UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CONSERVATION LAW FOUNDATION OF NEW ENGLAND,

and

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

DIRK KEMPTHORNE
Secretary of the Interior,
U.S. Department of the Interior;

CARLOS M. GUTIERREZ
Secretary of Commerce,
U.S. Department of Commerce;

H. DALE HALL
Director,
U.S. Fish and Wildlife Service;

and

VICE ADMIRAL CONRAD C. LAUTENBACHER, JR.
Undersecretary of Commerce for Oceans
and Atmosphere and NOAA Administrator
National Oceanic & Atmospheric Administration;

Defendants.

Civ. No. _____

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action for declaratory and injunctive relief under the citizen suit provision of the Endangered Species Act ("ESA"). 16 U.S.C. § 1540(g)(1)(C).

2. Plaintiffs the Conservation Law Foundation of New England and the Center for Biological Diversity (collectively, "CLF") challenge the failure of the Secretary of the Interior and the Secretary of Commerce (Hereafter jointly referred to as the "Secretaries"), acting through NOAA Fisheries Service (formerly the National Marine Fisheries Service) and the U.S. Fish and Wildlife Service (Hereafter jointly referred to as the "Services"), to designate, and thereby to legally protect, critical habitat for the endangered Gulf of Maine Distinct Population Segment of Atlantic Salmon (*Salmo salar*) (Hereafter "Atlantic Salmon DPS") as required by 16 U.S.C.§ 1533 (a)(3)(A)(i) of the ESA.

3. Plaintiffs seek a judgment declaring that the Defendants are in violation of the ESA and an order compelling the Services to promptly designate critical habitat for the endangered Atlantic Salmon DPS.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g)(1)(C) and 28 U.S.C. § 1331.

5. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A).

6. As required by 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs provided the Defendants with 60 days' notice of intent to sue via fax and certified letter dated October 11, 2006. (Attached hereto as Exhibit A.). Defendants have not remedied their violation of the law. Therefore, a present and actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

7. Relief is authorized by 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. § 1540(g)(4) (attorneys fees and costs).

PARTIES

8. Plaintiff the CONSERVATION LAW FOUNDATION ("CLF") is a nonprofit, member-supported organization dedicated to the conservation of natural resources and protection of the environment in New England. CLF also works to ensure that government agencies fulfill their responsibilities to the public. CLF has over 5000 members in New England, several hundred of whom live in Maine. CLF has offices at 14 Maine Street, Suite 200, Brunswick, Maine. CLF has a lengthy history of advocacy in support of efforts to protect the nation's last population of wild Atlantic salmon. CLF supported the petition to list the salmon as endangered. CLF was part of a precedent-setting memorandum of understanding with Maine's salmon farming industry that led to the development of several operational protocols for protecting wild Atlantic salmon from the threats posed by salmon farms. A CLF staff member has published a law journal article that helped develop the legal framework for including such conditions in salmon farm Clean Water Act (NPDES) permits. CLF later led a coalition of environmental organizations that helped develop and implement the first Clean Water Act (NPDES) permits for salmon farms, and ensured that these permits included conditions protective of the wild salmon. CLF has a continuing and direct interest in the protection of the endangered Atlantic salmon.

9. Members of CLF have educational, scientific, and recreational interests in the endangered Atlantic salmon and the habitat critical to their survival. Specifically, CLF has members who live in the 8 watersheds that are home to the endangered Atlantic salmon, namely the Dennys, East Machias, Machias, Pleasant, Narraguagus, Sheepscot, and Ducktrap Rivers and in Cove Brook, Maine. Plaintiffs' members are also members of watershed councils for these areas whose purpose is to restore and protect the water quality of the salmon rivers. Additionally, Plaintiffs' members regularly canoe, kayak, and otherwise use and enjoy these

eight watersheds in Maine. CLF members would like to have more salmon in the rivers to enjoy and ensure the rivers and the riverine ecosystems' health and balance. Plaintiffs' members regularly use and enjoy the eight watersheds in Maine that are home to the endangered salmon species. Plaintiffs' interests and those of its members have been, are being, and unless the requested relief is granted, will continue to be adversely affected and injured by the Defendants' violations of law.

10. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY ("CBD") is a non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. CBD has offices in Arizona, California, Oregon, New Mexico, and Washington, D.C. CBD strives to secure a future for animals and plants hovering on the brink of extinction, and for the habitat they need to survive. The CBD has over 25,000 members, 245 of whom live in Maine.

11. The Biodiversity Legal Foundation was one of the formal petitioners for federal listing of the Atlantic Salmon DPS under the Endangered Species Act in October 1993. This petition led to the listing of the species as endangered. The Biodiversity Legal Foundation has since merged with CBD.

12. CBD has been involved in efforts to protect other wildlife species in Maine. CBD has been a party in a series of lawsuits brought since 2000 challenging inadequacies in the Service's rule listing the Canada lynx (which occurs in Maine) as a threatened species and seeking to designate critical habitat for the lynx.

13. In July 2004 CBD published a comprehensive report regarding pesticides impacts on endangered species. The report, *Silent Spring Revisited - Pesticide Use and Endangered Species*, specifically discussed pesticide impacts on wild Atlantic Salmon in Maine.

14. In March 2006 CBD published a report documenting the long-term population trends of all endangered species in the Northeastern U.S. The 125-page study, *Measuring the Success of the Endangered Species Act: Recovery Trends in the Northeastern United States*, covered eight states, including Maine.

15. Members of CBD have educational, scientific, and recreational interests in the endangered Atlantic salmon species and the habitat critical to their survival. CBD's members regularly use and enjoy the watersheds in Maine that are home to the endangered salmon species for recreation including fishing, canoeing, and wildlife viewing.

16. The Galvin family has owned land in Maine for over 50 years on Mt. Desert Island. CBD Conservation Director and member Peter Galvin owns land in Maine and visits Maine often for recreation and wildlife viewing. Peter has visited the Dennys, Machias, Pleasant, Narraguagus, Sheepscot, and Ducktrap Rivers as well as Cove Brook. Peter plans to return to Maine in summer of 2007 to recreate and view Atlantic Salmon in their river habitat. CBD member Robert Galvin frequents Maine regularly to enjoy the wildlife and nature of the area.

17. CBD Policy Director and member Kieran Suckling has lived in the Northeastern U.S. most of his life, including several years in Maine. Kieran has visited Atlantic Salmon habitat in the Sheepscot, Ducktrap, and Pleasant Rivers for recreation and wildlife viewing and plans to return in summer 2007 and years following.

18. Plaintiffs' members regularly use and enjoy the watersheds in Maine that are home to the endangered salmon species for recreation including fishing, canoeing, and wildlife viewing. Plaintiffs' interests and those of its members have been, are being, and unless the requested relief is granted, will continue to be adversely affected and injured by the Defendants' violations of law.

19. Defendant DIRK KEMPTHORNE is sued in his official capacity as the Secretary of the Interior. The Secretary is the federal official in whom the ESA vests final responsibility for designating critical habitat for species listed under the Act.

20. Defendant CARLOS M. GUTIERREZ is sued in his official capacity as Secretary of Commerce. The Secretary is the federal official in whom the ESA vests final responsibility for designating critical habitat for species listed under the Act.

21. Defendant H. DALE HALL is sued in his official capacity as the Director of the U.S. Fish and Wildlife Service ("FWS"). FWS has primary responsibly for implementing the ESA.

22. Defendant VICE ADMIRAL CONRAD C. LAUTENBACHER, JR. is sued in his official capacity as the Administrator of the National Oceanic & Atmospheric Administration ("NOAA"). The Administrator has authority over NOAA Fisheries Service, formerly NMFS. NOAA Fisheries has responsibility for implementing the ESA with respect to marine species.

23. Under the ESA, the Department of the Interior and the Department of Commerce both have responsibility for endangered or threatened species. 16 U.S.C.A. § 1533(a)(2). The Secretaries of these agencies delegated their respective authority under the ESA to the Services. See 50 C.F.R. § 402.01(b) (2000). In this case, the Services have joint responsibility for the endangered Atlantic Salmon DPS, and thus, have joint responsibility to designate critical habitat.

STATUTORY AND REGULATORY FRAMEWORK

24. In 1973, Congress enacted the ESA to provide "a means whereby the ecosystems on which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species. . . ." 16 U.S.C. § 1531(b).

25. The ESA defines an "endangered species" as a species that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The ESA defines a "threatened species" as a species that is "likely to become an endangered species within the foreseeable future through all or a significant portion of its range." 16 U.S.C. § 1532(20).

26. "[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

27. A principle goal of the ESA is to protect the ecosystems including "critical habitat" upon which endangered and threatened species depend. 16 U.S.C. § 1531(b).

28. The ESA defines critical habitat as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

29. The ESA 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 . . . are no longer necessary." 16 U.S.C. § 1532(3).

30. The Secretaries must designate critical habitat "concurrently" with making the listing decision, unless they find that critical habitat is either "not determinable" at the time of listing, or that designation is "not prudent." 16 U.S.C. § 1533(a)(3)(A)(i).

31. As described below, in paragraphs 54-55, neither of the above exceptions applies in this case.

32. The ESA mandates that the Services develop and implement "recovery plans" for the conservation and survival of the listed species. 16 U.S.C. § 1533(f). Species are considered recovered when the protections of the Act are no longer needed. 16 U.S.C. § 1532(3).

33. The Recovery Plan for the Atlantic Salmon was published by the Services on December 20, 2005. See National Marine Fisheries Service and U.S. Fish and Wildlife Service, Final Recovery Plan for the Gulf of Maine Distinct Population Segment of Atlantic Salmon, 70 Fed. Reg. 75473 ("Recovery Plan").[1]

34. The Recovery Plan states that habitat restoration and protection is necessary for recovery of the Atlantic Salmon populations. Recovery Plan at 4-12.

35. The Recovery Plan focuses on 1) maintaining hydrological conditions to ensure stream flows adequate for the salmon; 2) restoring and maintaining water quality to support healthy and productive salmon populations; 3) ensuring timely passage of each life-stage, including connectivity of spawning and nursery habitats; 4) securing long term protections for freshwater and estuarine habitats; and 5) restoring degraded steam and estuarine salmon habitat. Recovery Plan at 4-1.

36. Courts have held that designation of critical habitat is a key step in the recovery process. Cf. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service, 378 F.3d 1059, 1070 (9th Cir. 2004).

[1] Available at http://ecos.fws.gov/docs/recovery_plans/2006/060407.pdf. (last visited 12/14/06).

FACTUAL BACKGROUND

Gulf of Maine DPS of Atlantic Salmon

37. The Atlantic Salmon, *Salmo salar*, is of the order Salmoniformes and the family Salmonidea. The Atlantic Salmon is one of only two members of the genus *Salmo* found in North America. Recovery Plan at 1-7.

38. The life history difference between United States and Canadian stocks of Atlantic Salmon were identified as early as 1874. Both environmental and genetic factors make the Gulf of Maine DPS markedly different from other populations of Atlantic Salmon in their life history and ecology. Recovery Plan at 1-7.

39. In 1999, a Biological Review Team completed a status review and concluded that the Atlantic Salmon DPS has unique life history characteristics that have a heritable basis. Id.

40. The National Research Council's Committee on Atlantic Salmon in Maine concluded that the large genetic differences among populations suggest biologically important genetic isolation. The genetic differences among tributaries within large watersheds are suggestive of local adaptations. Id.

41. Fish in the Atlantic Salmon DPS spend significant portions of their life in both the freshwater and saltwater. Salmon typically use the freshwater rivers of Maine during the first 2-3 years of their life before migrating to the ocean for 2-3 years at sea. At the end of the salmon's lives, they return to their natal rivers in Maine to spawn. Recovery Plan at 1-4.

42. The suitable spawning habitat for the salmon consists of coarse substrate in areas of free-flowing, cool water. Spawning generally occurs from mid-October to mid-November when female salmon seek gravel substrate within a riffle area and dig out a nest or depression with her tail. She deposits 7,000-8,000 eggs in the nest and awaits fertilization by milt from

nearby males. Eggs incubate slowly and hatch in March or April. Studies in Maine indicate that less that 10% of the eggs spawned in the autumn will survive to emerge the following spring. Sources of egg mortality include de-watering, freezing, mechanical destruction (i.e., sedimentation) and predation. Recovery Plan at 1-12.

43. Salmon spend the next 1-3 years in the parr stage of their development in Maine rivers. Parr habitat is typically riffle areas characterized by adequate cover of gravel and rubble up to 20 cm, moderate water dept of 10-60 cm, and moderate fast water flow of 30-90 cm/sec. A reduction in this type of habitat reduces foraging opportunities and thereby impairs growth and survival. Recovery Plan at 1-13.

44. Salmon larger than 12 cm undergo smoltification that prepares them for life in a marine habitat. Migration to sea is triggered by a number of environmental cues including water flow, temperature, and photoperiod changes. In Maine rivers, downstream migration occurs primarily from mid-April through mid-June. Changes in water flow and temperature can alter the timing of the migration. Recovery Plan at 1-14.

45. Only eight rivers [2] in the geographic range of the Atlantic Salmon are known to still support wild salmon populations. Recovery Plan at 1-1.

46. Remaining populations of Atlantic Salmon face the threat of extinction due to critically low adult returns to natal rivers, excessive and unregulated water withdrawal, threat of serious diseases, and other factors adversely affecting the quality of the freshwater habitat. Recovery Plan at 1-20.

[2] Dennys River, East Machias River, Machias River, Pleasant River, Marraguagus River, Ducktrap River, Sheepscot River and Cove Brook.

The Services' Decision to List the Gulf of Maine DPS of Atlantic Salmon

47. In October and November 1993, RESTORE: The North Woods, the Biodiversity Legal Foundation, and Jeffrey Elliot petitioned the Services to list under the ESA "anadromous Atlantic Salmon throughout its known historic range in the conterminous United States, and to designate critical habitat." 59 Fed. Reg. 3067, 3067-3068 (Jan. 20, 1994); see also Maine v. Norton, 257 F. Supp. 2d 357, 365 (D. Me. 2003).

48. On January 20, 1994, the Services published a 90-day finding, pursuant to 16 U.S.C. § 1533(b)(5)(A) announcing that, "the petition presents substantial information indicating that the proposed action may be warranted." 59 Fed. Reg. 3067; Maine v. Norton, 257 F. Supp. 2d at 366.

49. Following a status review, the Services determined that Atlantic Salmon populations in seven Maine rivers were "indigenous," and met the criteria to be considered a DPS eligible for protection under the ESA. 60 Fed. Reg. 14412 (Mar. 17, 1995); Maine v. Norton, 257 F. Supp. 2d at 366.

50. On November 17, 1999, the Services proposed listing of the Atlantic Salmon DPS as endangered in eight Maine rivers. 64 Fed. Reg. 62627; Maine v. Norton, 257 F. Supp. 2d at 370.

51. After the receipt and review of public comments the Services published a final listing decision on November 17, 2000 which became effective on December 18, 2000. 65 Fed. Reg 69459; Maine v. Norton, 257 F. Supp. 2d at 371.

52. The factors used in making the endangered status determination included: 1) the present or threatened destruction, modification, or curtailment of habitat or range; 2) overutilization of the species for commercial, recreational, scientific, or educational purposes; 3)

disease, predation and competition; 4) inadequacy of existing regulatory mechanisms; and 5) other natural or manmade factors (e.g. introduction of exotic species). Recovery Plan at 1-21.

53. The Services determined that the following conditions all pose threats to the survival and recovery of the salmon: water extraction; sedimentation; obstructions to passage including those caused by beaver and debris dams and poorly designated road crossings; input of nutrients; chronic exposure to insecticides, herbicides, fungicides and pesticides; elevated water temperature from processing water discharges; and removal of vegetation along stream banks. 50 Fed. Reg. 69459.

The Services' Failure to Designate Critical Habitat

54. In the proposed rule to list the Atlantic Salmon DPS as an endangered species, the Services "determined that it is prudent to designate critical habitat for the Gulf of Maine DPS of Atlantic Salmon." 64 Fed. Reg. 62627, 62640.

55. In the final listing rule, the Services did not make a finding that critical habitat was "not determinable," or that designation would not be prudent. 65 Fed. Reg. 69459.

56. To date, the Services have not designated critical habitat for the Atlantic Salmon DPS.

CLAIM FOR RELIEF: VIOLATION OF DUTY TO DESIGNATE CRITICAL HABITAT UNDER 16 U.S.C. § 1533(a)(3)(A)

57. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

58. Defendants are in violation of 16 U.S.C. § 1533(a)(3)(A)(i) due to their failure to designate critical habitat for the Atlantic Salmon DPS at the time of listing or at any time subsequent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

59. Declare that Defendants are in violation of 16 U.S.C. § 1533(a)(3)(A)(i) by failing to designate critical habitat for the Atlantic Salmon DPS;

60. Order Defendants to promptly designate critical habitat for the Atlantic Salmon DPS;

61. Award Plaintiffs their reasonable costs, litigation expenses, and attorney fees as provided by the ESA, 16 U.S.C § 1540(g)(4); and

62. Such other and further relief as this Court deems just and proper.

Dated: this 15th day of December, 2006

Respectfully Submitted,

/s/ Roger Fleming
Roger Fleming
rfleming@clf.org
Conservation Law Foundation
14 Main Street, Suite 200
Brunswick, ME 04011
(207) 729-7733
Fax: (207) 729-7373

Attorney for Plaintiffs

Patrick A. Parenteau
pparenteau@vermontlaw.edu
David K. Mears
dmears@vermontlaw.edu
Environmental and Natural
Resources Law Clinic
Vermont Law School
P.O. Box 96, Chelsea St.
South Royalton, VT 05068

Of Counsel