these analyses to achieve their organizational purposes, including monitoring the use of marine and coastal environments and the management of marine and coastal wildlife; monitoring compliance with the law concerning these species' management; educating members, directors, staff, and the public concerning species management and the state of the coastal environment; and advocating policies that protect coastal habitat and wildlife. The actions of the Defendants not only harm the procedural interest of the Center and its members, but also have harmed and threaten future harm to the concrete interests the Center, its members, staff, and board have in the fish, wildlife and ecosystems of the waters of the United States.

17. The interests and organizational purposes of the Plaintiff and their staff and members will be directly and irreparably injured by Defendants' violations of law as described in this complaint. Unless this Court grants the requested relief and orders Defendants to comply with the ESA, harm to the terrestrial, coastal, and marine environments and harm to the species that depend on those environments will continue to accrue, and the aesthetic, recreational, educational, professional, scientific, spiritual, and conservation interests of the Plaintiffs and their staff and members will continue to be adversely affected.

18. For example, spill response measures have the potential to jeopardize the endangered Atlantic and shortnose sturgeon by disturbing the riverbed areas where they feed and spawn, as well as the threatened loggerhead and green sea turtles through habitat loss from

dredging, direct impacts from in-situ burning, and disturbance of nesting sites by response vehicles and tire ruts that inhibit movement of turtle hatchlings to sea. The threatened piping plover and the endangered roseate tern may also be harmed by vehicle activity that can crush nests and eggs, and cause harassment of birds.

19. These are actual, concrete injuries to Plaintiff, caused by the EPA and Coast Guard's failure to comply with the ESA, the Administrative Procedure Act, and their implementing regulations. The relief requested will fully redress those injuries. Plaintiff brings this action on its own behalf and on behalf of their adversely affected members and staff.

20. Defendant UNITED STATES COAST GUARD is the United States federal agency that jointly shares responsibility with the EPA to ensure that the requirements of applicable laws are followed and enforced with respect to the preparation and revision of regional and area contingency plans, such as the 2011 NY/NJ ACP. These requirements include developing federal contingency plans, and approving, disapproving, or approving with modification the preauthorization plans that address specific oil spill clean-up measures.

21. Defendant PAUL F. ZUKUNFT, Commandant of the United States Coast Guard, is sued in his official capacity. He is the highest ranking official within in the United States Coast Guard and, in that capacity, has responsibility for co-chairing Regional Response Teams that develop federal regional and area contingency plans, and approving, disapproving, or approving with modification the preauthorization plans that address specific oil spill clean-up measures. He also has responsibility for compliance with all other federal laws applicable to the United States Coast Guard, including the ESA.

22. Defendant GINA MCCARTHY is sued in her official capacity as Administrator of the Environmental Protection Agency. She is the highest ranking official within the Environmental Protection Agency and, in that capacity, has ultimate responsibility for co-chairing Regional Response Teams that develop federal regional contingency plans, and approving, disapproving, or approving with modification the preauthorization plans that address specific oil

spill clean-up measures. She also has responsibility for compliance with all other federal laws applicable to the Environmental Protection Agency, including the ESA.

23. Defendant ENVIRONMENTAL PROTECTION AGENCY is the United States federal agency that has responsibility to ensure that the requirements of applicable laws are followed and enforced with respect to the preparation and revision of the National Contingency Plan, and regional and area contingency plans, such as the 2011 NY/NJ ACP. These requirements include approving, disapproving, or approving with modification the preauthorization plans that address specific oil spill clean-up measures.

#### **IV. STATUTORY BACKGROUND**

##### **A. The Clean Water Act**

###### *Oil Spill Response Measures*

24. The federal government's oil spill response duties and procedures are set forth in section 311 of the Clean Water Act. 33 U.S.C. § 1321. In the event of an oil spill, the President must take actions necessary to ensure effective and immediate removal of the discharged oil, as well as mitigation or prevention of a substantial risk of discharge of oil into the waters of the United States. *Id.* § 1321(c)-(d).

25. The President's duties with respect to responding to oil spills have been delegated to EPA and the Coast Guard, among others. Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 22, 1991).

26. Removal activities must be conducted pursuant to a detailed National Contingency Plan ("NCP"). *Id.* § 1321(d). The NCP must delineate the duties of various federal, state, and local officials in response to an oil spill, including Coast Guard "strike teams"; identify techniques and procedures for response; and provide a Product Schedule identifying which "dispersants, other chemicals, and spill mitigating . . . substances . . . may be used," and the quantities and locations in which those chemicals may be used. *Id.* Further, the National Contingency Plan must include a "fish and wildlife response plan" for the rescue and minimization of damage to wildlife

and habitat from a discharge. *Id.*

### *Area Contingency Plans*

27. In addition to the National Contingency Plan, the Clean Water Act also requires the development of Area Contingency Plans, prepared by a designated “Area Committee” comprised of federal, local, and state officials, including Defendants. 33 U.S.C. § 1321(j)(4).

28. The designated on-scene coordinators – which the Coast Guard provides for discharges within or threatening the coastal zone and the EPA provides for discharges or releases into or threatening the inland zone – are responsible for overseeing the development of the Area Contingency Plan for their respective areas of responsibility. 40 C.F.R. § 300.120. Area Contingency Plans are then approved by Defendants.

29. Each Area Contingency Plan must include a “Fish and Wildlife and Sensitive Environments Plan” that is prepared in consultation with the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration and identifies “potential environmental effects on fish and wildlife, their habitat, and other sensitive environments resulting from removal actions or countermeasures, including the option of no removal” and methods “for deterring sensitive fish and wildlife from entering oiled areas, and for capturing, holding, cleaning, and releasing injured wildlife.” *Id.* § 300.210(c)(4).

30. In addition, area contingency plans must include a list of actions, equipment, “dispersants or other mitigating substances and devices, and personnel available . . . to ensure an effective and immediate removal of a discharge, and to ensure mitigation or prevention of a substantial threat of a discharge.” 33 U.S.C. § 1321(j)(4)(C); 40 C.F.R. § 300.210(c)(3).

31. Regional Response Teams that are overseen by Defendants are responsible for developing and maintaining Regional Contingency Plans. 40 C.F.R. § 300.210(b). The Regional Contingency Plans “follow the format of the NCP” and coordinate response between state emergency plans and area-specific contingency plans. *Id.*

32. The regional contingency plan outlines the assistance available to the federal on-

scene coordinator, which is the key federal official pre-designated by the EPA and the Coast Guard to coordinate, mobilize and direct the services of all federal agencies and their resources. In the case of oil discharges within or threatening the coastal zone, the federal on-scene coordinator is a Coast Guard representative. 40 C.F.R. § 300.120(a)(1).

33. The representatives of EPA and the Coast Guard act as co-chairs of regional response teams except when the regional response team is activated for a response. 40 C.F.R. § 300.115. When the regional response team is activated for response actions, the Coast Guard chairs the response for oil discharges within or threatening the coastal zone. *Id.* §§ 300.115(c), 300.120(a)(1).

#### *Authorization of Oil Spill Response Measures*

34. The specific actions that may be taken in response to a discharge of oil in the New York Harbor and lower Hudson River area are governed by the 2011 NY/NJ ACP, which preauthorizes the use of dispersants, surfactants, biological additives and bioremediation, the deflection of spilled oil, in situ burning, dredging, field testing, and field training.

35. Regional response teams and area committees must address “the desirability of using appropriate dispersants, surface washing agents, surface collecting agents, bioremediation agents, or miscellaneous oil spill control agents listed on the NCP Product Schedule.” 40 C.F.R. § 300.910(a). Regional contingency plans and area contingency plans “shall, as appropriate, include applicable preauthorization plans and address the *specific contexts* in which such products should and should not be used.” *Id.* (emphasis added).

36. The regional response team representatives from EPA and states with jurisdiction over the waters of the area to which a preauthorization plan applies and the natural resource trustees from the Department of Commerce and Department of Interior “shall review and either approve, disapprove, or approve with modification the preauthorization plans developed by area committees, as appropriate.” 40 C.F.R. § 300.910(a).

37. Approved preauthorization plans shall be included in the appropriate regional

contingency plans and area contingency plans. *Id.*

38. Once the use of certain oil spill response actions or products is approved in a preauthorization plan as described above, the Coast Guard on scene coordinator may authorize the use of the actions or products without obtaining further concurrences that would be otherwise required by 40 C.F.R. § 300.910(b) and (c). 40 C.F.R. § 300.910(a).

39. When a spill presents a situation not addressed in preauthorization plans, the on-scene coordinator, with the concurrence of the EPA representative to the Regional Response Team and, as appropriate, the concurrence of state regional response team representatives and in consultation with the Department of Commerce and Department of Interior natural resource trustees, when practicable, “may authorize the use of dispersants, surface washing agents, surface collecting agents, bioremediation agents, or miscellaneous oil spill control agents on the oil discharge, provided that the products are listed on the NCP Product Schedule.” 40 C.F.R. § 300.910(b). The on-scene coordinator, with the concurrence of the EPA representative, may also “authorize the use of burning agents on a case-by-case basis.” 40 C.F.R. § 300.910(c).

## **B. The Endangered Species Act**

40. With the ESA, Congress intended endangered species to be afforded the highest of priorities. The ESA’s purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

41. Under the ESA, conservation means “to use and 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).

42. The ESA assigns responsibility to implement the statute to the Secretaries of Commerce and Interior, which in turn have delegated responsibility to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, respectively. 50 C.F.R. § 402.01(b). Generally, the National Marine Fisheries Service (“Fisheries Service”) has jurisdiction over

marine species, while the Fish and Wildlife Service has jurisdiction over terrestrial and freshwater species.

43. The ESA protects imperiled species by listing them as “endangered” or “threatened.” 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 in the foreseeable future.” *Id.* § 1532(20). For listed species, the ESA requires that the Fisheries Service or Fish and Wildlife Service designate “critical habitat” for each species. *Id.* § 1533. The critical habitat designations must be based on “the best scientific data available.” *Id.* § 1533(b)(2).

44. To fulfill the substantive purposes of the ESA, federal agencies are required to engage in Section 7 consultation with the Fisheries Service or the Fish and Wildlife Service, depending on the species at issue, to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” *Id.* § 1536(a)(2).

45. Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined broadly in the ESA’s implementing regulations to include “(b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.” *Id.* § 402.02.

46. Each federal agency must review its actions at “the earliest possible time” to determine whether any action “may affect” listed species or their critical habitat in the “action area.” *Id.* § 402.14(a). The “action area” encompasses all areas that would be “affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” *Id.* § 402.02. The term “may affect” is broadly construed to include “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,” and thus is easily triggered.

*Interagency Cooperation – Endangered Species Act of 1973, As Amended*, 51 Fed. Reg. 19,926

(June 3, 1986).

47. If an action agency concludes that the action is “likely to adversely affect” listed species or critical habitat, the agency must engage in “formal consultation” with the Fisheries Service or the Fish and Wildlife Service to meet the ESA’s substantive “no jeopardy” mandate. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The threshold for triggering the formal consultation requirement is “very low;” “any possible effect . . . triggers formal consultation requirements.” 51 Fed. Reg. 19,926.

48. Here, because the oil spill response measures in the 2011 NY/NJ ACP have the potential to affect listed species and critical habitat, the EPA and the Coast Guard must consult with the Fisheries Service and Fish and Wildlife Service on the action of developing, approving and implementing the 2011 NY/NJ ACP.

49. Unless the Services take action to extend the period, consultation must be completed within 90 days from the date of initiation. 16 U.S.C. § 1536(b)(1)(A)-(B).

50. At the completion of formal consultation, the Fisheries Service or the Fish and Wildlife Service will issue a biological opinion that determines if the agency action is likely to jeopardize the species. *Id.* §1536(b)(3)-(4); 50 C.F.R. § 402.14(h). The term “jeopardize” is defined as an action that “reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

51. The consulting agency must base its determination of whether an activity is likely to jeopardize the continued existence of a species solely on “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The ESA does not permit the agency to base its jeopardy determination on other factors, such as the cost of protecting the species.

52. If the Fisheries Service or the Fish and Wildlife Service determines that the action is likely to jeopardize a species, the biological opinion must outline “reasonable and prudent alternatives” to the action, if any exist, that will avoid jeopardy and “which [the agency] believes would not violate [Section 7(a)(2)].” *Id.* § 1536(b)(3)(A); 50 C.F. R. §402.14(h)(3). The Fisheries

Service or the Fish and Wildlife Service may also “suggest modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy. 50 C.F.R. § 402.13(b).

53. Conversely, pursuant to Section 7(b)(4) of the ESA, a biological opinion that concludes that the agency action is not likely to jeopardize the continued existence of a listed species must include an “incidental take statement,” which provides a limited exception to the ESA’s prohibition on take, specifies the impact of any allowable takes of individual members of the species, provides reasonable and prudent measures necessary to minimize the impact of those takes, and sets forth terms and conditions that must be followed to implement such measures. 16 U.S.C. § 1536(b)(4); 50 C.F. R. § 402.14(i)(1), (3). Section 7(o)(2) exempts takings in compliance with these terms and conditions from the prohibition on takings in Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

54. After the issuance of a final biological opinion and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must reinitiate formal consultation if, inter alia:

- “the amount or extent of taking specified in the incidental take statement is exceeded;
- new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- the identified action is subsequently modified in a manner that causes an effect to the listed species ... that was not considered in the biological opinion; or
- a new species is listed or critical habitat designated that may be affected by the identified action.”

50 C.F.R. § 402.16.

## V. FACTUAL and REGULATORY BACKGROUND

### *The Increase in Oil Transport and Related Accidents*

55. The Port of New York and the lower Hudson River are experiencing an unprecedented boom in the transport of oil through the region by rail and barge. When the 2011 NY/NJ ACP was last updated, an average of just 443 million barrels of oil were transported annually through the plan area. According to the U.S. Energy Information Administration, oil transported by rail nationwide was up 50 percent in the first half of 2013 from just one year before, and more than one billion gallons of Bakken crude oil alone passed through the Port of Albany by rail in 2013, with plans for further increases in the works.

56. Newly shipped oil includes rapidly increasing amounts of particularly explosive and toxic oil produced by hydraulic fracturing (“fracking”) of the North Dakota Bakken shale, as well as heavy oils, including diluted bitumen produced from strip-mined Alberta tar sands, which persist longer and can smother shorelines and the biota that live there. 2011 NY/NJ ACP at 1630.

57. This increased transport happens in the context of a past history of catastrophic barge accidents in the area and a very recent history of deadly rail accidents throughout North America involving oil and petroleum products.

58. Most recently, on April 30, 2014, an eastbound CSX train consisting of 105 tank cars loaded with Bakken crude oil from North Dakota derailed in downtown Lynchburg, Virginia. Seventeen of the train’s cars derailed, and one of the tank cars was breached. A petroleum crude oil fire ensued, shooting flames and black smoke into the air. Emergency responders evacuated approximately 350 individuals from the immediate area. Three of the derailed tank cars containing petroleum crude oil came to rest in the adjacent James River, spilling up to 30,000 gallons of petroleum crude oil into the river, threatening the habitat of listed species such as the Atlantic sturgeon.

59. Fiery derailments have also recently occurred in North Dakota, New Brunswick, Alabama and Quebec, the latter causing the death of 47 people, the evacuation of approximately 2,000 people from the surrounding area, and the incineration of a popular tourist town.

60. The likelihood of an oil spill has also increased recently due to improper handling of the increasing amount of oil being shipped by rail. In early 2014, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) sent violation notices to Hess Corp., Whiting Petroleum Corp. and Marathon Oil Co. for improperly loading rail-bound crude oil using the wrong safety packing categories. More than half of samples tested in unannounced inspections had been assigned incorrect categories. PHMSA said such mistakes “could result in material being shipped in containers that are not designed to safely store it, or could lead first responders to follow the wrong protocol when responding to a spill.”

61. On January 23, 2014, The National Transportation Safety Board (“NTSB”) acknowledged the unprecedented increase in oil rail shipments and the significant increase in likely oil spills and spill impacts. *See* Safety Recommendation Letters R-14-001-003 and R-14-004-006. The new NTSB recommendations call for increased scrutiny of rail carriers that may not be taking risks seriously and increased planning for worst-case spill scenarios. The sheer volume of oil that can be moved in a single train was recognized as a particular threat that could result in major environmental consequences.

62. The situation regarding rail accidents involving petroleum products has become such a problem that the United States Department of Transportation issued an Emergency Order on May 7, 2014. *See* Docket No. DOT-OST-2014-0067 (available at <http://www.dot.gov/briefing-room/emergency-order>). The Emergency Order states that “[t]he number and type of petroleum crude oil railroad accidents described below that have occurred during the last year is startling, and the quantity of petroleum crude oil spilled as a result of those accidents is voluminous in comparison to past precedents.” The Emergency Order was necessary “[d]ue to the volume of crude oil currently being shipped by railroads, the demonstrated recent propensity for rail accidents involving trains transporting crude oil to occur, and the subsequent releases of large quantities of crude oil into the environment and the imminent hazard those releases present....” The DOT went on to state that “[r]eleases of petroleum crude oil, subsequent fires, and environmental damage resulting from such releases represent an imminent hazard as defined by

49 U.S.C. 5102(5), presenting a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur.”

63. On May 13, 2014, the Federal Railroad Administration and Pipeline and Hazardous Materials Safety Administration issued recommendations for tank cars used for the transportation of petroleum crude oil by rail. *See* Notice of Safety Advisory 79 Fed. Reg. 27370 (May 13, 2014). The Safety Advisory notes the “recent propensity for rail accidents involving trains transporting Bakken crude oil” due to the “rapid growth in the quantity of petroleum crude oil shipped by rail in recent years,” and that “older ‘legacy’ tank cars ... without more modern construction and design enhancements, continue to be used to transport hazardous materials, including Bakken crude oil.” It further confirms that “the number and type of railroad accidents involving Bakken crude oil that have occurred during the last year has increased, and the quantity of petroleum crude oil released as a result of those accidents is higher than past precedents.”

#### *Potential Impacts to Listed Species in the ACP Planning Area*

64. Species in the planning area listed as endangered or threatened include Atlantic sturgeon, shortnose sturgeon, piping plover, roseate tern, green sea turtle, hawksbill sea turtle, Kemp’s Ridley sea turtle, leatherback sea turtle, loggerhead sea turtle, blue whale, fin whale, humpback whale, North Atlantic right whale, sperm whale, sei whale, and sea beach amaranth, and also include red knot, currently proposed for listing.

65. The 2011 NY/NJ ACP outlines numerous potential responses to oil or other hazardous materials spills, including but not limited to the use of dispersants, surfactants, biological additives and bioremediation, the deflection of spilled oil, in situ burning, dredging, field testing, and field training.

66. Each of these response activities may have effects, including adverse effects, on species listed under the ESA that are present in the planning area.

67. The New York Harbor and lower Hudson River area contain more than 300 waterfront facilities that handle oil or other hazardous substances in significant quantities. 2011

NY/NJ ACP at 9420.1. Worst case scenarios for potential future spills in the plan area envisioned in the 2011 NY/NJ ACP contemplate the possibility of a spill of as much as millions of gallons of oil. 2011 NY/NJ ACP at 9430.4. Such a spill, and the use of dispersants and other means to clean and contain it, could have disastrous consequences for listed species in this area.

68. At least three spills greater than 400,000 gallons of oil or refined petroleum products have occurred within the planning area of the ACP, two from vessels and one from an underwater pipeline rupture. More than a dozen other major spills occurred between 1977 and 1999. One, involving 400,000 gallons of heavy oil, occurred in close proximity to a National Park. 1999 NY/NJ ACP at E-III-1.

69. According to the 2011 NY/NJ ACP, rail cars are of particular concern in the planning area given their potential for spills in sensitive and in remote areas, where deployment of spill response teams could be substantially delayed or where clean up could be expected to be slow. 2011 NY/NJ ACP at 9420.11.

70. The Governor of New York recently signed an Executive Order attempting to address acknowledged deficiencies in the 2011 NY/NJ ACP, especially as regards rail traffic. *See* New York Executive Order 125. Governor Cuomo's statement that accompanied the order noted the potential for a "catastrophic accident" that would seriously damage the state's natural resources.

71. Barge and tanker accidents likewise present a high risk to listed species. The Upper New York Bay and Kill Van Kull present specific spill challenges given their high rate of traffic. 2011 NY/NJ ACP at 9420.2. The East River is challenging for its tremendous currents, high traffic, and the inability to stop a barge traveling with the current. *Id.* Diamond Isle shoal and its history of groundings is of particular concern. *Id.*

72. The complex geography, hydrology, and ecology of the Hudson River make it an especially difficult environment in which to administer an emergency spill response that avoids causing further harm to sensitive species, due to areas with rocky bottoms and its ever-present currents.

73. It is vital to know how the complexities of the spill environment may interact with different spill response strategies, including specific mechanical, chemical, and biological applications, which could affect listed species in different ways.

74. The Hudson River is under tidal influence all the way upriver from Manhattan to Albany, a distance of 150 miles.

75. Chemicals in water, including spilled crude oil as well as dispersants and dispersed oil, may behave differently depending on the degree of salinity. The degree of salinity in the river may not be predictable at any given time and at any given location. It is vital to know how different substances used in spill response will behave in water depending on the degree of salinity, and how this, in turn, may affect species.

76. The shifting currents in the Hudson are also of concern with regard to direction of flow. Installation of booms to protect sensitive areas from spilled crude may be more or less effective, or even harmful, depending on location, timing, tidal cycle, and direction and volume of flow in the river. The habitat of listed species could be harmed by deployment of booms, especially if deployment occurs without regard to the dynamic nature of the river and bay environment.

77. Heavy crude oil, such as that extracted from the Alberta tar sands region, if spilled in the 2011 NY/NJ ACP area from a train derailment or barge or tanker accident, could require both chemical and mechanical treatment to remove. Heavy crude tends to sink to the bottom when spilled in water. Removal efforts, in addition to the initial harm of the spill itself, could be devastating to listed species, such as sturgeon, which are sensitive to poor water quality and require specific substrates in specific locations to meet life history stages. Dredging could harm spawning sites, eggs, larvae, juveniles, and foraging adults.

78. Oil spill response activities on land pose a further threat to listed species. Beach cleanup operations, such as may follow a crude oil spill, can destroy turtle nests, and piping plover and roseate tern nests. Vehicle activity can crush nests and eggs, cause harassment of birds, and leave tire ruts that inhibit movement of loggerhead turtle hatchlings to sea. Digging and

removal of beach sand and salt marsh sediments, if contaminated with oil washed or sprayed up from the ocean, can also harm listed birds and sea turtles, directly or indirectly.

79. The 2011 NY/NJ ACP recognizes that there are response strategies that may do more harm to resources than simply leaving spilled oil in place. 2011 NY/NJ ACP at 1630. For example, due to currents and tides, spills mid-channel in the Hudson River are unlikely to be boomed effectively to prevent unwanted movement of spilled oil. Instead, booms might be deployed to pocket oil and deflect it to specific areas. In the absence of information regarding the locations of listed species and their critical habitat, oil could be pocketed directly into important listed species habitat by on-scene responders.

80. Similarly, in-situ burning may do more harm than good. In-situ burning involves the burning of oil, generally on water, at or where it was spilled, generally while contained by fire-resistant booms. Burning agents may also be employed for a higher degree of combustion. These activities remove oil from the water, but also have the potential to kill wildlife, including sea turtles, as was the case during the response to the Deepwater Horizon oil spill.

81. The use of dispersants may also do more harm than good. Dispersants are used to break oil into smaller droplets that can break down more readily than oil in slicks. The use of dispersants involves a complex calculation of impacts as oil, dispersants, and dispersed oil can all have toxic effects on aquatic species from plankton to fish to whales. Effects include direct mortality from ingestion, impacts on marine mammals from breathing dispersants, and impacts from the coating of birds' feathers with dispersants or dispersed oil.

82. The ACP contemplates the use of any dispersant listed on the NCP Product Schedule list at 40 C.F.R. 300.910. 2011 NY/NJ ACP at 1640 and 3260. Several of the dispersants listed on the NCP Product Schedule have been known for years to have impacts on wildlife, including listed species. EPA has never consulted on the impacts of these specific dispersants on listed species, and hence the presence of a dispersant on the Product Schedule does not in any way indicate that such dispersants have no adverse impacts on listed species.

83. The *Deepwater Horizon* oil spill provided new information that oil spill response

measures, including dispersant use, may affect listed species or critical habitat in a manner or to an extent not previously considered. Subsea application of dispersants had not been used as part of a response before. This method of use has the potential to affect listed species that were not considered vulnerable to oil spill responses prior to the *Deepwater Horizon* oil spill.

84. The use of dispersants has been controversial, because the dispersants themselves are toxic to aquatic organisms, and there are indications that the dispersants could inhibit the natural degradation of the oil.

85. Only a small number of species of limited diversity have been routinely used in dispersant testing. Testing has not been based on habitat and geographic location to guarantee adequate information in the event dispersant application is an option for spill response.

86. Recent research into the comparative toxicities of the different dispersants on the Product Schedule provides new information about where and when to use dispersants.

87. A primary concern associated with the use of dispersants is the toxicity of the dispersed oil and the increased bioavailability of toxic oil constituents dissipated over a larger spatial area of water column.

88. Scientists have documented effects of spilled oil and dispersants on genome expression and morphology on resident marsh fish. Larval and adult fish have shown aberrant protein expression in gill tissues. The effects persisted for over two months after exposure. Whitehead, A., B. Dubansky, C. Bodinier, T. Garcia, S. Miles, C. Pilley, V. Raghunathan, J. Roach, N. Walker, R. Walter, C. Rice, S. Galvez. 2011. *Genomic and physiological footprint of the Deepwater Horizon oil spill on resident marsh fishes*. doi/10.1073/pnas.1109545108 (2010), <http://www.pnas.org/content/early/2011/09/21/1109545108.full.pdf>.

89. Scientists and agencies continue to study the environmental impacts from the *Deepwater Horizon* oil spill and its response, including dispersant use; long-term effects have yet to be seen.

90. The new information described above, especially as it relates to the novel subsea application of dispersants and the impacts of in-situ burning in response to the *Deepwater*

*Horizon* oil spill, requires that Defendants initiate and complete formal consultation to ensure that the oil spill response measures set forth in the 2011 NY/NJ ACP are “not likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat” of listed endangered and threatened species.

*The 2011 NY/NJ ACP and Lack of Consultation*

91. The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is the federal government’s master plan for addressing oil and other hazardous substance spills in the U.S. Among its many functions, the NCP defines federal agency roles, creates Regional Response Teams, requires the development of area contingency plans, and establishes general responsibilities of on-scene coordinators. *See* 40 CFR Part 300.

92. Pursuant to the NCP, the EPA and Coast Guard develop and implement area contingency plans, which provide the policies and available measures for responding to oil and hazardous materials spills, and direct the actions of the personnel responding to the inevitable future rail and barge accidents in the planning area.

93. The 2011 NY/NJ ACP governs spill response in the Hudson River south of Troy, the entire New York Harbor, a wide variety of tributaries, canals, marshes, channels, streams and seasonal springs associated with these water bodies, including parts of the Raritan, Hackensack and Passaic Rivers, portions of the Long Island and New Jersey shorelines, and a portion of the territorial seas adjacent to these areas.

94. The 2011 NY/NJ ACP outlines numerous potential responses to oil or hazardous materials spills including, but not limited to, the use of dispersants, surfactants, biological additives and bioremediation, the deflection of spilled oil, in situ burning, dredging, field testing, and field training. The development of the 2011 NY/NJ ACP, and the EPA and Coast Guard’s approval of these response actions are continuing, affirmative and discretionary acts that may adversely affect ESA-listed species and critical habitats through ongoing impacts.

95. As such, the EPA and the Coast Guard must consult with the Fish and Wildlife Service and the National Marine Fisheries Service to ensure that oil spill response measures set

forth in the 2011 NY/NJ ACP are “not likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat” of these listed endangered and threatened species.

96. A 2001 Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act’s National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act (“ESA MOA”)<sup>1</sup> outlines a process for assuring that oil spill response planning and implementation is in full compliance with the Endangered Species Act. The agreement makes it the responsibility of committees that develop and implement ACPs “to identify and incorporate plans and procedures to protect listed species and designated critical habitat during spill planning and response activities.” ESA MOA at 1; *see also* 2011 NY/NJ ACP at 4860.

97. The ESA MOA acknowledges that implementation of an ACP may affect listed species. Therefore, “[b]y consulting on the anticipated effects prior to implementing response actions, decisions can be made rapidly during the spill, harm from response actions can be minimized, and implementation of response strategies specifically designed to protect listed species and critical habitat can be achieved.” ESA MOA at 5-6.

98. Specific steps outlining the consultation process are described in the ESA MOA. *Id.* at 6-7. Despite the existence of an ACP covering New York Harbor for decades, and despite the fact that the ACP recognizing the existence of these requirements (2011 NY/NJ ACP at 1670.30), formal consultation has never been completed, even though listed species are likely to be adversely affected by oil spill response measures set forth in the ACP.

99. The ACP recognizes that the protection of sensitive areas is “one of the most important considerations during an oil discharge release.” 2011 NY/NJ ACP at 3210. The 2011 NY/NJ ACP provides insufficient and outdated information on the location of sensitive areas and habitat for listed species. Unfortunately, until formal consultation is complete, there is no way to be certain that sensitive areas important for the area’s most vulnerable wildlife have been

---

<sup>1</sup> Available at [http://www.nrt.org/Production/NRT/NRTWeb.nsf/AllAttachmentsByTitle/A-259ESAMOU/\\$File/ESAMOA.pdf?OpenElement](http://www.nrt.org/Production/NRT/NRTWeb.nsf/AllAttachmentsByTitle/A-259ESAMOU/$File/ESAMOA.pdf?OpenElement)

identified and will be protected.

100. The 2011 NY/NJ ACP was approved by the EPA and the Coast Guard in 2011.<sup>2</sup> No consultation with the Services has been undertaken by Defendants on the 2011 NY/NJ ACP.

101. There has previously been limited and insufficient consultation with the Services regarding the impacts that oil spill response measures will have on listed species in the NY/NJ ACP planning area. The only consultation that has occurred predates the 2011 ACP, and pertained only to the preauthorized use of certain dispersants, in-situ burning in specific areas, and the use of solidifiers.

102. The Defendants initiated informal consultation with the Services in 1996 on a Memorandum of Understanding regarding the preauthorized use of in-situ burning in certain areas. The informal consultation found no adverse effects to listed species, including sea turtles, from implementation of the MOU. That consultation, however, is now entirely out of date and does not encompass the consultation requirements set forth in the ESA MOA.

103. Even if a finding of no adverse effects on sea turtles from in-situ burning may have been reasonable in 1996, reported incidents of sea turtles being injured or killed as a result of in-situ burning activities related to the Deepwater Horizon spill response clearly indicate that such activities can and do harm listed species. Consequently, neither the Defendants nor the Services can reasonably conclude that in-situ burning is not likely to adversely affect listed species unless and until there is formal consultation regarding this action.

104. The Defendants initiated informal consultation with the Services in 1993 regarding a Memorandum of Understanding for the Preauthorization of Chemical Countermeasures (the "Dispersant MOU"). This consultation was limited to an analysis of the dispersant COREXIT 9527, and is now entirely out of date and does not encompass the consultation requirements set forth in the ESA MOA.

---

<sup>2</sup> See [https://homeport.uscg.mil/cgi-bin/st/portal/uscg\\_docs/MyCG/Editorial/20111230/ACP%20NY-NJ%202011%20%20Basic%20Plan%20\(HP\)%20Open%20Side\\_2.pdf?id=74c077469942fe645642c25faaf06b74ba57fb3e&user\\_id=be31fea27f5a69bfe57ea54223cc5768](https://homeport.uscg.mil/cgi-bin/st/portal/uscg_docs/MyCG/Editorial/20111230/ACP%20NY-NJ%202011%20%20Basic%20Plan%20(HP)%20Open%20Side_2.pdf?id=74c077469942fe645642c25faaf06b74ba57fb3e&user_id=be31fea27f5a69bfe57ea54223cc5768).

105. The 1993 concurrence letter from FWS on the Dispersant MOU states that "if chemical countermeasures other than COREXIT 9527 become available and likely to be used as discussed below, or if additional information on listed or proposed species becomes available, this determination may be reconsidered." Not only have species been listed since the FWS concurrence letter was issued, but dispersants other than COREXIT 9527 are now likely to be used in the planning area pursuant to the 2011 ACP. The 2011 ACP states that "Dispersants approved for use under this ACP are any of those listed in the NCP Product Schedule (40 CFR 300.910)." The NCP Product Schedule now includes dispersants other than COREXIT 9527, including COREXIT 9500, which was used in response to the Deepwater Horizon oil spill, as well as 15 additional dispersant products that were added to the list after the 1993 FWS concurrence letter was written. Several of these are included in the list of Oil Spill Response Equipment in the 2011 NY/NJ ACP (at 5210.1.1), which provides retailers of COREXIT 9500, SPC 1000 (added to the Product Schedule in 1999), Gold Crew (added to the Product Schedule in 2001), JD-2000 (added to the Product Schedule in 2001), and Biodispers (added to the Product Schedule in 2002). This indicates that the ACP now contemplates the use of dispersants other than COREXIT 9527, requiring re-initiation of consultation pursuant to the FWS concurrence letter.

106. The 1993 concurrence letter from NMFS on the Dispersant MOU states that "consultation should be reinitiated if new information reveals effects to listed species or critical habitat (when designated) not previously considered." The letter goes on to acknowledge that at the time, "little or no data ha[d] been gathered on the effects of oil and dispersants on marine mammals and sea turtles. Similarly, no studies have been conducted relative to the effects of oil and the oil/dispersant mix on the prey species of these endangered species. Therefore, any conclusions regarding potential impacts to these species cannot be accurately assessed, and must be postulated." Several studies on the effects of dispersants have been completed since that time, and much has been learned from the use of chemical dispersants in response to the Deepwater Horizon oil spill. Therefore, re-initiation of consultation, and the completion of formal consultation, on the use of dispersants is required.

107. The Region II Regional Response Team (of which Defendants are members) also initiated informal consultation with the Services regarding a 2009 Limited Preauthorization and Use Policy for Chemical Countermeasures: Solidifiers. A 2009 NMFS concurrence letter on the preauthorized use of solidifiers states that "there is not currently enough information on the effects of solidifiers to determine that all effects of the use of these products on listed species would be wholly beneficial, insignificant, or discountable. As such, at this time, NMFS can not concur that the use of oil solidifiers in response to oil spill events in areas and times when listed species are present is unlikely to adversely affect listed species under out jurisdiction." The concurrence letter allows for the use of emergency consultation procedures set forth in the ESA MOA; however, this appears to be limited to the use of solidifiers "[i]n areas where listed species are not present," and insufficient information has been provided in the ACP regarding the presence of listed species in the planning area. Further, this does not comply with the requirements of the ESA MOA, which requires formal consultation where, as here, proposed actions are likely to adversely affect listed species.

108. A separate 2008 NMFS concurrence letter on the potential impacts on essential fish habitat (EFH) from the use of solidifiers states that "should new information become available that would modify the basis for this determination, consultation should be reinitiated. This includes, but is not limited to, substantive changes to the pre-authorization policy, the addition of new solidifiers to the list of the ones currently approved, changes in EFH designations of the designation of EFH for new species." Several new solidifiers have been added to the list of approved products in the NCP Product Schedule since this letter was written, including Oil Bond (added 06/03/10), Gelco 200 (added 08/17/10) and Norsorex APX (added 04/26/12), thereby requiring re-initiation of consultation pursuant to the NMFS concurrence letter.

109. The 2009 FWS concurrence letter on the use of solidifiers states that "the Service understands that the RRT2 Area Committee will consult with the Service during development of Area Contingency Plans.... Therefore, the Service defers consultation on the physical act of deploying solidifiers to those consultations on Area Contingency Plans and response specific

emergency consultations where it will be more appropriately addressed along with all other similar response activities." This evidences the FWS' understanding that consultation is required when ACPs are developed; however, consultation was not initiated by Defendants during the development of the 2011 NY/NJ ACP.

110. Additional species have been listed as threatened and endangered in the planning area, and critical habitat has been designated, since the Defendants sought concurrence with the Services on in-situ burning, the use of dispersants and the use of solidifiers as discussed above, requiring re-initiation of any consultation that has occurred regarding the 2011 NY/NJ ACP. 50 C.F.R. § 402.16.

111. The ESA MOA requires informal consultation with the Services on pre-spill response planning "to identify the potential for oil spill response activities to adversely affect listed species and critical habitat and to identify for inclusion in the ACP information on sensitive areas," and to engage in formal consultation where, as here, "it cannot be determined that adverse effects will not occur during a response action." ESA MOA at 6-7.

112. The Defendants have not completed sufficient informal consultation, and failed to undertake the required formal ESA section 7 consultation with the Services to ensure that the oil spill response measures set forth in the 2011 NY/NJ ACP are "not likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat" of listed endangered and threatened species in the plan area. 16 U.S.C. §§ 1531(c)(1) and 1536(a)(2).

## **VI. CLAIM FOR RELIEF**

### **Violation of the Endangered Species Act Section 7, 16 U.S.C. § 1536**

**(Failure to insure that oil spill response measures in the 2011 NY/NJ ACP are not likely to jeopardize listed species or adversely affect critical habitat.)**

113. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

114. Defendants are members and overseers of the NY/NJ Area Committee that

developed the 2011 NY/NJ ACP and have ongoing authority and responsibility for its implementation. The Defendants each have a duty to ensure that their actions, including the development, approval, amendment and implementation of the ACP, are not likely to jeopardize the continued existence of the many endangered and threatened species that exist in the planning area.

115. Responses to oil or other hazardous materials spills, including but not limited to the use of dispersants, surfactants, biological additives and bioremediation, the deflection of spilled oil, in situ burning, dredging, field testing, and field training as set forth in the 2011 NY/NJ ACP, are likely to adversely affect ESA listed species and their critical habitats.

116. Defendants' failure to enter into and complete formal consultation with the Fish and Wildlife Service and the National Marine Fisheries Service regarding the effects on listed species and their critical habitats from the development, approval and implementation of the 2011 NY/NJ ACP, and the oil spill response activities authorized by the ACP, constitutes a failure to insure that their actions are not likely to jeopardize the existence of listed species or result in destruction or adverse modification of critical habitat, in violation of section 7 of the ESA, 16 U.S.C. § 1536. Such action is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2), and is subject to judicial review under 16 U.S.C. §1540(g).

## **VII. PRAYER FOR RELIEF**

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

1. Declare that Defendants violated the ESA and its implementing regulations by failing to ensure through consultation that their actions, including the development, approval, amendment and implementation of the 2011 NY/NJ ACP will not jeopardize the continued existence of the threatened or endangered species in the ACP area, or destroy or adversely modify such species' critical habitats;

2. Order Defendants to initiate and complete formal consultation on their actions, including the development, approval, amendment and implementation of the 2011 NY/NJ ACP, with the National Marine Fisheries Service and the Fish and Wildlife Service by a date certain;
3. Award Plaintiff costs and attorneys' fees under the ESA, 16 U.S.C. § 1540(g); and
4. Grant Plaintiff such other and further relief as the Court deems just and equitable.

DATE: July 17, 2014

Respectfully Submitted,

/s/ Hollin Kretzmann  
Hollin Kretzmann (NY Bar No. 4679783)  
CENTER FOR BIOLOGICAL DIVERSITY  
351 California Street, Suite 600  
San Francisco, CA 94104  
Phone: (415) 436-9682 x333  
Facsimile: (415) 436-9683  
Email: hkretzmann@biologicaldiversity.org

/s/ Jared M. Margolis  
Jared M. Margolis, applicant, *pro hac vice*  
CENTER FOR BIOLOGICAL DIVERSITY  
2852 Willamette St.  
PO Box 171  
Eugene, OR 97405  
Phone: (971) 717-6403  
Facsimile: (415) 436-9683  
Email: jmargolis@biologicaldiversity.org

*Attorneys for Plaintiff  
Center for Biological Diversity*