

**DEFENDERS OF WILDLIFE
CENTER FOR BIOLOGICAL DIVERSITY
WILDEARTH GUARDIANS**

April 10, 2014

Via Electronic Mail & Certified Mail, Return Receipt Requested

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The Honorable Sally Jewell
Secretary
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RE: 60-day notice of intent to sue over violations of Sections 4 and 7 of the Endangered Species Act (“ESA”); Actions Relating to the March 27, 2014 Decision to List the Lesser Prairie Chicken As Threatened With a 4(d) Rule Habitat Under the ESA.

Defenders of Wildlife, the Center for Biological Diversity, and WildEarth Guardians (“Conservation Groups”) hereby provide this 60-day notice of intent to sue the U.S. Fish and Wildlife Service (“Service”) and the U.S. Department of the Interior over violations of Sections 4 and 7 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1533, 1536, for listing the lesser prairie (“chicken”) as a threatened species with a 4(d) rule. This notice is provided in fulfillment of the requirements of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

Defenders of Wildlife is a national, non-profit conservation organization with more than one million members and supporters. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities and the preservation of the habitat on which they depend. Defenders has a long-standing interest in the conservation of the lesser prairie chicken and other grassland species.

The Center for Biological Diversity is a national, non-profit conservation organization supported by more than 675,000 members and online activists. The Center and its members have a long-standing interest in the conservation of the lesser prairie chicken and its habitat in the United States.

WildEarth Guardians is a regional non-profit conservation organization working in the American West to protect and restore wildlife, wild places, and wild rivers. Guardians and its 43,000 members and online activists have long been active seeking to protect the lesser prairie chicken and the habitat in the United States that it needs to thrive.

I. The Endangered Species Act.

Enacted in 1973 amid growing concern over the loss of biodiversity stemming from “economic growth and development untempered by adequate concern and conservation,” 16 U.S.C. § 1531(a), the ESA establishes a comprehensive statutory program to protect and conserve imperiled species and their ecosystems. The Act establishes a listing process to identify species that are “endangered” or “threatened” with extinction and to designate their critical habitat, directs the Service to develop plans to recover such species, and bars the take of endangered species except as authorized under the Act. As the Supreme Court has emphasized, the “plain intent of Congress in passing the statute was to halt and reverse the trend toward extinction whatever the cost.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (citing *TVA v. Hill*, 437, U.S. 153, 184 (1978)).

A species is deemed to be “endangered” under the Act if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e). A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20); 50 C.F.R. § 424.02(m). The Service is required to “list” species of plants and animals as endangered or threatened if it determines that the species is facing extinction due to “the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1)(A)-(E). In making listing decisions, the Service must rely “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

Section 9 of the statute prohibits various activities including the “take” of all endangered species. 16 U.S.C. § 1538(a). “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The statute provides the Secretary may extend the take and other prohibitions in Section 9 to threatened species. *Id.* § 1533(d). The Secretary has applied the take prohibition to all threatened species by regulation. 50 C.F.R. § 17.31(a).

Section 4(d) also provides that when it is “necessary and advisable,” the Secretary “shall issue” regulations for the “conservation” of threatened species. 16 U.S.C. § 1533(d). The statute defines conservation as:

the use of *all* methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and

transplantation, and, *in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.*

16 U.S.C. § 1532(3) (emphasis added). The term “conservation” includes ensuring a species’ survival as well as promoting its recovery. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (quoting *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”)).

II. BACKGROUND

The lesser prairie chicken (*Tympanuchus pallidicinctus*), is a grassland bird found in southeastern Colorado, western Kansas, eastern New Mexico, western Oklahoma, and the Texas Panhandle. It is commonly recognized for its feathered feet, stout build, ground-dwelling habit, and lek mating behavior. Its preferred habitat is native short- and mixed-grass prairies having a shrub component dominated by sand sagebrush or shinnery oak. The bird’s currently-occupied range is thought to be just 16 percent of its historic range. Recent data show that between 2008 and 2011, more than 23 million acres of wildlife habitat was converted into row crop agriculture, including more than 1.5 million acres in the counties where the chickens still occur.¹ Once common, with an estimated population of as many as two million birds, the chicken was thought in 2012 to number approximately 45,000 individuals. A more recent study released September 24, 2013 estimated just 17,616 birds, a 50 percent decline from the 2012 count.

First petitioned for listing in 1995, the chicken was designated a candidate for listing in 1999. In its 2008 candidate notice of review, the Service changed the listing priority number for the chicken from an 8 to a 2, reflecting a change in the magnitude of the threats from moderate to high due to an anticipated increase in the development of wind energy and associated transmission lines throughout the occupied range of the chicken. The change in status also reflected conversion of certain Conservation Reserve Program lands from native grass cover to cropland and observed increases in oil and gas development in the chicken’s habitat. The Service, however, took no action to list the species. A settlement agreement in *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377, MDL Docket No. 2165 (D.D.C. May 10, 2011) required the Service to submit a proposed listing for the chicken by September 30, 2012.

On December 11, 2012, the Service issued a proposed rule listing the lesser prairie chicken as a threatened species under the ESA, and a determination that designating critical habitat for the species is prudent but not determinable at this time. 77 Fed. Reg. 73,828 (Dec. 11, 2012). On May 6, 2013, the Service issued a proposed 4(d) rule that exempts a host of activities from the ESA’s Section 9 prohibition on take. 78 Fed. Reg. 26,302 (May 6, 2013).

¹ Faber S., Rundquist S, and Male T. 2012. *Plowed Under: How Crop Subsidies Contribute to Massive Habitat Losses*. Environmental Working Group, available at <https://www.defenders.org/sites/default/files/publications/plowed-under-how-crop-subsidies-contribute-to-massive-habitat-loss.pdf>.

Conservation groups submitted comments to the Service addressing numerous flaws with the proposed 4(d) rule and calling into question the agency's assertion that the rule would provide for the conservation of the chicken.

On December 11, 2013, the Service proposed a revised 4(d) rule and reopened the public comment period on the proposed listing of the chicken. 78 Fed. Reg. 75,306 (Dec. 11, 2013). Conservation groups again submitted comments reaffirming our concerns with the 4(d) rule and raising new issues with the revised rule and proposed listing. In particular, Conservation groups commented that alarming new survey results warranted an explanation from the Service as to whether the species warrants listing as an "endangered species" based on threats throughout all or a significant portion of its range.

On December 18, 2013, the Service published a Federal Register notice announcing the draft Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances ("CCAA") for the chicken. 78 Fed. Reg. 76,639 (Dec. 18, 2013). The CCAA would extend regulatory assurances to participants in the plan that, in exchange for voluntarily agreeing to undertake certain conservation measures for the species, they would not be imposed with additional conservation requirements or regulatory restrictions in the event the chicken was listed as endangered or threatened under the ESA. Conservation groups submitted comments to the Service on the draft CCAA addressing numerous flaws and deficiencies with the agreement that will undermine conservation of the species.

On March 27, 2014, the Service announced its decision to issue final rules listing the lesser prairie chicken as a threatened species with a 4(d) rule and announcing that critical habitat is not determinable at this time.

III. LEGAL VIOLATIONS

a. Failure to List As Endangered

The Service's decision to list the species as threatened instead of endangered is arbitrary and capricious and fails to properly apply the ESA's listing factors or the best available science. Here, the Service has listed the chicken as a threatened species and attempted to use the regulatory flexibility provided for under section 4(d) of the ESA to effectively codify fatally flawed conservation agreements for the species and to exempt a host of activities harmful to the chicken and its habitat from the ESA's regulatory protections. The Service's failure to list the chicken as an endangered species violates the ESA and is otherwise arbitrary and capricious for the following reasons:

- The Service failed to utilize the best scientific data available and adequately evaluate the ESA's statutory listing factors. The best available scientific information regarding the status of the species and threats to its continued existence, including an estimated 84 percent reduction in the species' range, ongoing habitat destruction and fragmentation, and recent survey data indicating that chicken population numbers are crashing, all support a determination that the species is currently threatened with extinction and should be listed as an endangered species.

- The Service failed to consider adequately whether the chicken meets the definition of an endangered species in a “significant portion of its range.” The shinnery oak portion of the chicken’s range has experienced the largest percentage declines of habitat and, according to the Service, contains “a unique combination of precipitation, temperature, and vegetation type” that is necessary to “ensure redundancy, resiliency, and representation across the species’ range.” Scientific research shows that this population also is isolated from the remainder of the lesser prairie chicken population and exhibits distinct genetic traits versus the rest of the population, due to isolation by distance, and thus is at heightened risk of extinction. Accordingly, the shinnery oak ecoregion qualifies as a significant portion of the chicken’s range and is an area where the species is currently threatened with extinction.
- The Service failed to explain adequately why two Distinct Population Segments (DPS) of lesser prairie chickens were not listed (*e.g.*, a Shortgrass Prairie BCR and a Mixed-Grass Prairie BCR or a Northern DPS and a Southern DPS) and why certain DPSs, such as the Southern DPS, are not endangered instead of threatened.
- The Service improperly relied upon unproven conservation plans and strategies in listing the chicken as a threatened rather than endangered species. Just as the Service may not rely upon unproven conservation plans as a basis for not listing a species as endangered or threatened, *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 744 (W.D. Tex. 1997), it was similarly arbitrary for the agency to rely upon such agreements here to deny the chicken the more protective status of endangered.
- The Service has unlawfully relied upon the “Supplemental Explanation for the Legal Basis of the Department’s May 15, 2008, Determination of Threatened Status for the Polar Bear” (hereafter “the polar bear memo”) in determining that the lesser prairie chicken is a threatened species. The Service previously represented in federal court that it would not use the polar memo for any other species. Reliance upon the memo violates Section 4(h) of the ESA, violates the APA’s notice and comment requirements, is arbitrary and capricious, and contrary to law.

b. Promulgation of an Unlawful 4(d) Rule

In adopting the 4(d) rule for the lesser prairie chicken, the Service has violated several requirements of the ESA, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559, 701-706, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347. These violations include, *inter alia*, the following:

- The 4(d) Rule is invalid because the lesser prairie chicken must be listed as an endangered species, not as a threatened species, and therefore, the Service has no discretion to reduce the protections provided by Section 9 of the ESA or pass a 4(d) rule for the conservation of the species. Moreover, even if the species could be lawfully listed as threatened, for the reasons discussed below, the 4(d) rule accompanying the threatened listing is unlawful.

- By using a “net conservation benefit” standard to justify the 4(d) rule, instead of finding the rule is necessary and advisable for the conservation of the species, the Service violated the clear commands and plain language of the ESA. *See* 16 U.S.C. §§ 1533(d) (the Service “shall issue” regulations “necessary and advisable” for the conservation of the species and “may” issue regulations extending Section 9’s prohibitions), 1532(3) (defining conservation). Section 4(d) only authorizes the Service to conserve the species. *See* S. Rep. No. 93-307, 93d Cong., 1st Sess. 8 (1973) (Secretary is required “to issue regulations to *protect* that species” (emphasis added)); Conf. Rep. No. 930740, 93rd Cong., 1st Sess. 23 (1973), U.S.C.C.A.N 1973, at 2989, 3002 (discussing what conservation means); *Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985) (section 4(d) “clearly indicates an intent to limit the Secretary’s discretion to permit the taking of threatened species”). The “net conservation benefit” concept is from the Service’s Safe Harbor policy, which is used to issue permits under Section 10(a)(1)(A) of the ESA. 64 Fed. Reg. 32717, 32718 (June 17, 1999). Section 10(a)(1)(A) permits are not issued to authorize incidental take of species pursuant to an otherwise lawful activity, thus, this is not an appropriate standard for authorizing incidental take of a species. Moreover, under Section 10, the Service permits incidental take of ESA listed species under certain, limited circumstances. 16 U.S.C. § 1539(a)(1). When the Service issues such a permit, it undergoes public notice and comment, 16 U.S.C. § 1539(c), and the Service’s permitting regulations impose additional protections such as monitoring requirements and time limits. However, when the Service authorizes activities pursuant to a 4(d) rule, the public, and the species, is deprived of all of these protections of Section 10 and many others. By passing a 4(d) rule, instead of engaging in the process contemplated by Congress in the ESA – *i.e.*, Section 10 – the Service has deprived the public and lesser prairie chickens of the protections designed to accompany the authorization of incidental take of an imperiled species.
- The Service has decided under its authority in the second sentence of Section 4(d) to extend the “prohibitions and provisions of §§ 17.31 and 17.32” to the lesser prairie chicken. 16 U.S.C. § 1533(d). The agency has decided, as is required under the first sentence of Section 4(d), to issue regulations that are necessary and advisable for the conservation of the species. *Id.* These regulations, however, fail to provide for the conservation of the species. To the contrary, the regulations authorize incidental take of lesser prairie chickens from a whole host of activities that have been identified as contributing to the species’ decline. As such, these regulations are not necessary or advisable for the conservation of the species as required by the ESA. 16 U.S.C. § 1533(d). The attempts to justify the 4(d) rule are arbitrary and capricious and contrary to law. 5 U.S.C. § 706(2).
- The Service unlawfully relied upon voluntary, unproven lesser prairie chicken plans to form the basis for its 4(d) rule. *See Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (“NMFS must base its decision on current, enforceable measures”); *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1169 (N.D. Cal. 2000).
- The Service has unlawfully delegated its ESA authority to State wildlife agencies, the Natural Resources Conservation Service, and private landowners engaged in “routine

agricultural activities” under the 4(d) rule. *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

- The Service cannot lawfully adopt a 4(d) rule that fails to articulate what is permitted and what is not within the confines of the rule itself. The 4(d) rule for lesser prairie chicken mentions certain plans but the rule fails on its face to specify the conservation measures that must be implemented for the species or the activities that are authorized under the rule.
- The 4(d) rule is also unlawful because it was adopted without the required consultations or conferences under section 7 of the Act. Section 7(a)(2) of the Endangered Species Act requires “[e]ach federal agency,” including the Service, to “insure that any action authorized, funded, or carried out by” it “is not likely to jeopardize the continued existence of any endangered species or threatened species . . .” 16 U.S.C. § 1536(a)(2). Section 7(a)(4) requires the Service to consult on agency actions that are “likely to jeopardize the continued existence of” a species proposed for listing. *Id.* § 1536(a)(4). A 4(d) rule is a federal action that requires consultation under Section 7 of the Act. *See Wash. Envtl. Council v. Nat’l Marine Fisheries Serv.*, 2002 U.S. Dist. LEXIS 5432, *30 (W.D. Wash. 2002) (“ESA § 7 requires a formal consultation for any agency action ‘authorized, funded, or carried out by’ a federal agency. 16 U.S.C. § 1536(a)(2). The parties do not dispute that promulgation of the final § 4(d) rule in this case is such an action.”). Therefore, the Service needs to consult on the effects of the proposed 4(d) rule and ensure it will not jeopardize the continued existence of the species before the rule is adopted.
- The Service violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental assessment (EA) or environmental impact statement (EIS) to analyze the various alternatives for a lesser prairie chicken 4(d) rule. *See In re Polar Bear*, 818 F. Supp. 2d at 238 (D.D.C. 2011) (requiring NEPA for polar bear 4(d) rule). Congress has directed that NEPA be interpreted to apply to all federal actions “to the fullest extent possible.” 42 U.S.C. § 4332; *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986). The promulgation of a 4(d) rule authorizing the otherwise prohibited take of a threatened species is a “major Federal action significantly affecting the quality of the human environment.” While we believe that there are significant detrimental effects to lesser prairie chickens from the proposed 4(d) rule, even if the Service believed the effects of the proposed 4(d) rule are purely beneficial (as they should be under section 4(d) of the ESA), the agency would still need to undertake a NEPA review. *See* 40 C.F.R. § 1508.27(b)(1) (requiring analysis of “both beneficial and adverse” impacts). As evidenced by the NEPA review undertaken for the polar and at least 15 other NEPA reviews for 4(d) rules, there is strong precedent requiring compliance with NEPA as a 4(d) rule is proposed and adopted for a species.

c. Unlawful Approval of Candidate Conservation Agreements with Assurances

The Service has approved a CCAA covering oil and gas development within the range of the chicken. This agreement provides, among other things, that participants in the plan will not be required to undertake any additional conservation actions or be subject to additional

regulatory restrictions beyond those outlined in the agreement. These regulatory “assurances” will be extended to plan participants through a section 10(a)(1)(A) survival of enhancement permit.

The Service’s approval of the CCAA was arbitrary because the conservation measures in the plan are woefully inadequate and unproven and cannot reasonably be expected to conserve or enhance the survival of the species. In approving CCAAs for the lesser prairie chicken, the Service has violated several requirements of the ESA, the APA, and NEPA, including, inter alia, the following:

- This CCAA relies improperly on voluntary conservation actions and unproven and unspecified off-site mitigation efforts. The CCAA applies discretionary “avoidance” rather than mandatory “exclusion” for the primary impacts of oil and gas development on lesser prairie chickens, including siting of wells and roads in critical lesser prairie chicken habitats such as within 1.25 miles of leks. Indeed, recent cases make clear that the Service cannot rely on speculative future regulatory and non-regulatory conservation measures in making listing decisions. *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 794 F. Supp. 2d 65 (D.D.C. 2011) (“As other courts have found, the ESA does not permit FWS to consider speculative future conservation actions when making a listing determination.”); *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 113 (D.D.C. 1996). *See also, e.g., Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1154 (D. Or. 1998) (criticizing reliance on a regulatory mechanism where there is no assurance that the “measures will be carried out, when it will be carried out, nor whether they will be effective in eliminating the threats to the species.”).²
- In addition, the Service’s authorization of activities related to oil and gas development that will incidentally take listed species pursuant to a section 10(a)(1)(A) enhancement of survival permit, rather than a section 10(a)(1)(B) incidental take permit, was arbitrary and capricious.

² Although the Service’s Policy on the Evaluation of Conservation Efforts (“PECE”) contemplates that agreements containing sufficiently certain future actions may be considered in making listing decisions, courts have held such efforts to a high standard. Judge Sullivan in the polar bear case noted: “Moreover, established agency policy requires that in making a listing determination FWS may only consider formalized conservation efforts that have been implemented and have been shown to be effective.” 794 F. Supp. 2d at 113 n.56 (citing the PECE policy). Other courts concur that the PECE policy requires certainty that current conservation measures are actually being implemented and effectively aiding the species. *Alaska v. Lubchenco*, 825 F. Supp. 2d 209 (D.D.C. 2011) (holding that conservation measures “must actually be in place and *have achieved some measure of success* in order to count under the Service’s policy” (emphasis added)); *Marincovich v. Lautenbacher*, 553 F. Supp. 2d 1237 (D. Idaho 2008) (holding that NMFS need not give weight to future conservation efforts).

- The Service may not rely upon a conservation agreement where “[t]he effect of the measures articulated in the Conservation Agreement on the species is speculative. There are no assurances that the measures will be carried out, when they will be carried out, nor whether they will be effective in eliminating the threats to the species.” *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 744 (W.D. Tex. 1997). The ESA mandates that FWS “cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record.” *Id.* at 747. As the court explained in *Save Our Springs*:

The Secretary placed the continued existence of a species, found only one place in the natural world, in the hands of state agencies and a Conservation Agreement with no proven track record for success. It may well come to pass that the Conservation Agreement passes with flying colors in its intended effect of eliminating the risk to the species and is the best possible way to accomplish that aim. However, absent some historical data to back the decision that the Conservation Agreement is sufficient to adequately protect the species, it is arbitrary and capricious to conclude that at this time.

Id. at 748-49. The Service’s reliance here on unproven conservation agreements is arbitrary and capricious.

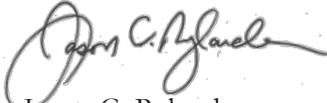
- Reliance upon a Conservation Agreement that does not recover the species violates the ESA. The Act requires recovery and is based on Congress’s policy determination that “[i]f a species is listed under the ESA, [FWS] must not merely avoid elimination of that species, but is required to bring the species back from the brink sufficiently to obviate the need for protected status.” *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1163 (N.D. Cal. 2000); *see also Gifford Pinchot Task Force*, 378 F.3d at 1070 (distinguishing between recovery and survival under the ESA); *Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 42 (D.D.C. 2007) (affirming that conservation is broader than survival and encompasses species’ recovery); *Fund v. Babbitt*, 903 F. Supp. 96, 104 (D.D.C. 1995) (“The Act contains a number of provisions designed to stem the threat of extinction, promote recovery of those species found to be threatened or endangered, and establish systems to conserve the species even after the threat of extinction has passed.” (emphasis added)).
- Furthermore, the Service has failed to complete an intra-agency section 7 formal consultation or conference addressing the effects of the CCAA on the chicken. 16 U.S.C. §§ 1536(a)(2), (a)(4), *see supra* at 7. And it has failed to complete NEPA analysis of the effects of these agreements. 42 U.S.C. § 4332, *see supra* at 7.

CONCLUSION

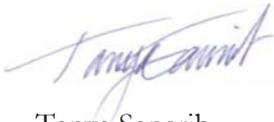
This letter provides notice that Conservation Groups will take the necessary steps to compel the Service to lawfully protect the lesser prairie chicken, and meet its mandatory duties under the ESA, as well as its duties under the APA. If the Service does not act to remedy these violations within 60 days, Conservation Groups will initiate litigation in federal district court

against the Service concerning these violations and will seek declaratory and injunctive relief and reasonable attorneys' fees and costs. If you would like to discuss these issues or believe that anything stated above is in error, please contact Mr. Rylander at 202-682-9400 x. 145. We appreciate your consideration of these concerns.

Sincerely,



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