

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,)
)
Plaintiff,) Civil No: 15-00229 (EGS)
)
v.) SECOND AMENDED COMPLAINT
) FOR DECLARATORY AND
S.M.R. JEWELL, *et al.*,) INJUNCTIVE RELIEF
)
Defendants.)
_____)

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) brings this action under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), to challenge the Secretary of the Interior’s (“Secretary”) and the U.S. Fish and Wildlife Service’s (“FWS”) (collectively, “Defendants” or “FWS”) failure to make mandatory findings on whether 10 highly-imperiled species should be listed as threatened or endangered under the ESA. 16 U.S.C. § 1533(b)(3)(B). These species are: the ashy darter (*Etheostoma cinereum*); black-capped petrel (*Pterodroma hasitata*); candy darter (*Etheostoma osburni*); frecklebelly madtom (*Noturus munitus*); longhead darter (*Percina macrocephala*); Mohave shoulderband (*Helminthoglypta (Coyote) greggi*); sickle darter (*Percina williamsi*); trispot darter (*Etheostoma trisella*); western glacier stonefly (*Zapada glacier*); and yellow lance (*Elliptio lanceolata*). Each of these 10 species is experiencing steep population declines and ongoing threats to its existence.

2. To obtain federal safeguards and habitat protections, the Center submitted petitions to list nine of these species as “endangered” or “threatened” pursuant to the ESA, and another conservation organization submitted a petition to list one: the black-capped petrel. FWS concluded in its 90-day findings that each petition presented substantial information showing that

listing the species may be warranted. 16 U.S.C. § 1533(b)(3)(A); *see also* 76 Fed. Reg. 59,836 (Sept. 27, 2011) (ashy darter, candy darter, frecklebelly madtom, longhead darter, sickle darter, trispot darter, and yellow lance); 76 Fed. Reg. 78,601 (Dec. 19, 2011) (western glacier stonefly); 77 Fed. Reg. 37,371 (June 21, 2012) (black-capped petrel); 80 Fed. Reg. 19,259 (Apr. 10, 2015) (Mohave shoulderband). FWS was required to determine if listing these species is “warranted” within 12 months of receiving the petitions, yet it has failed to make these requisite findings to date. 16 U.S.C. § 1533(b)(3)(B). Defendants are therefore in violation of the ESA. *Id.*

3. To remedy these violations, the Center seeks declaratory relief to affirm that Defendants are in violation of the ESA by failing to make 12-month findings on the petitions to list these 10 species, and injunctive relief that establishes dates certain for Defendants to determine if listing these species as endangered or threatened is warranted. Compliance with the nondiscretionary deadlines of the ESA is necessary to ensure the continued existence of these species in the wild.

JURISDICTION

4. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) and (g)(1)(C) (action arising under the ESA’s citizen suit provision), 5 U.S.C. § 702 (review of agency action under the APA), and 28 U.S.C. § 1331 (federal question jurisdiction).

5. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

6. The Center provided 60 days notice of its intent to file this suit pursuant to the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letters dated March 14, 2013, February 6, 2014, April 10, 2015, and April 13, 2015. Defendants have not remedied the violations to date. Therefore, an actual controversy exists between the parties within the

meaning of 28 U.S.C. § 2201.

VENUE

7. The United States District Court for the District of Columbia is the proper venue for this action pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e). Defendants' headquarters are located within this district, and a substantial part of the events giving rise to the Center's claim occurred in this district.

PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation that is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States, including Arizona, New Mexico, California, Oregon, Washington, Alaska, Minnesota, Vermont, Florida, and Washington, D.C. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has more than 50,000 members. The Center and its members are concerned with the conservation of imperiled species, including the ashy darter, black-capped petrel, candy darter, frecklebelly madtom, longhead darter, Mohave shoulderband, sickle darter, trispot darter, western glacier stonefly, and yellow lance.

9. The Center has members who visit areas where the ashy darter, black-capped petrel, candy darter, frecklebelly madtom, longhead darter, Mohave shoulderband, sickle darter, trispot darter, western glacier stonefly, and yellow lance are known to still occur. The Center's members use these areas for observation of these species and other wildlife; for research; nature photography; aesthetic enjoyment; and recreational, educational, and other activities. The Center's members derive professional, spiritual, and economic benefits from these species and their habitats. Those members have concrete plans to continue to travel to and recreate in areas

where they can observe these species and will continue to maintain an interest in these species and their habitats in the future.

10. In addition to submitting petitions to list these species under the ESA, the Center and its members have participated in conservation efforts. For example, the Center has campaigns to protect biodiversity in the southeastern United States and to raise awareness about the environmental impacts from human activities, including impacts to imperiled species. Likewise, the Center is actively engaged in efforts to protect native plants and animals from the effects of climate change. These campaigns would help the species at issue in this case.

11. The Center's conservation efforts are prompted by the concern that the ashy darter, black-capped petrel, candy darter, frecklebelly madtom, longhead darter, Mohave shoulderband, sickle darter, trispot darter, western glacier stonefly, and yellow lance are at serious risk of extinction. Defendants' failure to comply with the ESA's nondiscretionary deadline for issuing 12-month findings on these species deprives them of statutory protections that are vitally necessary to their survival and recovery. Until these species are protected under the ESA, the Center's interest in their conservation and recovery is impaired. Therefore, the Center's members and staff are injured by Defendants' failure to make a timely determination as to whether listing these species is warranted, as well as by the ongoing harm to the species and their habitats in the absence of such protections. The injuries described above are actual, concrete injuries presently suffered by the Center and its members, and they will continue to occur unless this Court grants relief. These injuries are directly caused by Defendants' inaction, and the relief sought herein – an order compelling listing decisions for these species – would redress these injuries. The Center and its members have no other adequate remedy at law.

12. Defendant SALLY M.R. JEWELL is the Secretary of the Interior and is the

federal official in whom the ESA vests final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including listing and critical habitat decisions. Secretary Jewell is sued in her official capacity.

13. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for most terrestrial species as well as ensuring prompt compliance with the ESA's mandatory listing deadlines.

LEGAL BACKGROUND

14. The ESA is a comprehensive federal statute which declares that endangered and threatened species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Accordingly, the purpose of the ESA 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" *Id.* § 1531(b).

15. To this end, section 4 of the ESA requires the Secretary to protect imperiled species by listing them as either "endangered" or "threatened." *Id.* § 1533(a). A "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 1532(16).

16. The ESA's conservation measures apply only after the Secretary lists a species as threatened or endangered. For example, section 7 of the ESA requires all federal agencies to ensure that their actions do not "jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification" of a species' "critical habitat." *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, "any person" from intentionally

taking listed species or incidentally taking listed species without a lawful authorization from the Secretary. *Id.* §§ 1538(a)(1)(B) and 1539. Concurrently with listing, the Secretary must designate the species' critical habitat, which includes areas that are essential to the conservation of the species. *Id.* §§ 1532(5)(A) and 1533(a)(3)(A). Other provisions of the ESA require the Secretary to “develop and implement” recovery plans for listed species, authorize the Secretary to acquire land for the protection of listed species, and make federal funds available to states to assist in their efforts to preserve and protect listed species. *Id.* § 1533(f), § 1534, and § 1535(d).

17. To ensure the timely protection of species that are at risk of extinction, Congress set forth a detailed process whereby citizens may petition the Secretary to list a species as endangered or threatened. The process includes mandatory, non-discretionary deadlines that the Secretary must meet so that imperiled species receive the ESA's substantive protections in a timely fashion. The three required findings, described below, are the 90-day finding, the 12-month finding, and the final listing determination. The Secretary has delegated responsibility for making these findings to FWS.

18. Upon receiving a listing petition, FWS must “to the maximum extent practicable, within 90-days” make an initial finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A). If FWS finds that the petition does not present substantial information indicating that listing may be warranted, the petition is rejected and the process ends.

19. If FWS instead determines that a petition does present substantial information indicating that listing may be warranted, then the agency must conduct a full scientific review of the species' status. *Id.* Upon completion of this status review, and within 12 months from the date that it receives the petition, FWS must make one of three findings: (1) listing is “not

warranted”; (2) listing is “warranted”; or (3) listing is “warranted but precluded” by other pending proposals for listing species, provided certain requirements are met. *Id.* § 1533(b)(3)(B).

20. If FWS’s 12-month finding concludes that listing is warranted, the agency must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii). Within one year of publication of the proposed regulation, the ESA requires FWS to render its final determination on the proposal. *Id.* § 1533(b)(6)(A). At such time, FWS must either list the species, withdraw the proposed listing rule, or, if there is substantial disagreement about scientific data, delay a final determination for up to six months in order to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

21. Because the ESA does not safeguard a species facing extinction until it is formally listed as endangered or threatened, it is critical that FWS meticulously follow the ESA’s listing procedures and deadlines so that such species are protected in a timely manner. Defendants have regularly ignored these statutory procedures and have missed statutory listing deadlines, leading to litigation to correct these deficiencies.

22. On July 12, 2011, the Center and Defendants entered into a comprehensive stipulated settlement agreement that defines Defendants’ responsibilities regarding future ESA statutory deadline litigation between these parties. Stipulated Settlement Agreement, *In re Endangered Species Act Section 4 Deadline Litigation – MDL No. 2165*, No. 10-377 (D.D.C. July 12, 2011), ECF No. 42-1.

23. Under the settlement, the Center may file deadline suits addressing up to 10 species, and to obtain remedies from up to three deadline suits, in each fiscal year from 2012

through 2016. If the Center files suits addressing more than 10 species, or obtains remedies from more than three suits in any one of these fiscal years, negotiated deadlines that Defendants must meet under the agreement may be pushed back to 2016. Under the settlement, a “remedy” means a stipulated settlement agreement or judicially-enforceable order requiring the FWS to make any finding, listing determination, or critical habitat determination for a species before April 1, 2017. The instant complaint is a “deadline suit” as defined in the parties’ settlement.

24. The Center has not filed any other deadline suits during the current fiscal year.

FACTUAL BACKGROUND

A. Ashy Darter

25. The ashy darter is a freshwater fish that is endemic to upland streams in the Cumberland and Tennessee rivers. It is one of the largest members of the genus *Etheostama*, with unique color patterns and snout shapes as compared to other darters. Although scientists first described the species in 1845, little is understood about the early life history or spawning behavior of this enigmatic fish. However, it is known that the ashy darter relies on clear pools and clean gravel – habitat that has become increasingly rare in its natural range. The ashy darter was historically found in 15 tributaries of the Cumberland and Tennessee rivers, but recent collections are largely restricted to seven reaches of streams in Tennessee and Kentucky. It is likely extirpated from Georgia and Alabama today, and was thought to be extirpated from Virginia until it was rediscovered there in 2004.

26. The ashy darter is endangered by habitat destruction and fragmentation, which is primarily caused from the construction of dams and other impoundments. Threats also include sediment pollution from land clearing and agriculture, as well as pollution caused by urbanization. The ashy darter is listed as threatened by the State of Tennessee and a “species of

special concern” by Kentucky. NatureServe, a non-profit provider of scientific information to support conservation, classifies the species as imperiled. The International Union for the Conservation of Nature (“IUCN”), which studies and identifies species at risk of extinction, considers it to be vulnerable. The American Fisheries Society, the world’s largest professional society for fisheries scientists, recognizes the species as endangered. FWS lists the ashy darter as a “species of management concern” in the agency’s Southeast region.

27. Due to the threats to the ashy darter, on April 20, 2010, the Center submitted a petition to FWS to list the ashy darter as endangered or threatened under the ESA.

28. FWS issued a 90-day finding on the Center’s petition to list the ashy darter on September 27, 2011. The finding concluded that the Center’s petition presented substantial scientific or commercial information indicating that listing the ashy darter may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

29. FWS was required to make a 12-month finding as to whether listing the ashy darter is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

B. Black-Capped Petrel

30. The black-capped petrel is a long-lived (≥ 40 years) seabird that forages in deep ocean waters along the Gulf Stream from North Carolina to Florida and lives primarily at open sea, only going to land when it nests on Caribbean islands. Known as diablón, or “little devil,” due to their eerie nighttime mating calls, the seabirds are nocturnal at their nesting sites, where breeding females lay a solitary egg in crevices found on steep forested cliffs. Recent studies tracked adult black-capped petrels from the coasts of Columbia and Panama to the outer continental shelf offshore of North Carolina and Virginia, traveling as far as 420 miles in a single

day. The black-capped petrel was once abundant and had breeding colonies throughout islands of the Greater Antilles, but there are now just 13 confirmed breeding colonies in the high mountains of Hispaniola, with an estimated 600 to 2000 breeding pairs.

31. Introduced mongooses and rats, human hunting, and habitat destruction nearly wiped out the black-capped petrel in the 19th and early 20th centuries, and indeed, the species was believed to be extinct for several decades until it was rediscovered in 1963. Threats to the black-capped petrel persist both on land and at open sea today, as its nesting habitat continues to be reduced and degraded from logging and other human encroachments, while its foraging habitat is threatened with new oil and gas drilling off the U.S. Atlantic coast. Oil spills are particularly dangerous to black-capped petrels, which are attracted to oily surfaces to feed. NatureServe considers the black-capped petrel critically imperiled, and the IUCN lists it as endangered.

32. WildEarth Guardians submitted a petition to list the black-capped petrel under the ESA due to its low population numbers and high threats, which FWS received on September 13, 2011.

33. FWS issued a 90-day finding on the petition to list the black-capped petrel on June 21, 2012. The finding concluded the petition presented substantial scientific or commercial information indicating that listing the black-capped petrel may be warranted. 77 Fed. Reg. 37,367 (June 21, 2012).

34. FWS was required to make a 12-month finding as to whether listing the black-capped petrel is warranted by September 13, 2012, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

C. Candy Darter

35. The candy darter is a small freshwater fish found only in a limited range of the New River watershed. The candy darter is known for its brilliant colors, which become particularly showy and ornate in males during the spring spawning season. Adults are typically found in silt-free runs, riffles, and pockets of swift-flowing current in and around large rubble and boulders, with spawning potentially occurring in patches of sand. The candy darter is no longer found at many of its former locations, and its numbers are declining where the fish continues to survive today. It now exists in a few isolated populations, primarily in the Greenbrier, Gauley, and Bluestone rivers in West Virginia, with a small number also occurring in Big Stony Creek in Virginia.

36. The candy darter is sensitive to changes in water quality and temperature, and sedimentation and turbidity are among the primary threats confronting the species. These problems have a variety of causes, including the removal of riparian vegetation; agricultural and urban runoff; and alterations to the channels and banks of streams and rivers. The candy darter is also threatened by mountaintop-removal coal mining, which fills in streams, elevates selenium levels, and eliminates food sources for fish. Additionally, it is threatened by the introduction of and hybridization with a non-native darter. NatureServe classifies the species as “critically imperiled” in Virginia and imperiled in West Virginia. The IUCN considers it to be “near threatened.” The American Fisheries Society recognizes the species as vulnerable.

37. Due to the threats to the candy darter, on April 20, 2010, the Center submitted a petition to FWS to list the fish as endangered or threatened under the ESA.

38. FWS issued a 90-day finding on the Center’s petition to list the candy darter on September 27, 2011. The finding concluded that the Center’s petition presented substantial

scientific or commercial information indicating that listing the candy darter may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

39. FWS was required to make a 12-month finding as to whether listing the candy darter is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

D. The Frecklebelly Madtom

40. The frecklebelly madtom is a small, secretive catfish that inhabits the Pearl River and Mobile Bay watersheds, ranging through portions of Georgia, Alabama, Tennessee, Mississippi, and Louisiana. Its main habitat is rocky riffles, rapids, and runs in small to large rivers that contain high-quality shoals. Though the frecklebelly madtom was historically abundant in such habitat, it is exceedingly rare today. The species abruptly disappeared from the Alabama River after the construction of dams and channel modifications, and it could soon be extirpated from the upper Tombigbee River due to the effects of the Tennessee-Tombigbee Waterway (a manmade shipping waterway). Its population is greatly reduced in the Pearl, upper Tombigbee, and upper Coosa rivers, with relatively high numbers only remaining in the Cahaba and Battahatchee rivers.

41. The frecklebelly madtom is severely affected by habitat modification from dams and other impoundments as well as siltation from logging, agriculture, and development. Other threats include gravel removal and channelization for flood control. It is listed as threatened by the State of Tennessee, endangered by the states of Mississippi and Georgia, and as a “species of greatest conservation need” by Alabama. NatureServe ranks the frecklebelly madtom as critically imperiled in Georgia and Tennessee, and imperiled in Alabama, Mississippi, and Louisiana. The IUCN and American Fisheries Society list the species as vulnerable.

42. Due to the threats to the frecklebelly madtom, on April 20, 2010, the Center submitted a petition to FWS to list the fish as endangered or threatened under the ESA.

43. FWS issued a 90-day finding on the Center's petition to list the frecklebelly madtom on September 27, 2011. The finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the frecklebelly madtom may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

44. FWS was required to make a 12-month finding as to whether listing the frecklebelly madtom is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

E. Longhead Darter

45. The longhead darter is a freshwater fish that is native to the Ohio River watershed on the western side of the Appalachians. It requires medium-sized, unpolluted streams and prefers fast, rocky riffles or clear pools. Once ranging from New York to Tennessee, this fish has been extirpated from a large portion of its natural range.

46. The longhead darter is at risk of extinction from a number of different factors, but mountaintop-removal coal mining is an escalating threat to the species where it still occurs, particularly in West Virginia. Other threats include pollution from agricultural, industrial, and municipal development; habitat fragmentation and degradation from dams; and the channelization of rivers and streams. The longhead darter is listed as endangered in the State of Kentucky; threatened in Tennessee and New York; and a "species of special concern" in North Carolina. NatureServe lists the species as "critically imperiled" in Kentucky and New York; imperiled in Pennsylvania, Tennessee, and West Virginia; and extirpated in Ohio. The American Fisheries Society recognizes the species as vulnerable.

47. Due to the threats to the longhead darter, on April 20, 2010, the Center submitted a petition to FWS to list the fish as endangered or threatened under the ESA.

48. FWS issued a 90-day finding on the Center's petition to list the longhead darter on September 27, 2011. The finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the longhead darter may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

49. FWS was required to make a 12-month finding as to whether listing the longhead darter is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

F. The Mohave Shoulderband

50. The Mohave shoulderband is a small terrestrial snail that is known to exist on just three isolated peaks in the western Mojave Desert, occupying a total range of 4,802 acres – less than eight square miles. To avoid drying out, the snail needs moist microclimates found in desert rock outcrops, rock slides, and talus deposits, along with deep crevices under the soil where the species goes dormant during dry spells. Approximately 86 percent of the Mohave shoulderband's remaining habitat exists on Soledad Mountain.

51. Habitat for the Mohave shoulderband has been significantly reduced and polluted from past mining activities and a recently approved, open pit mine has put the species at imminent risk of extinction. Located on 1,440 acres on Soledad Mountain, this open pit gold and silver mine will cover about a third of the peak's total area, and conservative estimates show it will destroy more than 50 percent of the Mohave shoulderband's total population. In addition to direct habitat destruction from blasting and crushing, the snail is also threatened by toxic pollution from cyanide and other chemicals used at past and the current open pit mines.

NatureServe lists the status of the Mohave shoulderband as critically imperiled; it does not have a status ranking from the California Natural Heritage Program or California Department of Fish and Wildlife.

52. Due to the threats to the Mohave shoulderband, on January 31, 2014, the Center filed an emergency petition to protect the snail as threatened or endangered under the ESA.

53. FWS issued a 90-day finding on the Center's petition to list the Mohave shoulderband on April 10, 2015. The finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the Mohave shoulderband may be warranted. 80 Fed. Reg. 19,259 (Apr. 10, 2015).

54. FWS was required to make a 12-month finding as to whether listing the Mohave shoulderband is warranted by January 31, 2015, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

G. Sickle Darter

55. The sickle darter is a slender freshwater fish that inhabits clear flowing streams, pools, and small rivers from the Appalachian Mountains to the upper reaches of the Tennessee River. The sickle darter is closely related to the longhead darter, and scientists only discovered that it is a unique subspecies in 2007. It spends much of its time swimming in river currents and often occurs near woody debris, stream vegetation, or large boulders. Although the sickle darter is common in some years in a handful of streams, its current populations are severely fragmented, and it has been extirpated from several places where it previously was found. Today, the sickle darter is considered extirpated in North Carolina, rare in Virginia, and threatened in Tennessee. The total population size is unknown.

56. The sickle darter is at risk of extinction due to its limited range and degradation of

its habitat. The primary threat to the species is turbidity and siltation caused by agriculture and development, which smother nests and eggs in gravel shoals. Other threats include toxic pollution and impoundments from dams. No populations receive special management considerations or protections, with the exception of one population in the Great Smoky Mountains National Park. NatureServe classifies the species as imperiled. The IUCN considers it to be vulnerable. The American Fisheries Society recognizes the species as threatened.

57. Due to the threats to the sickle darter, on April 20, 2010, the Center submitted a petition to FWS to list the fish as endangered or threatened under the ESA.

58. FWS issued a 90-day finding on the Center's petition to list the sickle darter on September 27, 2011. The finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the sickle darter may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

59. FWS was required to make a 12-month finding as to whether listing the sickle darter is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

H. Trispot Darter

60. The trispot darter is a small freshwater fish that lives in portions of the upper Coosa River watershed in Alabama, Tennessee, and Georgia, including areas of the Conasauga, Coosawatee, and Oostanaula rivers. The fish occupies slack water when not breeding, but it migrates to spawn in seepage waters, small ditches along pastures, and floodplain forests. This requirement for two distinct but interconnected habitats makes the trispot darter highly sensitive to habitat modification, and impoundments have wiped out the trispot darter from large portions of its historic range. The species was long thought to be extinct in Alabama, but it was recently

discovered in protected forestland east of Gadsden, Alabama, near the Georgia border. Today its populations are restricted to limited areas in a few mainstem rivers and a small number of tributary streams.

61. Primary threats to the trispot darter are habitat loss and degradation, including dams that block access to spawning areas, and dredging and filling activities in small seepage streams. Other threats include water pollution from agricultural runoff and urban sprawl. NatureServe lists the species as extirpated in Alabama, and “critically imperiled” globally and in Georgia and Tennessee. It is categorized as extinct by the State of Alabama, endangered in Georgia, and threatened in Tennessee. The American Fisheries Society reclassified the status of the trispot darter from threatened to endangered in 2008 due to increasing threats to its survival. There currently are no substantial state-level regulatory protections in place for the species.

62. Due to the threats to the trispot darter, on April 20, 2010, the Center submitted a petition to FWS to list the fish as endangered or threatened under the ESA.

63. FWS issued a 90-day finding on the Center’s petition to list the trispot darter on September 27, 2011. The finding concluded that the Center’s petition presented substantial scientific or commercial information indicating that listing the trispot darter may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

64. FWS was required to make a 12-month finding as to whether listing the trispot darter is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

I. Western Glacier Stonefly

65. The western glacier stonefly is a rare aquatic insect that is found only in steep, glacier-fed streams in Glacier National Park. Considered excellent representatives of the health

of this unique ecosystem, western glacier stoneflies also play an important role in breaking down vegetative matter and forming the base of the food chain for fish and other aquatic life.

66. The western glacier stonefly is extremely sensitive to changes in water temperature, and with its restricted range and specialized habitat, it is particularly vulnerable to the effects of climate change. Only 27 of 150 glaciers surveyed in Glacier National Park in 1910 exist today, and as glaciers melt and disappear, the western glacier stonefly is abandoning its former habitat in search of higher, cooler alpine streams – and soon will have nowhere left to go. It is expected that all glaciers will be gone entirely from Glacier National Park in the next 15 years, putting this rare aquatic insect at imminent risk of extinction. The Montana Natural Heritage Program rates the species at “high risk of extinction,” and NatureServe recently changed its ranking for the western glacier stonefly from imperiled to critically imperiled due to the immediate threats of climate change.

67. Threats to the western glacier stonefly led the Center to petition to list the species as endangered or threatened under the ESA, which was submitted to FWS on January 10, 2011.

68. FWS issued a 90-day finding on the Center’s petition to list the western glacier stonefly on December 19, 2011. The finding concluded that the Center’s petition presented substantial scientific or commercial information indicating that listing the western glacier stonefly may be warranted. 76 Fed. Reg. 78,601 (Dec. 19, 2011).

69. The FWS was required to make a 12-month finding as to whether listing the western glacier stonefly is warranted by January 10, 2012, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

J. Yellow Lance

70. The yellow lance is a large freshwater mussel that reaches six inches in length. It

lives in sandy areas, rocks and mud, and slack water, and it may migrate with shifting sands.

The yellow lance is native to creeks and mid-sized rivers in the coastal plains of Virginia, North Carolina, and possibly Maryland and South Carolina, though taxonomic issues are unresolved in those two states, and it is likely extirpated from Maryland if it ever existed there.

71. All of the current known populations of yellow lance are at risk today: it has a restricted range in the Chowan River; is very rare in the James, South Anna, and Rappahannock rivers; is extremely threatened with extirpation in the Neuse River; and may be extirpated from the Roanoke River. Stable populations exist in the Tar River, but it recently has been wiped out from portions of the watershed and remaining populations are patchily distributed and also vulnerable to extirpation.

72. The yellow lance is sensitive to sediment pollution and also appears particularly sensitive to chemical pollutants. There are a multitude of threats confronting the species, including wastewater, urban runoff, fertilizer, and other pollution caused by a rapid increase in development and population growth. These problems will intensify as the human population continues to expand in the range of the yellow lance; for example, the human population is expected to increase by 30 percent in the next five years in the Neuse River basin, reaching nearly three million people by 2020. Pollution from industrial development, logging, confined animal feeding stations, and agriculture also degrade the habitat of the yellow lance. Additional threats include impoundments, channelization, and water withdrawals. The yellow lance is listed as endangered by the State of North Carolina; a “species of special concern” by the State of Virginia; endangered by the American Fisheries Society; and imperiled in Virginia and critically imperiled in North Carolina by NatureServe.

73. Due to the threats to the yellow lance, on April 20, 2010, the Center submitted a

petition to FWS to list the mussel as endangered or threatened under the ESA.

74. FWS issued a 90-day finding on the Center's petition to list the yellow lance on September 27, 2011. The finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the yellow lance may be warranted. 76 Fed. Reg. 59,836 (Sept. 27, 2011).

75. FWS was required to make a 12-month finding as to whether listing the yellow lance is warranted by April 20, 2011, but it has not made this mandatory finding to date, a violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Ashy Darter

76. Plaintiff hereby incorporates all preceding paragraphs.

77. FWS's failure to make a timely 12-month finding on the Center's petition to list the ashly darter as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Black-Capped Petrel

78. Plaintiff hereby incorporates all preceding paragraphs.

79. FWS's failure to make a timely 12-month finding on the petition to list the black-capped petrel as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

THIRD CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Candy Darter

80. Plaintiff hereby incorporates all preceding paragraphs.

81. FWS's failure to make a timely 12-month finding on the Center's petition to list the candy darter as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

FOURTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Frecklebelly Madtom

82. Plaintiff hereby incorporates all preceding paragraphs.

83. FWS's failure to make a timely 12-month finding on the Center's petition to list the frecklebelly madtom as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

FIFTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Longhead Darter

84. Plaintiff hereby incorporates all preceding paragraphs.

85. FWS's failure to make a timely 12-month finding on the Center's petition to list the longhead darter as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

SIXTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding
for the Mohave Shoulderband

86. Plaintiff hereby incorporates all preceding paragraphs.

87. FWS's failure to make a timely 12-month finding on the Center's petition to list

the Mohave shoulderband as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been “unlawfully withheld or unreasonably delayed” within the meaning of the APA. 5 U.S.C. § 706(1).

SEVENTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Sickie Darter

88. Plaintiff hereby incorporates all preceding paragraphs.

89. FWS’s failure to make a timely 12-month finding on the Center’s petition to list the sickie darter as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been “unlawfully withheld or unreasonably delayed” within the meaning of the APA. 5 U.S.C. § 706(1).

EIGHTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Trispot Darter

90. Plaintiff hereby incorporates all preceding paragraphs.

91. FWS’s failure to make a timely 12-month finding on the Center’s petition to list the trispot darter as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been “unlawfully withheld or unreasonably delayed” within the meaning of the APA. 5 U.S.C. § 706(1).

NINTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the
Western Glacier Stonefly

92. Plaintiff hereby incorporates all preceding paragraphs.

93. FWS’s failure to make a timely 12-month finding on the Center’s petition to list the western glacier stonefly as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been “unlawfully withheld or unreasonably delayed” within the meaning of the APA. 5 U.S.C. § 706(1).

TENTH CLAIM FOR RELIEF

Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Yellow Lance

94. Plaintiff hereby incorporates all preceding paragraphs.

95. FWS's failure to make a timely 12-month finding on the Center's petition to list the yellow lance as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court enter Judgment for Plaintiff providing the following relief:

A. Declare that Defendants violated the ESA and APA by failing to issue timely 12-month findings as to whether listing the ashy darter, black-capped petrel, candy darter, frecklebelly madtom, longhead darter, Mohave shoulderband, sickle darter, trispot darter, western glacier stonefly, and yellow lance is warranted;

B. Order Defendants to issue, by dates certain, findings as to whether listing the ashy darter, black-capped petrel, candy darter, frecklebelly madtom, longhead darter, Mohave shoulderband, sickle darter, trispot darter, western glacier stonefly, and yellow lance is warranted, 16 U.S.C. § 1533(b)(3)(B);

C. Grant Plaintiff its attorneys' fees and costs in this action as provided by the ESA, 16 U.S.C. § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412; and

D. Provide such other relief as the Court deems just and proper.

Dated: June 22, 2015

Respectfully submitted,

/s/ Amy R. Atwood

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