IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, EX REL. LUTHER STRANGE, ET AL.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:16-cv-00593-CG-N
NATIONAL MARINE FISHERIES SERVICE, ET AL.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AS DEFENDANTS
UNDER FEDERAL RULE OF CIVIL PROCEDURE 24

In this case, a coalition of state attorneys general is seeking to overturn an important collection of rules that govern the obligations of federal agencies under the Endangered Species Act. Given their significant interests in the protection of imperiled species and critical habitat, Black Warrior Riverkeeper, Defenders of Wildlife, and the South Carolina Coastal Conservation League should be granted leave to intervene in defense of the challenged regulations under Federal Rule of Civil Procedure 24.

BACKGROUND

For more than four decades, the Endangered Species Act has "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). With the statute, Congress established a vital program for the conservation of imperiled species and "the ecosystems upon which ... [they] depend[.]" 16 U.S.C. § 1531(b). Central to this program are the protections it extends to designated "critical habitat." See id. §§ 1536(a)(2), 1532(5).

Unlike the statutory prohibition on the "take" of endangered species—which applies to federal, state, and private actors alike, id. §§ 1538(a)(1)(B)-(C), 1532(13)—the Endangered Species Act's critical-habitat provisions bind federal agencies alone. Under Section 4 of the statute, federal wildlife officials are required to designate, "to the maximum extent prudent and determinable[,] ... any habitat of ... [a threatened or endangered] species which is ... considered to be critical habitat" at the time of the species' listing. Id. § 1533(a)(3)(A). And under Section 7(a)(2), "[e]ach Federal agency" is obligated to "insure that any action authorized, funded, or carried out by such agency ... is not likely to ... result in the destruction or adverse modification" of designated critical habitat. Id. § 1536(a)(2).

One year ago, the Obama Administration finalized a suite of amendments to the rules that guide the designation and protection of critical habitat. See 81 Fed. Reg. 7,414 (Feb. 11, 2016) (amending the regulations governing the designation of critical habitat); 81 Fed. Reg. 7,214 (Feb. 11, 2016) (amending the regulatory definition of "destruction or adverse modification"). While some of the changes fell short of what the applicant conservation groups had recommended, see Beach Dec. ¶ 4; Scribner Dec. ¶ 5; Senatore Dec. ¶¶ 13-14, others implemented much-needed reforms. Most importantly, perhaps, the revisions eliminated an "unnecessary and unintentionally limiting" standard that had made it difficult for federal agencies to protect essential habitat areas that were not being used by an imperiled species at the time of its listing. 81 Fed. Reg. at 7,434. As the administration explained, "the ability to designate areas that a species has not historically occupied is expected to become increasingly important" as "the effects of global climate change continue to influence distribution and migration patterns of species[.]" Id. at 7,435.

On November 29, 2016, only three weeks after the presidential election, a coalition of state attorneys general filed the present challenge to the outgoing administration's critical-habitat rules.[1] Despite the fact that critical habitat serves as a limitation on federal agencies alone, the plaintiffs have alleged that the regulations constitute "an unlawful attempt to expand regulatory authority and control over State lands and waters[.]" Compl. ¶ 2. They have accordingly asked this Court to declare the rules invalid under both the Endangered Species Act and the Administrative Procedure Act; to vacate the regulations "in their entirety;" to issue an injunction "prohibiting the … [U.S. Fish and Wildlife Service and the National Marine Fisheries Service]

[1] While the coalition includes seventeen state attorneys general, it has been joined by only one wildlife-conservation official—the head of New Mexico's Department of Game and Fish. See Complaint ¶ 15, State of Ala. ex rel. Luther Strange v. Nat'l Marine Fisheries Serv., No. 1:16-cv-00593-CG-N (S.D. Ala. Nov. 29, 2016) ("Compl.").

from using, applying, enforcing, or otherwise proceeding on the basis" of the rules; and to "[r]emand[] this case to the Services" for another round of rulemaking. Id. ¶ 80.

ARGUMENT

Because this case threatens the applicant groups' substantial interests in protecting imperiled species and their habitat, the organizations should be granted leave to intervene as of right under Federal Rule of Civil Procedure 24(a). Alternatively, they should be allowed to intervene permissively under Rule 24(b).

I. The Applicant Conservation Groups Are Entitled to Intervene in Defense of the Challenged Critical-Habitat Rules under Federal Rule of Civil Procedure 24(a)(2)

Under Federal Rule of Civil Procedure 24(a)(2), an applicant seeking leave to intervene as of right need only demonstrate four things: first, that its "application to intervene is timely;" second, that it "has an interest relating to the property or transaction which is the subject of the action;" third, that it "is so situated that disposition of the action, as a practical matter, may impede or impair [its] ... ability to protect that interest;" and finally, that its "interest is represented inadequately by the existing parties to the suit." Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). If an applicant "establishes each of the four requirements, the district court must allow [it] ... to intervene." Id. While "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors[,]" Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993), there is no reason for doubt in the present case. Black Warrior Riverkeeper, Defenders of Wildlife, and the South Carolina Coastal Conservation League are entitled to intervene under Rule 24(a)(2).

A. The Applicants' Motion to Intervene Is Timely

As the applicant organizations have requested leave to intervene during the opening moments of this proceeding, their motion is "timely[.]" Fed. R. Civ. P. 24(a). In evaluating the timeliness of applications for intervention, the Eleventh Circuit has considered four factors:

> (1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the[] motion was timely.

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1259 (11th Cir. 2002). Here, the applicants have filed their motion less than three months after the filing of the complaint. While the applicants are aware that the federal defendants have moved to dismiss this case, they have no intention of seeking to delay the resolution of that motion. As confirmed by the stay that was recently entered by this Court, the existing parties would suffer no prejudice as a result of the applicants' intervention. See, e.g., Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Civ. No. 10-0254-WS-C, 2010 WL 5139101, at *2 (S.D. Ala. Dec. 9, 2010) (holding that an intervention motion "filed just three months after th[e] lawsuit began ... cannot possibly prejudice any other party or delay adjudication of th[e] action"). In contrast, and as explained below, the applicant organizations would be significantly prejudiced if their request to intervene were denied. All told, the applicants' motion is timely. See, e.g., Georgia, 302 F.3d at 1259-60 (holding that a motion filed "six months" after the complaint was timely); Chiles, 865 F.2d at 1213 (holding that a motion filed "only seven months after ... [the] original complaint" and "three months after the government filed its motion to dismiss" was timely).

B. The Applicants Have Substantial Interests Related to the Critical-Habitat Protections at Issue in this Case

The applicant conservation groups also have substantial interests related to the critical-habitat protections being challenged in this case. See Fed. R. Civ. P. 24(a)(2). As the Eleventh Circuit and other courts have recognized, "'[t]he "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" Worlds v. Dep't of Health & Rehab. Servs., State of Fla., 929 F.2d 591, 594 (11th Cir. 1991) (quoting Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)); see also Hodgson v. United Mine Workers of Am., 473 F.2d 118, 130 (D.C. Cir. 1972) ("The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard."). The test is satisfied whenever the "interest asserted is 'direct, substantial, [and] legally protectable.'" Huff v. Comm'r of Internal Revenue Serv., 743 F.3d 790, 796 (11th Cir. 2014) (quoting Athens Lumber Co., Inc. v. Fed. Election Comm'n, 690 F.2d 1364, 1366 (11th Cir. 1982)). "In deciding whether a party has a protectable interest, ... courts must be 'flexible' and must 'focus[] on the particular facts and circumstances' of the case." Id. (quoting Chiles, 865 F.2d at 1214).

Each of the organizations seeking to intervene in this case has long been committed to the conservation of imperiled species and their habitat. See Beach Dec. ¶¶ 2-5; Scribner Dec. ¶¶ 2-6; Senatore Dec. ¶¶ 3-17. The groups have accordingly worked to defend the legal protections afforded to listed species and critical habitat under the Endangered Species Act. See Beach Dec. ¶¶ 3-4; Scribner Dec. ¶¶ 2-5; Senatore Dec. ¶¶ 8-13. With respect to the specific protections at issue in this case, the applicant organizations participated in the administrative process that preceded the adoption of the rules. See Beach Dec. ¶ 4; Scribner Dec. ¶ 5; Senatore Dec. ¶ 13.

Given their substantial interests in protected species, protected habitat, and the challenged regulations, the applicant groups readily satisfy the "interest" requirement of Rule 24(a)(2). See, e.g., Huff, 743 F.3d at 796 (noting that the requirements of Rule 24(a)(2) are satisfied by a "'direct, substantial, [and] legally protectable'" interest); Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of the Interior, 100 F.3d 837, 841-42 (10th Cir. 1996) (holding that an applicant for intervention had a "'direct, substantial, and legally protectable'" interest in a challenge to Endangered Species Act protections the applicant had advocated for).

C. A Decision in this Case May, as a Practical Matter, Impair or Impede the Applicants' Ability to Protect Their Interests

With respect to the third requirement for intervention as of right, the applicant organizations' ability to protect their interests may be impaired or impeded, "as a practical matter[,]" by a decision in this case. Fed. R. Civ. P. 24(a)(2). As the Eleventh Circuit has emphasized, "[a]ll that is required under Rule 24(a)(2) is that the would-be intervener[s] be practically disadvantaged by ... [their] exclusion from the proceedings." Huff, 743 F.3d at 800; see also id. (citing Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 134 n.3 (1967) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene[.]")). Indeed, "the potential for a negative stare decisis effect" alone "'may supply that practical disadvantage which warrants intervention of right.'" Stone v. First Union Corp., 371 F.3d 1305, 1309-10 (11th Cir. 2004) (emphasis omitted) (quoting Chiles, 865 F.2d at 1214). Here, a decision in the plaintiffs' favor would invalidate the very legal protections that the applicants seek to defend. See Compl. ¶ 80 (requesting an order barring implementation of the challenged rules and vacating them "in their entirety"). Because any later effort to advocate for such protections could "be an exercise in futility" if the plaintiffs prevail, the interests of the applicant organizations are on the line in this

case. See Chiles, 865 F.2d at 1214; see also United States v. S. Fla. Water Mgmt. Dist., 922 F.2d 704, 707-09 (11th Cir. 1991) (holding that an injunction establishing the requirements of the water-quality standards at issue would bind the defendant agency, "eras[ing] the ... [applicants'] legally protectable right to participate in the administrative development of the numeric standards").

D. The Applicants' Interests Are Not Adequately Represented by the Existing Parties to this Suit

Finally, the applicants' interests are not adequately represented by the existing parties to this suit, satisfying the last of the requirements for intervention as of right under Rule 24(a)(2). See Fed. R. Civ. P. 24(a)(2). "The Supreme Court has held that the inadequate representation requirement 'is satisfied if the [proposed intervenor] shows that representation of his interest "may be" inadequate[.]'" Chiles, 865 F.2d at 1214 (quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972)). "'[T]he burden of making that showing should be treated as minimal.'" Id. (quoting Trbovich 404 U.S. at 538 n.10). As the Eleventh Circuit has noted, an applicant "should be allowed to intervene unless it is clear that [an existing party] will provide adequate representation." Id. (internal quotations omitted). Though "[t]here is a presumption of adequate representation where an existing party seeks the same objectives as the interveners[,] ... [t]his presumption is weak and can be overcome if the ... [applicant] present[s] some evidence to the contrary." Stone, 371 F.3d at 1311.

As demonstrated by their disagreements with the agencies during the rulemaking process, the applicant organizations do not share the same interests and objectives as the federal defendants in this case. See Beach Dec. ¶ 4; Scribner Dec. ¶ 5; Senatore Dec. ¶¶ 13-14. Unlike the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, the applicant groups have consistently pushed to strengthen the protections that are afforded to imperiled

species and their habitat under the Endangered Species Act. See Beach Dec. ¶¶ 3-4; Scribner Dec. ¶¶ 2-5; Senatore Dec. ¶¶ 8-14. Given this difference, as well as the federal government's general obligation to represent a broad set of interests, it is likely that the applicants will choose to "emphasize" and "focus ... on" different arguments in the litigation. See Chiles, 865 F.2d at 1214-15 (noting that "[t]he fact that the interests [of the applicants and an existing party] are similar does not mean that approaches to litigation will be the same"); see also, e.g., Fund for Animals v. Norton, 322 F.3d 728, 736-37 (D.C. Cir. 2003) (noting that the D.C. Circuit has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors"); In re Sierra Club, 945 F.2d 776, 779-80 (4th Cir. 1991) (holding that a state environmental agency did not adequately represent the interests of the Sierra Club and other groups, which shared some of the agency's "objectives" but had interests that "may diverge at points"); Sierra Club v. Martin, Civ. No. 96-CV-926FMH, 1996 WL 452257, at *3 (N.D. Ga. June 17, 1996) (granting intervention of right where "the ultimate objective of the [applicants] ... [wa]s in synchrony with the ultimate objective of the Federal Defendants, [but] the actual interests of the [applicants] ... and the Federal Defendants [we]re not totally identical"). Moreover, a "greater willingness to compromise" on the part of the federal defendants could result in a settlement adverse to the applicants' interests. See Clark v. Putnam County, 168 F.3d 458, 462 (11th Cir. 1999) (holding that "[a] greater willingness to compromise can impede a party from adequately representing the interests of a nonparty"). This latter possibility was underscored by a January 17, 2017 letter in which most of the plaintiff attorneys general "encourage[d] the new administration to withdraw" the challenged rules and "to address the recent litigation challenging their legality." Letter from Alabama Attorney General Luther Strange to Ado Machida (Jan. 17, 2017), at 3, available at http://www.ago.alabama.gov/news/

972.pdf (attached as Ex. 1).

In short, because their interests are both threatened and inadequately represented in this case, the applicant conservation groups should be granted leave to intervene as of right under Rule 24(a)(2).

II. Alternatively, the Applicants Should Be Granted Permissive Intervention under Federal Rule of Civil Procedure 24(b)

In the alternative, this Court should allow the applicant organizations to intervene under Federal Rule of Civil Procedure 24(b). "Permissive intervention under ... [Rule] 24(b) is appropriate where a party's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties." Georgia, 302 F.3d at 1250. Here, the applicants seek to defend the challenged regulations from the claims raised in the plaintiffs' complaint. Moreover, as previously explained, the applicants' intervention would not result in prejudice or delay. Permissive intervention is accordingly appropriate. See Fed. R. Civ. P. 24(b)(1).

CONCLUSION

The critical-habitat rules being challenged in this case offer essential protections to threatened and endangered species. Given their longstanding interests in the conservation of imperiled species and their habitat, Black Warrior Riverkeeper, Defenders of Wildlife, and the South Carolina Coastal Conservation League request leave to intervene in the regulations' defense.

Respectfully submitted this 28th day of February, 2017.

s/ Barry A. Brock
Barry A. Brock
ASB-9137-B61B
Attorney for Proposed Intervenors
Southern Environmental Law Center
2829 2nd Avenue South, Suite 282
Birmingham, AL 35233
(205) 745-3060 | Telephone
(205) 745-3064 | Facsimile
bbrock@selcal.org

Catherine M. Wannamaker
Pro Hac Admission Forthcoming
Attorney for Proposed Intervenors
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270 | Telephone
(843) 720-5240 | Facsimile
cwannamaker@selcsc.org

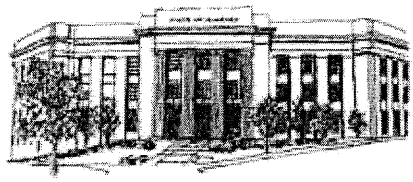
Memorandum in Support of Motion to Intervene as Defendants under Federal Rule of Civil Procedure 24

Exhibit 1

NEWS ADVISORY

Luther Strange

Alabama Attorney General



FOR IMMEDIATE RELEASE
January 19, 2017

For More Information, contact:
Mike Lewis (334) 353-2199
Joy Patterson (334) 242-7491

ATTORNEY GENERAL STRANGE LEADS COALITION OF STATES CALLING ON TRUMP ADMINISTRATION TO REPEAL BROAD EXPANSION OF DEFINITION OF CRITICAL HABITAT FOR ENDANGERED SPECIES

(MONTGOMERY) – Attorney General Luther Strange led a coalition of 14 states calling on the incoming Trump administration to immediately repeal two new rules pushed by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to broadly expand the definition of critical habitat for endangered species.

"If allowed to go unchallenged these new rules will assign government bureaucrats unprecedented power to unnecessarily expand critical habitat to potentially cover any areas they choose," said Attorney General Strange. "One can only imagine how such unlimited authority in hands of federal rule makers could have a devastating impact on private property and economic development."

In a letter this week to the Trump administration's transition team, Attorney General Strange and 13 other Attorneys General said the new rules promulgated by the two federal agencies "unlawfully and vastly expand the authority of the Services to designate areas as critical habitats." Furthermore, the rules "violate the (Endangered Species) Act because they expand the regulatory definition of a 'critical habitat' beyond its narrow statutory definition."

The Attorneys General also noted that the rules expand the definition of "adverse modification" of critical habitat beyond what is legally permitted.

"This definition would give the Services power that the Act never contemplated - to consider whether an alteration would adversely modify or destroy features that do not exist at present. Under this definition, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species."

In November, 18 states, including Alabama, sued the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the current Secretaries of the Interior and Commerce, to challenge the rules. The Obama administration filed a motion to dismiss this lawsuit on January 13, 2017.

Joining Alabama and Arkansas in the letter to the Trump transition team are Alaska, Arizona, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, South Carolina, Texas, West Virginia and Wyoming.

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A copy of the letter is attached

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.ALABAMA.GOV

January 17, 2017

Ado Machida
Policy Implementation Team Lead
1801 E Street NW
Washington, DC 20240
ado.a.machida@ptt.gov

Dear Mr. Machida:

Throughout his campaign, President-elect Donald Trump made it clear that his priorities are to restore prosperity and create jobs in order to "Make America Great Again." In keeping with those priorities, the new administration should immediately repeal two new rules promulgated under the purported authority of the Endangered Species Act by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and challenged in court by a coalition of States—the "Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat" rule[1] and the "Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat" rule.[2] We strongly urge President-elect Trump's administration to prioritize its response to these unlawful and expensive Rules.

The Endangered Species Act is important but also costly. As one means of protecting endangered species, the Act authorizes the designation of specific lands as "critical habitats." Once an area is designated as a critical habitat, federal agencies must consult with the Services to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). A designation under the Act has a significant impact on private landowners and their property rights. States must also comply with the Act when undertaking their own construction projects and when issuing permits for the use of certain pesticides and herbicides, including monitoring the use of these chemicals to ensure they do not destroy critical habitat.

Critical habitat designations, by their very nature, limit human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000

[1] This rule revised portions of 50 C.F.R. § 424 and is available at 81 Fed. Reg. 7413–40 (Feb. 11, 2016).
[2] This rule revised 50 C.F.R. § 402.02 and is available at 81 Fed. Reg. 7214–26 (Feb. 11, 2016).

jobs.[3] As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated as critical habitat. For instance, proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ."[4]

These new Rules unlawfully and vastly expanded the authority of the Services to designate areas as critical habitats. The Rules violate the Act because they expand the regulatory definition of "critical habitat" beyond its narrow statutory definition. The Act defines critical habitat as "specific areas within the geographical area occupied by the species at the time it is listed . . . 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." 16 U.S.C. § 1532(5)(A)(i). And unoccupied areas trigger an additional requirement—the Services must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

The Rules ignore the limitations on the critical habitat definition in the Act in at least four ways. First, the Rules allow the Services to designate unoccupied areas as essential to conservation, even if designating only occupied areas would result in the recovery of the species. Second, the Rules allow the Services to designate areas as occupied critical habitat, containing the physical and biological features essential to conservation, even when those areas are neither occupied nor contain those features. Third, the Rules allow the Services to designate uninhabited areas as critical habitat for a species, even when that species could not live in that area. And finally, the Rules allow the Services to declare broad, generalized swaths of land and water critical habitat even though the Act requires the Services to identify those specific areas that qualify as critical habitat. This redefinition of "critical habitat" so clearly contradicts the Act that an article published by American Bar Association lauded the goal of this redefinition "[a]s admirable, or as biologically necessary," while criticizing this change as "a bold effort by the Services to eliminate virtually all statutory elements that serve as constraints on the designation of critical habitat and, instead, to award themselves with largely unfettered discretion in exercising their designation authority."[5] The article lamented, "[w]hile the Services seek to invigorate the regulatory concept of critical habitat, this end should be accomplished by legislation, not rulemaking."[6]

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[3] Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014), https://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/.

[4] Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST, May 11, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

[5] Steven Quarles et al., *Critical Habitat in Critical Condition: Can Controversial New Rules Revive It?*, 30 NAT. RES. & ENV'T 8, 9–10 (2015).

[6] *Id.*

Similarly, the Rules expand the definition of "adverse modification" beyond that permitted by the Act. The new definition of adverse modification includes alterations in a critical habitat that "preclude or significantly delay development" of physical or biological features. 50 C.F.R. § 402.02. This definition would give the Services power that the Act never contemplated—to consider whether an alteration would adversely modify or destroy features that do not exist at present. Under this definition, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species.

We encourage the new administration to withdraw these unlawful and expensive Rules and to address the recent litigation challenging their legality. Because the Rules clearly violate the text of the Act, no action by Congress is necessary. First, we urge the new administration to issue an executive order that the Rules are unlawful and the Services cannot enforce them. Second, we urge the new administration to withdraw these Rules, while complying with both the Endangered Species Act and the Administrative Procedure Act, and return to the regulations which have defined the power of the Services to designate an area as a critical habitat since 1984. Third, we urge the new administration to address the current litigation over these Rules. In November, 18 States sued the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the current Secretaries of the Interior and Commerce to challenge the Rules.[7] The current administration filed a motion to dismiss the litigation on January 13, 2017. We would be open to pursuing a stay or settlement of this case.

We look forward to working with you to withdraw these unlawful Rules and resolve this litigation promptly.

Sincerely,

Luther Strange
Attorney General of Alabama

Jahna Lindemuth
Attorney General of Alaska

Leslie Rutledge
Attorney General of Arkansas

Mark Brnovich
Attorney General of Arizona

[7] Alabama *ex rel.* Luther Strange v. Nat'l Marine Fisheries Serv., No. 16-cv-593 (S.D. Ala.).

Derek Schmidt
Attorney General of Kansas

Adam Paul Laxalt
Attorney General of Nevada

Jeff Landry
Attorney General of Louisiana

Alan Wilson
Attorney General of South Carolina

Bill Schuette
Attorney General of Michigan

Ken Paxton
Attorney General of Texas

Tim Fox
Attorney General of Montana

Patrick Morrisey
Attorney General of West Virginia

Doug Peterson
Attorney General of Nebraska

Peter Michael
Attorney General of Wyoming

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, EX REL. LUTHER STRANGE, ET AL., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, ET AL., Defendants.	Case No. 1:16-cv-00593-CG-N

DECLARATION OF DANA BEACH

I, Dana Beach, declare as follows:

1. I am the Executive Director of the South Carolina Coastal Conservation League (the League). I am also a member of the League.

2. The League is a not-for-profit corporation founded in 1989. The League is incorporated under the laws of South Carolina, maintains its headquarters office in Charleston, South Carolina, and currently has approximately 2,262 household donors and 35,000 activists. The League has offices in Beaufort, Charleston, Columbia, and Georgetown. Its mission is to protect the threatened resources of the South Carolina Coastal plain – its natural landscapes, abundant wildlife, clean water, and quality of life – by working with citizens and government on proactive, comprehensive solutions to environmental challenges.

3. Since its establishment, the League has worked extensively to conserve both wildlife and wildlife habitat along the South Carolina coast. The Endangered Species Act and its critical-habitat protections have been a central part of these efforts. In advocating on behalf of

the critically endangered North Atlantic right whale, for instance, the League successfully pushed for an expansion of the species' designated critical habitat off the Southeastern coast. The League also went to court in an effort to protect the right whale's designated habitat from the destructive actions of a federal agency.

4. Because of its interest in the habitat protections of the Endangered Species Act, the League joined a coalition of organizations in submitting a comment letter during the rulemaking process that is being challenged in this case. The League urged the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure strong protections for critical habitat and the species that rely on it. While the agencies did not go as far as the League recommended, their final rules establish important safeguards. For instance, the regulations provide federal agencies with the flexibility that is needed to address habitat shifts caused by climate change. The rules also confirm the ability of federal agencies to protect ephemeral habitats, like those used by shorebirds and other coastal species.

5. The League has donors and activists throughout the Lowcountry and the entire state of South Carolina. Many of these donors and activists regularly visit the Lowcountry's beaches, rivers, streams, wetlands, grasslands, forests, and other habitats for recreational activities, such as wildlife observation, birding, fishing, paddling, hiking, photography, and other pursuits. Donors and activists of the League have used and enjoyed these habitat areas in the past for the above-described activities, and our members intend to continue enjoying recreational opportunities in these areas in the future. I also personally use and enjoy these habitats for recreational activities, and will continue to do so in the future. I travel extensively throughout the Lowcountry, birding, hiking, and enjoying other activities in these areas. The challenged

regulations protect my interests, and the interests of other League members, in protecting wildlife and wildlife habitat.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20 day of February, 2017.

Dana Beach

Dana Beach

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, EX REL. LUTHER STRANGE, ET AL., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, ET AL., Defendants.	Case No. 1:16-cv-00593-CG-N

DECLARATION OF CHARLES SCRIBNER

I, Charles Scribner, declare as follows:

1. I am the Executive Director of Black Warrior Riverkeeper. I am also a member of the organization.

2. Black Warrior Riverkeeper is an Alabama nonprofit membership corporation with over 4,000 members that is dedicated to the protection and restoration of the Black Warrior River and its tributaries. Black Warrior Riverkeeper actively supports the effective implementation and enforcement of our nation's environmental laws, including the Endangered Species Act, on behalf of and for the benefit of its members.

3. The Endangered Species Act is important to the work of Black Warrior Riverkeeper due to the number of imperiled species in the Black Warrior River and its watershed. There are ten aquatic species in the watershed that are on the federal list of endangered species, and many more species have been listed as threatened. There are four species of endangered fish: the Cahaba shiner, rush darter, vermilion darter, and watercress

darter. There is one species of endangered snail: the plicate rocksnail. And there are five endangered mussel species: the dark pigtoe, ovate clubshell, southern clubshell, southern combshell, and triangular kidneyshell. Recently, the U.S. Fish and Wildlife Service also proposed listing the region's Black Warrior waterdog as an endangered species. Among the many threatened species in the watershed, there is the flattened musk turtle.

4. Given its interest in the conservation of imperiled species and their habitat, Black Warrior Riverkeeper has a significant interest in the critical-habitat protections of the Endangered Species Act. The organization, for instance, recently submitted comments in support of the U.S. Fish and Wildlife Service's proposed designation of critical habitat for the Black Warrior waterdog (81 Fed. Reg. 69,475).

5. In an effort to ensure that the Endangered Species Act's habitat protections are fully implemented by federal agencies, Black Warrior Riverkeeper joined other environmental groups in submitting a comment letter during the rulemaking process that has been challenged in this case. The letter asked the U.S. Fish and Wildlife Service and National Marine Fisheries Service to implement strong critical-habitat regulations. Although the agencies did not adopt the organizations' recommendations, the challenged rules establish other important safeguards. The regulations provide agencies with the flexibility required to address the habitat impacts of climate change. They also confirm the federal government's authority to designate formerly occupied areas that are essential to the recovery of a listed species. This authority was recently used in the proposed designation for the Black Warrior waterdog, which includes "specific areas outside the geographical area occupied by the Black Warrior waterdog at the time of listing that are within the historical range of the species, but are currently unoccupied, because ... such areas are essential for the conservation of the species" (81 Fed. Reg. at 69,481).

6. Members of Black Warrior Riverkeeper, including me, value the Black Warrior watershed and the species it sustains. We use the river for recreation—including paddling, boating, fishing, swimming, and wildlife observation and photography. We intend to continue all of these activities in the future. The challenged rules protect my interests, and the interests of other members, in protecting wildlife and wildlife habitat.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of February, 2017.

Charles Scribner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, EX REL. LUTHER STRANGE, ET AL., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, ET AL., Defendants.	Case No. 1:16-cv-00593-CG-N

DECLARATION OF MICHAEL P. SENATORE

I, MICHAEL P. SENATORE, declare as follows:

1. I am over 21 years of age, have personal knowledge of the matters asserted in this declaration, and if called upon to testify would state the same.

2. I have been a member of Defenders of Wildlife ("Defenders") for nearly 20 years. I have served as a Staff Attorney, Litigation Director and currently Vice President for Conservation Law. I have held my current position for seven years. In my current position, I oversee Defenders' legal and policy work to protect endangered and threatened species and their habitats. Additionally, I work to protect and strengthen the environmental laws and regulations that provide a basis for wildlife conservation in the United States, particularly the Endangered Species Act ("ESA").

3. Defenders of Wildlife is a not-for-profit conservation organization recognized as one of the nation's leading advocates for wildlife and their habitat. Founded in 1947, Defenders is headquartered in Washington, D.C., with field offices and staff in Alaska, Arizona, California, Colorado, Florida, Idaho, Montana, New Mexico, North Carolina, and Washington. Defenders supports approximately 1.2 million members and activists.

4. Defenders works on behalf of its members to protect wildlife and the habitat upon which that wildlife depends. Defenders emphasizes the appreciation and protection of all species in their ecological role within the natural environment. Our programs encourage protection of entire ecosystems and interconnected habitats while protecting predators and keystone species that serve as indicator species for ecosystem health.

5. Defenders' primary mission is to protect native wild animals and plants in their natural communities. To accomplish this, Defenders informs and educates the public about environmental issues and the impacts of federal and state policy decisions on wildlife. Defenders employs education, litigation, research, legislation and advocacy to defend wildlife and its habitat. Long recognized for leadership on endangered species issues, Defenders advocates approaches to wildlife conservation that will help species from becoming endangered or threatened.

6. Defenders employs education, litigation, research, legislation and advocacy to defend wildlife and its habitat. In each program area, an interdisciplinary team of

scientists, attorneys, wildlife specialists and educators works to promote multi-faceted solutions to wildlife problems.

7. Defenders' members derive aesthetic, recreational, educational, scientific, and spiritual benefits from viewing and observing highly imperiled species in their natural habitats. On behalf of our members, Defenders has a long history of advocating for the protection of rare species and their habitat. Defenders tracks not only the biological status of listed species but also legislative and regulatory initiatives that may affect species conservation. We do this to ensure that our members can continue to explore and enjoy wild species and their natural habitats.

8. The Endangered Species Act ("ESA") is the foremost wildlife conservation statute in the world. It is aimed not just at protecting imperiled plants and animals but the habitats on which they depend. Congress designed the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To that end, at the time a species is listed as threatened or endangered, the ESA requires designation of critical habitat, i.e. those habitat areas "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). The designation of critical habitat is an important tool for protecting imperiled species.

9. Defenders has long supported the designation of critical habitat for wildlife and has, at times, brought suit to compel the U.S. Fish and Wildlife Service ("FWS") to designate statutorily required critical habitat. We have also brought suit defending critical habitat designation against challenge.

10. For example, Defenders filed two successful lawsuits, in 1996 and 1997, against the Department of the Interior and the FWS for failing to designate critical habitat for the Great Lakes and Northern Great Plains populations of the piping plover. *Defenders of Wildlife v. Babbitt,* Nos. 96–CV–2695, 97–CV–777 (D.D.C Feb. 8, 2000. After FWS designated habitat in these areas, an off-road vehicle user group in North Carolina filed a lawsuit challenging the designation of four units of critical habitat on Cape Hatteras National Seashore. *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). Defenders of Wildlife and other conservation groups intervened. The court vacated and remanded the designation of those units to the FWS for reconsideration. After FWS published its revised critical habitat designation, 73 Fed. Reg. 62,815 (Oct. 21, 2008), the off-road vehicle user group sued again, and Defenders again intervened. That case was dismissed and the designation stands. *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111 (D.D.C. 2009).

11. In another recent example, Defenders worked to ensure the designation of critical habitat for the threatened polar bear. After oil and gas interests filed suit challenging the FWS's designation of critical habitat in 2010, Defenders and other conservation groups intervened to defend the rule. *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544 (9th Cir. 2016).

12. In addition to participation in litigation, Defenders has filed comments in support of critical habitat for many species, including the Canada lynx, Florida manatee, green and loggerhead sea turtles, northern right whale, piping plover, polar bear, red knot,

Sonoran pronghorn, and woodland caribou. We filed these comments and advocated for designation of critical habitat because we support Congress' approach to recovering imperiled species and that includes protecting habitat essential to the conservation of those species.

13. In 2016, the Obama Administration completed a long-awaited revision of rules that guide the designation and protection of critical habitat. See 81 Fed. Reg. 7,414 (Feb. 11, 2016) (amending the regulations governing the designation of critical habitat); 81 Fed. Reg. 7,214 (Feb. 11, 2016) (amending the regulatory definition of "destruction or adverse modification"). Defenders actively participated in the regulatory process, submitting detailed comments on both rule.

14. Defenders does not agree with all aspects of the Obama administration's revisions, nonetheless, we believe the rules are consistent with congressional intent and will aid in the recovery of listed species while improving the ability of federal agencies to protect essential habitat areas in the face of changing threats.

15. Defenders seek to intervene in this case to protect our interests in species conservation in the Southeast and across the country.

16. A ruling for Plaintiffs in this case would have national implications and could very seriously undermine the conservation of many species of concern to Defenders and its members.

17. My interests, along with the interests of Defenders and its members around the country, would be seriously harmed if this court ruled in favor of Plaintiffs in this matter.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of February, 2017, in Washington, D.C.

MICHAEL P. SENATORE