

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF BLACKWATER  
501 Elizabeth Street, Room 3  
Charleston, WV 25311,

THE WILDERNESS SOCIETY  
1615 M Street, N.W.  
Washington, DC 20036,

CENTER FOR BIOLOGICAL DIVERSITY  
1333 North Oracle Road  
Tucson, AZ 85705,

SOUTHERN APPALACHIAN FOREST COALITION  
46 Haywood Street, Suite 323  
Asheville, NC 28801,

WILD SOUTH  
16 Eagle Street, Suite 200  
Asheville, NC 28801,

JUDITH S. RODD  
3830 Colebank Road  
Moatsville, WV 26405,

Plaintiffs,

v.

KENNETH SALAZAR, Secretary  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240,

SAM D. HAMILTON, Director  
U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, DC 20240,

Defendants.

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## **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This suit challenges the decision of the U.S. Department of the Interior's Fish and Wildlife Service ("Service" or "FWS") to remove the West Virginia Northern Flying Squirrel ("Squirrel"), listed as an endangered subspecies in 1985, from any protection under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.* The Service issued a Recovery Plan for the Squirrel in 1990, revised as recently as 2001, which set forth detailed criteria for determining when the Squirrel should be deemed recovered and removed from the ESA's protection. Nonetheless, the FWS refused to apply these criteria – which have not been satisfied – when it delisted the subspecies. In addition, the delisting decision did not give serious consideration to grave threats confronting the subspecies, such as logging, development, tree pests, and global climate change. By failing to base the delisting decision on the Recovery Plan's recovery criteria and other best available science, the federal defendants have violated both the ESA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

### **JURISDICTION**

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

### **PARTIES**

3. Plaintiff Friends of Blackwater ("FOB") is a not-for-profit West Virginia membership organization devoted to preserving wilderness and wildlife; protecting West Virginia's forests, parks, rivers, wildlands, unique habitats and endangered species; and fostering a West Virginia land preservation ethic. FOB has a longstanding interest in the West Virginia Northern Flying Squirrel. FOB has supported studies of the Squirrel in Blackwater Canyon, FOB

staff has communicated with scientists from a number of states and Canada on the Squirrel's natural history and status, and the organization has collected a large library of information on the Squirrel. FOB commented on the Habitat Conservation Plan for Snowshoe Mountain Resort and the Threatened and Endangered Species Amendment to the Monongahela National Forest Land Management Plan, both of which dealt with management of Squirrel habitat. FOB's members enjoy studying and attempting to observe the Squirrel, and recreating in the subspecies' habitat. The FWS's decision to delist the Squirrel without ensuring that the recovery criteria set forth in the Squirrel's Recovery Plan were met and the agency's refusal to otherwise use the best available science in its delisting decision injure FOB and its members by increasing the likelihood that the Squirrel and its habitat will be destroyed and the subspecies will become extinct.

4. Plaintiff The Wilderness Society ("TWS"), founded in 1935, is a nonprofit organization that works to protect America's wilderness and wildlife and to develop a nationwide network of wild lands through public education, scientific analysis and advocacy. TWS's goal is to ensure that future generations will enjoy the clean air and water, wildlife, beauty and opportunities for recreation and renewal that pristine forests, rivers, deserts and mountains provide. TWS also has a longstanding interest in the West Virginia Northern Flying Squirrel. TWS commented on the Threatened and Endangered Species Amendment to the Monongahela National Forest Land Management Plan, the revision of the Land Management Plan itself and numerous forest management projects that have impacted the Squirrel and its habitat. TWS and FOB have long worked together to analyze the large library of Squirrel information FOB has collected. TWS has over 800 West Virginia members and more than 310,000 members and supporters nationwide. TWS's members enjoy studying and attempting to observe the Squirrel,

and recreating in the subspecies' habitat. The FWS's decision to delist the Squirrel without ensuring that the recovery criteria set forth in the Squirrel's Recovery Plan were met and the agency's refusal to otherwise use the best available science in its delisting decision injure TWS and its members by increasing the likelihood that the Squirrel and its habitat will be destroyed and the subspecies will become extinct.

5. Plaintiff Center for Biological Diversity (the "Center") is a 501(c)(3) corporation dedicated to the preservation, protection, and restoration of biodiversity, native species and ecosystems. The Center has more than 44,000 members worldwide. The Center has offices in Washington, D.C.; Tucson and Phoenix, Arizona; Silver City, New Mexico; San Francisco, Los Angeles, and Joshua Tree, California; and Portland, Oregon. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including the protection of the West Virginia Northern Flying Squirrel. Staff and members of the Center enjoy studying and attempting to observe the Squirrel, and recreating in the subspecies' habitat. The FWS's decision to delist the Squirrel without ensuring that the recovery criteria set forth in the Squirrel's Recovery Plan were met and the agency's refusal to otherwise use the best available science in its delisting decision injure the Center and its members by increasing the likelihood that the Squirrel and its habitat will be destroyed and the subspecies will become extinct.

6. Plaintiff Southern Appalachian Forest Coalition ("SAFC") is a regional nonprofit organization whose mission is to protect and restore the wild lands, waters, native forests, and ecosystems of the Southern Appalachian landscape. SAFC's objectives are to create a unified and

compelling regional conservation vision for the 21st Century and to strengthen grassroots groups with the tools and the leadership needed to protect the forests at the local level. SAFC's members enjoy studying and attempting to observe the Squirrel, and recreating in the subspecies' habitat. The FWS's decision to delist the Squirrel without ensuring that the recovery criteria set forth in the Squirrel's Recovery Plan were met and the agency's refusal to otherwise use the best available science in its delisting decision injure SAFC and its members by increasing the likelihood that the Squirrel and its habitat will be destroyed and the subspecies will become extinct.

7. Plaintiff Wild South is a nonprofit grassroots organization whose mission is to inspire and empower people to protect and restore the native ecosystems of the Southeast. Wild South works toward a region with healthy intact ecosystems. Wild South's members enjoy studying and attempting to observe the Squirrel, and recreating in the subspecies' habitat. The FWS's decision to delist the Squirrel without ensuring that the recovery criteria set forth in the Squirrel's Recovery Plan were met and the agency's refusal to otherwise use the best available science in its delisting decision injure Wild South and its members by increasing the likelihood that the Squirrel and its habitat will be destroyed and the subspecies will become extinct.

8. Plaintiff Judith S. Rodd, a resident of Preston County, West Virginia and the Executive Director and a member of FOB, visits the habitat of the West Virginia Northern Flying Squirrel, just 45 minutes from her home, at least monthly in an effort to observe the subspecies and otherwise recreate in Squirrel habitat. For the past 12 years, she has studied and written about the Squirrel and advocated for this signature subspecies of the West Virginia Highlands. She has concrete plans to return to Squirrel habitat in November 2009, and regularly thereafter. The FWS's decision to delist the Squirrel without ensuring that the recovery criteria set forth in

the Squirrel's Recovery Plan were met and the agency's refusal to otherwise use the best available science in its delisting decision injure Ms. Rodd by increasing the likelihood that the Squirrel and its habitat will be destroyed and the subspecies will become extinct.

9. Defendant Kenneth Salazar is the Secretary of the Interior and has ultimate responsibility for the Department of the Interior and agencies within the Department, including the FWS.

10. Defendant Sam Hamilton is the Director of the FWS, the agency within the Department of the Interior responsible for implementing the ESA, including making delisting determinations such as the one at issue in this case.

## **STATUTORY FRAMEWORK AND FACTS GIVING RISE TO PLAINTIFFS' CLAIMS**

### **A. The Endangered Species Act**

11. Prompted by the "esthetic, ecological, educational, historical, recreational, and scientific value" of all of the country's species of fish, wildlife and plants, 16 U.S.C. § 1531(a)(3), Congress enacted the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.* § 1531(b). The ESA defines the term "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 [by the ESA] are no longer necessary" – that is, to recover species so that they no longer need ESA protection. *Id.* § 1532(3). The Act imposes duties on the Secretary of the Interior, which have been delegated to the Director of the FWS. 50 C.F.R. § 402.01(b).

12. The ESA requires the Secretary to issue regulations listing species as “endangered” or “threatened” based on the present or threatened destruction, modification, or curtailment of a species’ 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 the species’ continued existence. 16 U.S.C. § 1533(a)(1). A “species” is defined by the Act to include a subspecies, such as the Squirrel. Id. § 1532(16). The ESA also authorizes the FWS to change the listing of a species from endangered to threatened, or to delist a species altogether when the species has recovered to the point that such a change in status is warranted. Id. § 1533(a)-(b).

13. A species must be listed as endangered if, based on one or more of the statutory listing factors, the species is “in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6). A species is deemed threatened if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20). Decisions to list a species must be made “solely on the basis of the best scientific and commercial data available” to the Secretary after he conducts a review of the species’ status. Id. § 1533(b)(1)(A).

14. Once listed as endangered or threatened, a species receives a number of important protections. First, under the ESA and its implementing regulations, it is illegal for anyone to “take” an endangered or threatened species. Id. § 1538(a)(1); see also 50 C.F.R. §§ 17.21, 17.31. The term “take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

15. Second, under section 7(a)(1) of the ESA, each federal agency must “utilize [its] authorities in furtherance of the purposes” of the ESA, § 1536(a)(1), and under section 7(a)(2), “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” Id. § 1536(a)(2).

16. The ESA requires that the Secretary review the status of listed species every five years and “determine on the basis of such review whether any such species should – (i) be removed from such list; (ii) be changed in status from an endangered species to a threatened species; or (iii) be changed in status from a threatened species to an endangered species.” Id. § 1533(c)(2).

17. The Secretary is also obligated to “develop and implement” a Recovery Plan for the “conservation and survival” of each listed species, unless the Secretary makes a determination that such a plan would not promote the conservation of the species. Id. § 1533(f)(1). Each plan must incorporate both “site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species” and “objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list.” Id. § 1533(f)(1)(B). In the event that the Plan requires revision, the FWS must provide “public notice and an opportunity for public review and comment,” and consider such comments before issuing a revised Recovery Plan. Id. § 1533(f)(4)-(5).



18. Decisions on whether to remove a species from the list of endangered or threatened species must be made “solely on the basis of the best scientific and commercial data available,” in light of “objective, measurable criteria” adopted in the Recovery Plan. Id. §§ 1533(b)(1)(A), (f)(1)(B). As explained by the Service, such criteria “allow the Service and others to objectively determine when recovery has been achieved,” and hence the species may be delisted. U.S. Fish and Wildlife Service, Policy and Guidelines for Planning and Coordinating Recovery of Endangered and Threatened Species (1990). Once a species is delisted, none of the prohibitions or protections of the ESA apply.

**B. The Listing of the West Virginia Northern Flying Squirrel**

19. The West Virginia Northern Flying Squirrel (*Glaucomys sabrinus fuscus*), a subspecies that is characterized by silky fur, prominent eyes, and a long, broad, flattened tail, can glide between trees by using folds of skin between its wrists and ankles called patagia. The Squirrel is genetically distinct and geographically separate from other northern flying squirrels and inhabits the high-elevation coniferous and hardwood forests of the Alleghany Highlands in West Virginia and Virginia. The greatest threats to its survival are the destruction, fragmentation, and alteration of habitat caused by logging, mineral extraction, development, introduced tree pests, and climate change.

20. The FWS designated the West Virginia Northern Flying Squirrel as an endangered species in 1985. 50 Fed. Reg. 26999 (July 1, 1985). The FWS listed the Squirrel together with another subspecies, the Carolina Northern Flying Squirrel (*Glaucomys sabrinus coloratus*), at a time when fewer than 30 animals of both subspecies had been collected from eight localities. U.S. Fish and Wildlife Service, Appalachian Northern Flying Squirrels Recovery Plan (1990). The

threats to the two squirrel subspecies were so similar that the final rule designating each as endangered subspecies made no attempt to distinguish between factors threatening the West Virginia Northern Flying Squirrel and those affecting the Carolina Northern Flying Squirrel. 50 Fed. Reg. at 27000-01. For example, both subspecies had suffered diminished habitat due to logging and the development of skiing and other recreational facilities. *Id.* at 27000. In addition, where their habitats overlapped with those of the southern flying squirrel, FWS found that both subspecies of northern flying squirrels could be displaced by the more aggressive southern flying squirrel or die from a nematode parasite carried by the southern flying squirrel. *Id.* at 27001.

**C. The Squirrel's Recovery Plan**

21. In 1990, the FWS developed a Recovery Plan for both the West Virginia and Carolina northern flying squirrels that set forth a four-part strategy for species recovery and incorporated objective, measurable criteria on which the FWS should base any decision to downlist or delist either subspecies. To downlist either the West Virginia or the Carolina Northern Flying Squirrel from endangered to threatened status, the Plan requires that: (1) populations are stable or expanding for ten consecutive years in at least 80 percent of designated Geographic Recovery Areas ("GRAs"); (2) sufficient biological data regarding the subspecies' needs are available to permit effective management; and (3) GRAs will be managed for squirrels on an ongoing basis. Recovery Plan at 18, 21.

22. The first of the recovery criteria – stable or expanding populations in GRAs – is based on the premise that recovery is best measured by how squirrels are actually faring throughout most of their range. The Plan explicitly allowed for the addition of other GRAs based on further surveys, *id.* at 17, and its outline of recovery tasks described how to identify potential

Squirrel habitat, determine whether Squirrels are present, and monitor known populations. Id. at 19-21. The Plan repeatedly emphasized the importance of actual data on the Squirrel's population status in determining whether the subspecies is recovering. See id. at 19.

23. The second recovery criterion required that the FWS develop an understanding of the Squirrel's habitat requirements, diet, and interaction with other squirrels to ensure that management decisions protect habitat of sufficient size and quality to sustain viable populations. Id. at 18, 21-27. The Plan specifically called on the Service to address the effects of logging, interactions with the southern flying squirrel, and the presence of parasites on the Squirrel's survival and recovery. Id.

24. The third recovery criterion mandated that GRAs be managed for the long term to ensure both sufficient habitat size to increase or at least maintain Squirrel populations and habitat corridors to ensure that Squirrels can move between GRAs. Id. at 18. For example, the Plan called for habitat protection through "land acquisition or other means as appropriate." Id. at 28-30.

25. The Plan further provided that in order to take the next step beyond downlisting and delist the subspecies entirely, the FWS must ensure the satisfaction of these three factors and also demonstrate that "the existence of high elevation forests on which the squirrels depend is not itself threatened by introduced pests ... or by environmental pollutants." Id. at 18.

26. In 2001, the FWS amended the Squirrel Recovery Plan to provide additional protection for the Squirrel. U.S. Fish and Wildlife Service, Appalachian Northern Flying Squirrels, Recovery Plan Update, Amendment to Appendix A (2001) ("Updated Recovery Plan"). Prior to the amendment, the Plan allowed the FWS to consider areas where Squirrels were not

discovered in nest boxes or by live trapping to be unoccupied and therefore suitable for development. Id. at 3. Recognizing that Squirrels are less likely to use nest boxes or enter traps in good quality habitat that provides den sites and food, the Updated Recovery Plan underscored that “protection of suitable [Squirrel] habitat, whether or not the squirrel’s presence can be demonstrated, is needed.” Id. at 4.

27. The 2001 amendment to the Recovery Plan did not otherwise change the recovery criteria for downlisting or delisting the Squirrel. In 2004, the FWS testified before Congress that the West Virginia Northern Flying Squirrel’s recovery was insufficient to warrant delisting. See U.S. Fish and Wildlife Service, West Virginia Northern Flying Squirrel: 5-Year Review: Summary and Evaluation, at 2 (April 2006) (“Five-Year Review”).

#### **D. The FWS’s Decision to Delist the Squirrel**

##### **1. The Proposed Rule and Public Comment**

28. In 2006, only two years after advising Congress that no change in the Squirrel’s listing status was warranted, the FWS undertook a five-year review of the status of the subspecies. See 16 U.S.C. § 1533(c)(2). However, rather than apply the objective, measurable criteria in the Recovery Plan to evaluate whether the subspecies’ listing status should be changed, as required by the ESA, the review addressed fundamentally different criteria for evaluating Squirrel recovery. For example, rather than analyze whether the Squirrel population was stable or expanding in 80 percent of the GRAs over a ten-year period, the Service merely evaluated whether some Squirrels “persisted” in some portion of their range.

29. Although the Service determined that the longstanding recovery criteria in the Plan should not be followed, the Service did not amend the Plan to establish new criteria. Instead, the

FWS immediately published a proposal that the Squirrel be delisted and hence stripped of all ESA protection. As in the five-year review, the Service's Proposed Rule did not claim that any of the recovery criteria set forth in the Recovery Plan had been achieved. Rather, the agency stated that recovery could be declared and delisting accomplished "without all criteria being fully met," although the Service set forth no legal justification for this position. See Proposed Rule to Remove the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 75924, 75925 (Dec. 19, 2006). The Proposed Rule only mentioned GRAs once – despite the fact that GRAs represent a key concept in two of the four delisting criteria laid out in the Recovery Plan – and then only to say that the current known range of the Squirrel is larger than the GRAs designated in the Recovery Plan. Id.

30. In the Proposed Rule, the Service dismissed the recovery criteria in the recently revised Recovery Plan as outdated, but the Service did not explain why it was not updating the Plan or otherwise addressing any purported deficiencies in the Plan before initiating delisting.

31. In addition to failing to document that the delisting criteria in the Recovery Plan had been satisfied, the Proposed Rule failed to provide any reliable information on the Squirrel's population, thus preventing assessment of population trends. Instead of estimating Squirrel population numbers, the FWS asserted that habitat data and "persistence" studies, which merely showed whether the Squirrel was present or absent from a location, sufficed to show that the Squirrel has recovered. Although no information was provided in the Proposed Rule as to whether the Squirrel population is stable, increasing, or decreasing, the Service made no effort to explain why the population trend analysis it had long called for in the Recovery Plan was being abandoned.

32. The Proposed Rule did not address many of the information gaps about the Squirrel's life history that existed at the time of its listing and that the Recovery Plan stated should be addressed prior to any change in the subspecies' listing status. For example, the Service failed to meaningfully address how the Squirrel was being affected by the southern flying squirrel – one of the principal reasons the Squirrel was listed as endangered in the first place. Not only did the Proposed Rule fail to give serious consideration to whether the southern flying squirrel carries parasites that harm northern flying squirrels in natural conditions, but it neglected to address whether interactions between the two species would increase as climate change damages or eliminates high elevation coniferous forests and causes the expansion of northern hardwood forests where southern flying squirrels thrive.

33. The Proposed Rule also failed to adequately address other threats that the Squirrel continues to face. For example, the Service ignored data that the Squirrel has been found in stands of hardwood trees and therefore did not address the threat that the destruction of hardwood trees from logging and development poses to the subspecies. The agency did not adequately analyze the continued threats that tree pests, such as adelgids, pose to Squirrel habitat. The Proposed Rule also summarily dismissed the effects of climate change, even though the high elevation red spruce forests preferred by the Squirrel are at particular risk from landscape-scale changes caused by the release of carbon dioxide and other greenhouse gasses into the environment.

34. In addition, although a species must be listed if there are inadequate “existing regulatory mechanisms” to protect the species in the absence of listing, 16 U.S.C. § 1533(a)(1), the Proposed Rule relied on largely unenforceable management plans to protect Squirrel habitat

and admitted that much of the Squirrel's habitat is being managed under a "mixed-use" mandate that, among other activities potentially harmful to the Squirrel, allows logging.

35. The Service received nearly 5,000 comments on the proposed rule from scientists and the public, the majority of which opposed delisting the Squirrel. See Final Rule Removing the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 50226, 50227 (Aug. 26, 2008). In addition to arguing that the Service should apply the recovery criteria set forth in its Recovery Plan, some commenters suggested that if the Squirrel's status had improved sufficiently to warrant any change in its status – which was not demonstrated by the Proposed Rule – then the FWS should have gone through the process of analyzing whether the Squirrel should be downlisted to threatened before delisting it altogether, as provided in the Recovery Plan.

36. Many commenters also urged the Service to address grave threats to the Squirrel that the agency ignored or discounted. In particular, because climate change will likely severely impact Squirrel habitat and increase harmful interactions with southern flying squirrels, commenters urged the Service to consider the threats posed by climate change in the Final Rule.

37. Scientists also submitted comments critical of the rule. For example, Dr. Robert Leo Smith, Professor Emeritus of Wildlife Ecology at West Virginia University and a leading expert in wildlife population studies, analyzed several inadequacies of the delisting rule and demonstrated that the FWS's refusal to employ widely accepted approaches to conservation biology undermined the credibility of the Service's claim that it used the best available science in coming to its decision. Dr. Smith explained that locations where FWS had identified squirrels were not necessarily high-quality habitat that would support Squirrel survival or reproduction; in

fact, he stated that some are likely “sinks” that function as ecological wastelands where squirrels subsist for a while before dying. For that reason, evidence of “persistence” did not indicate that the subspecies had recovered or that it would survive the threats it faced.

## **2. The Final Rule Delisting the Squirrel**

38. Notwithstanding the public and scientific opposition, the Service issued the Final Rule delisting the Squirrel on August 26, 2008. Once again, the Final Rule did not apply any of the objective, measurable recovery criteria set forth in the Recovery Plan. Rather, it delisted the subspecies without documenting that any of the formal criteria have been satisfied: *i.e.*, (1) there is no evidence in the record that the subspecies is stable or expanding in at least 80 percent of designated GRAs; (2) there is no evidence in the record that the Service or any entity has collected sufficient biological data about the Squirrel to permit effective management; (3) there is no evidence in the record that GRAs or any other Squirrel habitat will be managed for the Squirrel in the future; and (4) there is no evidence in the record that the Squirrel’s habitat has ceased to be threatened by environmental pollutants or introduced pests.

39. In addition to failing to apply the Plan’s criteria for recovery and delisting, the Service also ignored or failed meaningfully to address the best available data on current and long-term threats to the Squirrel. For example, the Final Rule does not meaningfully address the adverse impact that climate change will have on the Squirrel’s habitat and increased competition with the southern flying squirrel.

40. The Service also failed to address scientific criticisms, such as Dr. Smith’s critique, in which he argued that data presented in the Proposed Rule suggest that some of the places



where the Service claimed the Squirrel was persisting were actually poor habitat that did not support reproduction, survival, or long-term recovery.

41. The Carolina Northern Flying Squirrel – the subspecies listed at the same time as the Squirrel and sharing a Recovery Plan with it – remains on the endangered species list and has never been proposed for delisting. The Service has never explained why it is treating the two very similar subspecies so differently from the standpoint of ESA protection.

**E. Plaintiffs' Sixty-Day Notice Letter**

48. Because the decision to delist the West Virginia Northern Flying Squirrel violates the ESA by failing to address the criteria the FWS itself set forth in the Squirrel's Recovery Plan, and because it is not based on the best available scientific and commercial data, in April 2009 plaintiffs sent defendants a formal notice letter pursuant to Section 11(g) of the ESA. 16 U.S.C. § 1540(g).

49. Plaintiffs attached to that letter the comments of leading experts who opposed the Squirrel's delisting, including Dr. Peter D. Weigl, Dr. John F. Pagels, and Dr. Robert Leo Smith.

50. The FWS has declined to take any action in response to plaintiffs' notice letter.

**PLAINTIFFS' CLAIM FOR RELIEF**

51. By failing to base the decision to delist the Squirrel on objective, measurable recovery criteria set forth in a formal Recovery Plan for the Squirrel, the defendants have violated the ESA, 16 U.S.C. §§ 1533(b)(1), (f)(1), and the APA. 5 U.S.C. § 706.

52. By promulgating a rule to remove the Squirrel from the protection of the Endangered Species Act without applying the best available science, including that set forth in the


Recovery Plan and that furnished to the Service in public comments and otherwise available to the agency, the defendants have violated the ESA, 16 U.S.C. § 1533(b)(1), and the APA. 5 U.S.C. § 706.

53. These legal violations are injuring Plaintiffs in the manner described in paragraphs 3-7 above.

Wherefore, Plaintiffs respectfully request that this Court:

- (1) declare that defendants have violated the ESA and the APA;
- (2) enjoin the defendants from removing the West Virginia Northern Flying Squirrel from the list of endangered species.
- (3) set aside and remand the Service's 2008 rule removing the West Virginia Northern Flying Squirrel from the federal list of endangered and threatened wildlife, 73 Fed. Reg. 50226;
- (4) award Plaintiffs their costs, attorneys' fees, and other disbursements for this action, including any expert witness fees; and
- (5) grant Plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully Submitted,



Eric R. Glitzenstein (D.C. Bar No. 358287)

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