

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

CONSERVANCY OF SOUTHWEST)
FLORIDA; SIERRA CLUB; CENTER)
FOR BIOLOGICAL DIVERSITY;)
PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY;)
AND COUNCIL OF CIVIC)
ASSOCIATIONS, INC;)

Plaintiffs)

vs.)

No. _____)

UNITED STATES FISH AND WILDLIFE)
SERVICE; SAM HAMILTON, in his)
official capacity as Director of the U.S.)
Fish and Wildlife Service; UNITED)
STATES DEPARTMENT OF INTERIOR;)
and KENNETH SALAZAR, in his official)
capacity as Secretary of the Department of)
Interior;)

Defendants.)

**COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

NATURE OF ACTION

1. This is a suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, *et seq.*, and the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, challenging Defendants' denials of Plaintiffs' petitions to the U.S. Fish and

Wildlife Service to designate critical habitat for the endangered Florida panther (*Puma concolor coryi*).

2. Critical habitat is provided for in the Endangered Species Act (ESA) §§ 3, 4 and 7; 16 U.S.C. §§ 1532, 1533 and 1536. It is one of the most important of the measures available to the U.S. Fish and Wildlife Service to protect endangered species. Although the Florida panther has been listed as an endangered species since 1967, largely due to habitat loss, and today less than 100 remain in the wild, the U.S. Fish and Wildlife Service has not designated critical habitat for this species.

3. In January 2009, the Conservancy of Southwest Florida (hereafter “Conservancy”) filed a petition with the U.S. Fish and Wildlife Service under the ESA, U.S. Fish and Wildlife Service regulations, and the Administrative Procedure Act (APA), asking the agency to establish critical habitat for the Florida panther. The Sierra Club and numerous other environmental organizations joined in that petition in July 2009. On September 17, 2009, the Center for Biological Diversity, Public Employees for Environmental Ethics and Council of Civic Associations petitioned the U.S. Fish and Wildlife Service to designate critical habitat for the Florida panther. And in November 2009, Sierra Club filed a supplemental petition with the U.S. Fish and Wildlife Service to establish critical habitat for the Florida panther, specifically to account for habitat loss due to climate change.

4. On February 11, 2010 the U.S. Fish and Wildlife Service (hereafter “the Service” or “FWS”) denied the Conservancy’s January 2009 petition, the Center for Biological Diversity’s September 2009 petition, and the Sierra Club’s November 2009 petition, in their entirety, and refused to designate critical habitat for the Florida panther. As set forth fully below, these denials were arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A), and in violation of the ESA and applicable regulations. The Service acted contrary to the evidence before the agency on the need for critical habitat, overlooked serious aspects of the problem and the benefits of critical habitat designation, and failed to base its decision on the science that was set forth in the petitions.

5. Plaintiffs respectfully ask the Court to enter a declaratory judgment finding that Defendants’ response to the petitions was contrary to the ESA, the Service’s regulations, and the APA. Plaintiffs ask this Court to remand this matter to the Service, for it to review the petitions consistent with the ESA, the Services’ regulations and the APA, and to order the Service to undertake prompt rulemaking in order to designate critical habitat for the Florida panther consistent with the petitions.

JURISDICTION AND VENUE

6. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-02 (declaratory judgment), 28 U.S.C. § 2202 (further relief), the ESA citizen suit provision at 16 U.S.C. § 1540(g), and the APA, 5 U.S.C. §§ 701-06.

7. Venue in this case is proper under § 28 U.S.C. §§ 1391(e). Plaintiffs Conservancy of Southwest Florida and Sierra Club each have offices in this judicial district and this division. Habitat occupied by Florida panther, including areas that Plaintiffs requested be designated critical habitat, are located in this judicial district and in this division. Defendant U.S. Fish and Wildlife Service has an office in this district. A substantial part of the events or omissions giving rise to the claims occurred in this district.

PLAINTIFFS

8. a) The Conservancy of Southwest Florida is a non-profit corporation organized under the laws of the State of Florida in 1964 and headquartered in Naples, Florida. The Conservancy has more than 6,000 members in Southwest Florida. The mission of the Conservancy is to protect the environment and natural resources of Southwest Florida, including endangered species such as the Florida panther. The Conservancy pursues this mission in at least four ways relevant to the

protection and restoration of the Florida panther: (1) through policy advocacy on the local, regional, state and national levels; (2) through independent scientific field research on protection and restoration of species and their habitats; (3) through environmental education at the Conservancy Nature Center and by naturalist-lead excursions into wilderness areas of Southwest Florida; and (4) through purchase and protection of land for conservation purposes.

b) The Conservancy has been engaged in policy advocacy for the protection of the Florida panther for many years, including active involvement in local land-use plan formation for the protection of panther habitat in Collier and Lee Counties and the petitioning of the U.S. Fish and Wildlife Service to designate critical habitat for the panther in South Florida, which is the subject of this litigation. The Conservancy conducts sponsored scientific field research focused on the Florida panther, including examining panther use of public lands in the Primary Zone and establishing benchmarks for panther prey in panther habitat being restored as part of Everglades restoration. The Conservancy's environmental education activities highlight the Florida panther as an "umbrella species," key to the protection of habitat for several other endangered and threatened species and offer opportunities to members and visitors to learn about the panther in the Conservancy Nature Center and on excursions to Florida panther habitat with the hope of viewing a panther in the wild.

c) The Conservancy also owns property for conservation purposes in Collier County in the area the Fish and Wildlife Service refers to as the panther's Primary Zone – the core of panther habitat. This property is used by Florida panthers and helps support their continued survival. Finally, individual Conservancy members have an aesthetic and scientific appreciation of the Florida panther in the wild and travel to areas in the Primary Zone of panther habitat in hopes of viewing and photographing the elusive panther.

9. The Sierra Club was founded in 1892, and is the nation's oldest grass-roots environmental organization. Headquartered in San Francisco, California, it has more than 700,000 members nationwide, including a Florida chapter with thousands of members in Florida. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including wildlife and endangered species such as the Florida panther. The Sierra Club has members who use the public lands in Florida panther habitat, including areas that Plaintiffs have requested be designated critical habitat, for recreation, wildlife observation, study and photography, and aesthetic, scientific and business purposes. Sierra Club members' use of the areas includes

observing, looking for and otherwise enjoying the wildlife, including the Florida panther. The loss of the Florida panther would diminish their enjoyment of these areas.

10. Plaintiff Center for Biological Diversity is a non-profit corporation with offices in Tucson, Arizona and elsewhere in the United States, and is dedicated to the preservation, protection and restoration of biodiversity, native species, and ecosystems. The Center has over 42,000 members worldwide, including members in the State of Florida. The Center's members regularly visit, use, and enjoy the areas that the Center petitioned for as critical habitat for the Florida panther, and plan to continue visiting, using, and enjoying these areas in the future. The Center and its members derive environmental, recreational, scientific, and aesthetic benefit from their use and enjoyment of these areas. In addition, the Center and its members derive environmental, recreational, scientific, and aesthetic benefit from the existence of Florida panthers in the wild. These interests of the Center and its members have been, are, and will be directly, adversely, and irreparably affected by the Secretary's failure to designate critical habitat for the Florida panther. The Center and its members will continue to be prejudiced by Defendant's unlawful actions until and unless this Court provides the relief prayed for in this complaint.

11. Plaintiff Public Employees for Environmental Ethics (PEER) is a national non-profit organization based in Washington, D.C. with field offices nationwide, including Florida. PEER works with local, state, and federal resource professionals to monitor, advocate, and uphold the environmental laws of the United States. PEER members reside in the State of Florida and study wildlife, including the Florida panther, in the Everglades ecosystem for professional, recreational, and aesthetic benefits.

12. Plaintiff Council for Civic Associations, Inc. is a not-for-profit organization founded in 1996. It is affiliated with over 70 Civic organizations, government liaisons and community leaders in South Florida. Its goal is to make government at all levels accountable for enforcing the laws for which they are responsible, for the benefit of all citizens and not just specific special interest groups. It has been actively involved in efforts to protect the Florida panther on behalf of itself and its members.

13. Plaintiffs and their members have petitioned the U.S. Fish and Wildlife Service and met with the agency concerning critical habitat designation for the Florida panther. Plaintiffs and their members have also filed public comments on other federal actions and management activities that affect the Florida panther and its habitat.

14. Plaintiffs and Plaintiffs' members stand to be injured, and will continue to be adversely affected and irreparably injured, by Defendants' continuing failure to comply with the ESA and the APA with regard to the petitions and the protection of the Florida panther as set forth herein. Plaintiffs have no adequate remedy at law; and the relief sought in this action, if awarded, will redress this harm.

DEFENDANTS

15. Defendant U.S. Fish and Wildlife Service (FWS) is an agency within the federal Department of Interior. The Secretary of the Interior has charged the Fish and Wildlife Service with carrying out the ESA's duties, including designating critical habitats for species listed as endangered or threatened. 50 C.F.R. § 402.01(b) (2010).

16. Defendant Sam Hamilton is the Director of the FWS. He is sued in his official capacity.

17. Defendant Department of Interior (DOI) is an agency of the federal government that is responsible for administering the provisions of the ESA.

18. Defendant Kenneth Salazar is the Secretary of the Interior. He is sued in his official capacity.

STATUTORY FRAMEWORK

19. The ESA, passed by Congress in 1973, establishes a system for the protection of endangered and threatened species and their habitats. The Eleventh Circuit Court of Appeals summarized the ESA in *Florida Key Deer v. Paulison*, 522 F3d 1133, 1137-38 (11th Cir. 2008) as follows:

The Endangered Species Act of 1973 (“ESA”) is “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, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Its stated purposes were “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth.*, 437 U.S. at 184, 98 S.Ct. 2279. In short, the preservation of endangered species was to be considered “the highest of priorities.” *Id.* at 194, 98 S.Ct. 2279. At the most basic level, this goal translated into the ESA’s requirement that the Secretaries of Commerce and the Interior maintain a list of endangered and threatened species (“listed species”) and designate their critical habitats. 16 U.S.C. § 1533.”

20. As the Eleventh Circuit noted, the purpose of the ESA is to conserve the ecosystems upon which endangered and threatened species depend and to provide a program for the conservation of such species. 16 U.S.C. § 1531(b). 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 [of the ESA] are no longer necessary.” 16 U.S.C. § 1532(3).

Section 2 of the ESA declares it to be “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes [of the ESA].” 16 U.S.C. § 1531(c)(1).

21. Section 4 of the ESA governs the listing of species and the designation of their critical habitats. Pursuant to this section, the Secretary of the Interior (the “Secretary”) must first “determine whether any species is an endangered ... or threatened species.” 16 U.S.C. § 1533(a)(1). The Secretary must identify endangered species, designate their “critical habitats,” and develop and implement recovery plans. 16 U.S.C. §§ 1533, 1536, 1538, 1539. A species’ critical habitat encompasses areas it occupies “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 protections,” along with unoccupied areas which are “essential to the conservation of the species.” 16 U.S.C. § 1532(5). Because critical habitat is so central to the ESA’s purposes, the Secretary is generally required to designate critical habitat at the same time as a species is listed. 16 U.S.C. § 1533(a)(3)(A). Of course, the Secretary can also establish critical habitat for species for which no critical habitat has previously been established, such as the Florida panther, that were listed as threatened or

endangered at the time of the 1982 amendments to the ESA, which established critical habitat designation procedures. 16 U.S.C. § 1532(5)(B).

22. When determining whether to designate critical habitat, the ESA requires the Secretary to act “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2).

23. Section 7 of the ESA requires federal agencies to consult with the FWS to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of any endangered species “or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical.” 16 U.S.C. § 1536(a)(2). If an agency action poses such a risk, the Secretary helps the agency to find “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3).

24. The ESA’s protection against critical habitat damage or destruction is broader than its bar on actions that will “jeopardize the continued existence” of a species. *See, e.g., Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-45 (5th Cir. 2001). It requires federal agencies to protect habitat sufficient to conserve and recover a species, not just to ensure the species’ bare existence. This means designating critical habitat for the Florida panther could, for example, better protect the panther and its habitat from a wide array of activities that require

federal permits, receive federal funding, or occur on federal lands, including road-building and widening and increased traffic, dredging and filling wetlands, agriculture, recreation, mining, and residential development.

STATEMENT OF FACTS

A. Natural History of the Florida Panther

25. The Florida panther is the last subspecies of the American cougar surviving in the American East. The largest native cat in the East, it can reach seven feet long and weigh as much as 160 pounds. The Florida panther once ranged from Arkansas and Louisiana east to the Atlantic Ocean, and from Florida north to Tennessee. Today, due to the booming human population of the Southeast, only a small group in the wilds of South Florida survives. Less than 100 panthers remain, clinging to less than 5% of their historic range, because of centuries of habitat loss.

26. Panthers range widely and require large areas to meet their needs, which includes room to hunt, establish home ranges, reproduce and raise young, and disperse. Most states have failed to protect the large expanses of forested, relatively undisturbed, terrain that panthers rely upon to provide cover for dens, resting areas, and ambush sites. Male panthers generally establish home ranges of roughly 250 square miles; females have approximately 150 square mile ranges.

27. Panther ranges must provide adequate food. Panthers feed primarily on white-tailed deer and feral hogs. A male will generally consume one deer-sized prey animal every 8-11 days. Females do so every 14-17 days, unless they have kittens, in which case they may need to kill and eat roughly every 3 days.

28. Panthers also need safe places to raise their kittens. Female panthers establish their dens in dense understory vegetation. Generally, a female will raise two or three kittens each time she dens.

29. Kittens disperse after a year to 18 months. Young males strike out to establish their own ranges, traveling, on average 42.5 miles from the den; young females stay closer to their mothers, traveling, on average, just under 13 miles.

30. In view of these habitat needs, in its Florida Panther Recovery Plan, the FWS concluded that a reserve network as large as 15,635 to 23,438 square miles was needed to support 100-200 adult panthers. FWS, Florida Panther Recovery Plan Third Revision at 26 (Nov. 1, 2008) (hereinafter 'Recovery Plan'). But to "provide for long-term persistence," the Service added, panthers would need enough space to support 1,000 to 2,000 adults – 156,251 to 234,376 square miles. *Id.* That area is equivalent to roughly 60 - 70 % of the Florida panther's historic range.

31. In contrast, panthers now have only an approximately 3,500 square mile breeding range, which stretches north and west from the Everglades, passing

through Big Cypress National Preserve and nearly reaching the Caloosahatchee River. Male panthers sometimes disperse north of the Caloosahatchee, although no females have been seen there for decades.

B. Threats to the Florida Panther and Its Habitat

1. Habitat Loss

32. The limited habitat the panthers now occupy is insufficient to assure the long-term survival and recovery of the species. Worse, what little habitat remains is significantly threatened, further imperiling the Florida panther's survival and recovery.

33. The FWS agrees with this assessment. According to its Recovery Plan, “[h]abitat loss, fragmentation, and degradation, and associated human disturbance are the greatest threats to panther survival and among the greatest threat to its recovery.” *Id.* at 36.

34. Habitat loss has been driven by Florida's booming population, which increased from 87,000 in 1850 to 17 million in 2000. From 1936 to 1987, urban areas in South Florida expanded by 538%, and cropland by 30%, while 21% of the forested lands were converted to other uses. By 2003, an additional 13% of natural or semi-natural lands had been developed.

35. Panthers lost on the order of 0.8% of their remaining habitat every year between 1986 and 1996. The loss rate after 1996 may have doubled or even

tripled. These pressures are unlikely to relent any time soon, as the South Florida population is predicted to continue to grow, expanding from roughly 6 million in 2000 to an estimated 9.52 million by 2030.

36. As well as directly destroying panther habitat, rapid growth is also fragmenting what little habitat remains into small blocks thereby leaving panthers trapped on ‘islands’ of remaining habitat. Badly fragmented habitat cannot support a viable long-term panther population. As the Service explains in the Recovery Plan, “small populations may become isolated, subjecting them to demographic and stochastic factors that reduce their chances of survival and recovery.” *Id.* at 39.

37. Road construction associated with development does not just fragment habitat. It also increases the chances of panther roadkills as traffic increases. Indeed, 56% of all such roadkills have occurred since 2000. The Service believes that “[n]ew and expanded highways are likely to increase the threat of panther mortality and injuries due to collisions.” Fish and Wildlife Service, Florida Panther 5-Year Review: Summary and Evaluation at 18 (Mar. 27, 2009) (hereinafter ‘Five-Year Review’).

38. A record-high 24 panthers died in 2009: 17 of those deaths were roadkills. *Scientific American*, Extinction Countdown, Motored Down: Record number of manatee, panther deaths in 2009 (Jan. 6, 2010). These deaths included a three- or four-month old kitten which was killed on New Year’s Eve. *Id.*

39. In sum, as the FWS has concluded, “[r]apid development in southwest Florida has compromised the ability of landscapes to support a self-sustaining panther population.” Recovery Plan at 38; *see also* Five- Year Review at 14.

2. Climate Change

40. Climate change will further threaten the panthers and their habitat through a combination of rising seas, strong hurricanes, flooding, and other environmental disruptions. The Intergovernmental Panel on Climate Change (the ‘IPCC’) has determined that “[w]arming of the climate system is unequivocal.” IPCC, *Climate Change 2007: Synthesis Report* at 30. The U.S. Global Change Research Program projects that average sea levels will rise by 1 m or more by the end of the century. U.S. Global Change Research Program, *Global Climate Change Impacts in the United States* at 24 (2009). It also reports that Atlantic hurricanes are getting stronger, combining with rising sea levels to cause major flooding and shoreline loss that will be “among the most costly consequences of climate change” for the Southeast. *Id.* at 112-15.

41. Researchers have shown that a 1 m rise in sea level would swamp 29% of existing panther habitat. Andrew Whittle et al., *Global Climate Change and Its Effect on Large Carnivore Habitat in Florida*, Abstract in Florida’s Wildlife: On the Frontlines of Climate Change (2008). Strong storms can also

significantly damage inland habitat and bring floods which can kill the white-tailed deer upon which panthers primarily feed.

42. The FWS acknowledges these dangers, writing that “[c]limate change in south Florida could exacerbate current land management challenges involving habitat fragmentation, urbanization, invasive species, disease, parasites, and water management.” U.S. Fish and Wildlife Service, Biological Opinion for the Construction and Operation of the Fort Myers Mine No. 2 Project at 17-19 (Feb. 12, 2009); *see also* U.S. Fish and Wildlife Service, Biological Opinion for the Widening of Oil Well Road (Feb. 26, 2009). The FWS emphasizes that climate change’s consequences “would be particularly dire for the panther[,] which has no populations outside of lowlying South Florida.” *Id.*

43. The combined stresses of climate change and development on the already small panther population and its shrinking habitat pose a dire threat to the species. Protecting the panther’s habitat would give the species a better chance of surviving and recovering.

C. The Fish and Wildlife Service and the Florida Panther

1. Published Scientific Studies Demarcate Panther Habitat

44. The Florida panther was among the first species to be listed under the ESA. *See* 32 Fed. Reg. 4,001 (Mar. 11, 1967). Although the panther was and is

endangered primarily by habitat loss, over 42 years have passed and the FWS has not officially designated its critical habitat.

45. This failure is not due to insufficient information. In 2006, for instance, a team of researchers led by Randy Kautz, and working with the FWS, identified “[t]hree priority zones as important for panther habitat conservation,” and the Service incorporated these zones into its latest Recovery Plan for the Florida panther. Recovery Plan at 27.

46. The 3,548 square mile ‘Primary Zone’ encompasses the current breeding population of Florida panthers. Protecting this area is a necessary measure to save the wild Florida panthers. Indeed, according to the Service, the Primary Zone is “essential to the long-term viability and persistence of the panther in the wild.” *Id.*

47. The 1,269 square mile ‘Secondary Zone’ is contiguous to the Primary Zone. It contains valuable potential panther habitat. Although now used by relatively few panthers, the Secondary Zone could “accommodate expansion of the panther population south of the Caloosahatchee,” especially if it was further restored. *Id.*

48. Finally, the ‘Dispersal Zone’ is a 44 square mile strip of land connecting the Primary and Secondary Zones to a crossing point of the

Caloosahatchee River which panthers already use, and so could be used by panthers expanding their habitat.

49. Expanding the panther's range would produce important conservation benefits. It would, for instance, allow panthers to establish a larger population and would also allow them to begin to expand into habitats which may be less vulnerable to climate change.

50. An analysis of the Primary, Secondary, and Dispersal Zones was published as a peer-reviewed paper, which is cited as Randy Kautz et al., *How Much is Enough? Landscape-level conservation for the Florida panther*, 130 *Biological Conservation* 113 (2006). The Kautz paper has been known to the FWS since at least 2006.

51. Nonetheless, the FWS has not designated any of the areas identified by Kautz et al. as critical habitat for the Florida panther.

52. In 2006, a second team of researchers, led by Cindy Thatcher, also identified potential panther habitat in south-central Florida, which could help the south Florida population expand, grow, and survive the effects of climate change. They submitted a report to the FWS, entitled *An Assessment of Habitat North of the Caloosahatchee River for Florida Panthers* (June 2006).

53. This area the report identifies includes 4,387 square miles of panther habitat, in patches in and around the Avon Park, Duette Park, Fisheating Creek,

and Babcock Ranch areas. This area is connected to the regions discussed by Kautz et al. 2006 by the Dispersal Zone. It would provide valuable room for the panther population to grow, maintain and increase genetic diversity, and weather climate stresses. Male panthers already use this habitat.

54. A version of this report was published as a peer-reviewed paper which is cited as Cindy Thatcher et al., *A Habitat Assessment for Florida Panther Population Expansion into Central Florida*, 90 *Journal of Mammalogy* 918 (2009). This paper is known to the FWS. However once again, the FWS has not designated any of these areas as critical habitat for the Florida panther.

2. Plaintiffs' Petitions to Establish Critical Habitat and the FWS Denials

55. On January 21, 2009, the Conservancy of Southwest Florida petitioned the FWS to designate the Primary, Secondary, and Dispersal Zones as critical habitat for the Florida panther. The petition was received January 23, 2009. On July 23, 2009, a broad coalition of conservation groups, including the Sierra Club, joined the Conservancy's petition.

56. On September 17, 2009 the Center for Biological Diversity, Public Employees for Environmental Ethics and Council of Civic Associations petitioned the FWS to designate critical habitat for the Florida panther.

57. On November 19, 2009, the Sierra Club petitioned the FWS to designate both the Primary, Secondary, and Dispersal Zones, and the areas

identified by Thatcher et al. 2009 as critical habitat for the Florida panther. The petition was received on November 20, 2009.

58. Because the FWS had not granted or denied the petitions, on December 16, 2009, the Conservancy and the Sierra Club gave 60-daynotice of intent to sue under ESA § 11(g), 16 U.S.C. § 1540(g), the ESA citizens' suit provision, and notified the FWS by certified mail that they intended to file suit against it under the ESA and APA to compel responses to the petitions. That letter also included notice of intent to sue for violations of ESA § 7. That letter was received December 17, 2009. Plaintiff Center for Biological Diversity served a citizen suit notice on December 22, 2009. That letter was received by the FWS. The Conservancy and the Sierra Club sent a supplemental notice letter on January 26, 2009, which was received the next day.

59. On February 11, 2010 the FWS finally answered the petitions in three separate letters. In a letter to The Conservancy's attorneys, it denied the Conservancy's petition in its entirety. In a letter to Center for Biological Diversity it denied that petition in its entirety. In a letter to Sierra Club's attorney, it denied the Sierra Club's petition in its entirety.

60. However, the FWS's denials did not address the science that Plaintiffs presented in the petitions. They did not find whether the petitions presented substantial scientific information indicating that critical habitat designation was

warranted. They did not find whether the science in the petitions constituted the best available science. They did not find whether the areas Plaintiffs asked be designated critical habitat contained those physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. They did not identify the principal biological or physical constituent elements within the areas that are essential to the conservation of the species. Rather, both denials simply recited other actions the FWS was undertaking to protect the Florida panther. They did not state why critical habitat would not be designated.

61. The conservation actions that the FWS recites in its denials are no substitute for designating critical habitat. They do not make the areas subject to the prohibition on adverse modification in ESA § 7, as would critical habitat designation. The “conservation banking” system the FWS relies on allows primary zone areas to be destroyed in return for less valuable secondary and dispersal zones, contrary to the recommendation in Kautz et al. that the spatial extent of Primary Zone habitat be preserved. The Florida Panther Protection Program relied on includes less than 6% of the areas that the best available science has determined to be essential to the panther (primary, secondary, and dispersal zone areas). The FWS’s other conservation actions actually support the designation of critical habitat, since under §3(5)(A)(i) of the ESA the term “critical habitat” is defined to

include areas “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i).

62. The Florida Panther ESA § 11 Recovery Plan emphasizes that the total available area, quality and spatial extent of the primary zone should be preserved to support the remaining population of endangered Florida panther. Critical habitat designation would provide such landscape-level protection of the entire area recognized by the best available science as essential panther habitat.

FIRST CLAIM FOR RELIEF

(Violations of the ESA, FWS regulations, and the APA in the denials of the petitions to establish critical habitat)

63. The allegations of paragraphs 1 – 62 are incorporated by reference as if repeated verbatim herein.

64. Agency action is arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), where the agency has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfr’s Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency actions must be reversed as arbitrary and capricious when the agency fails to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.*

65. An agency's failure to comply with its regulations renders its action arbitrary and capricious, contrary to the APA, 5 U.S.C. § 706(2)(A). "[C]ourts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself." *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) and cites therein.

66. In this case, the FWS's denials of the petitions were arbitrary and capricious. This includes, but is not limited to: denying the petitions contrary to the evidence before the agency on the need for critical habitat; overlooking a serious aspect of the problem in ignoring climate change and the benefits of critical habitat designation; and failing to offer a rational explanation between the facts presented in the petitions and the conclusion made by the FWS in denying them.

67. For example, the Sierra Club's petition presented a detailed analysis of how sea level rise and climate-related floods, and storms, and droughts, would threaten panther habitat and the resulting urgent need to protect existing habitat and room for growth. The FWS's letters do not even mention climate change and do not analyze the panther-specific habitat analyses the Sierra Club offered. Similarly, the Sierra Club's petition carefully described the South Central Florida habitats identified by Thatcher et al. in their 2006 report and 2009 paper. The FWS's denial letters do not discuss these areas at all, or explain why they should not be designated. Further, the Sierra Club's petition quoted and described

Secretarial Order 3289, which commits the FWS and the Department to protect wildlife and wildlife habitat from climate change, and the FWS's own draft climate response plan, and explained why these policies further supported critical habitat for the panther. Once again, the denial letters do not even acknowledge – much less discuss – this issue. These instances are nonexclusive examples; the FWS avoided important issues raised in the petition in many other regards.

68. Similarly, the Conservancy's petition presented a detailed discussion of how development pressures in the Primary, Secondary, and Dispersal Zones threatens the panthers and explains why and how critical habitat designation would best address these pressures. The denial letters assert that critical habitat is not necessary, but do not explain why the FWS takes this position, instead simply listing other activities the FWS happens to be taking. This list does not speak to the issue, as the FWS could continue to take the various actions it lists whether or not it designates critical habitat. The FWS simply does not explain why it has opted to forego the strongest habitat protection measures the ESA offers, and which the Conservancy requested, even though the panther is primarily threatened by habitat loss. Nor does it explain whether or how the actions it lists will prevent the specific developments and threats the Conservancy discusses in detail in its petition, including extensive development in Collier County in the panther's Primary Zone. Once again, these examples only serve to illustrate the many failings in the FWS's

response. The same deficiencies exist in the Service's denial of the Center for Biological Diversity's petition.

69. It was further arbitrary and capricious for the Service to not comply with the regulatory requirements for review of petitions to designate critical habitat in 50 U.S.C. § 424.14(d). That rule requires review to be in accordance with the APA and "applicable department regulations." The applicable departmental regulations on critical habitat determinations is 50 C.F.R. § 424.14(b). That requires the agency to consider those "physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protections," and it lists five elements that must be considered. That regulation further requires that "when considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species." However, the Service's responses to the petitions failed to make these findings or mention these factors at all.

70. It was further arbitrary and capricious for the Service not to comply with the regulatory requirements for review and responding to petitions to revise critical habitat in 50 U.S.C. § 424.14(c)(1), (2)(i) and (3).

71. In addition, in its denials the FWS did not address the facts and the science set forth in the petitions. The denials do not contain any rational

connection between the facts and the science set forth in the petitions and the decision to deny the petitions. Indeed, even though the Conservancy and Sierra Club petitions raised a range of distinct issues and arguments, the Service sent essentially identical denial letters to both groups, responding to careful analysis with a form letter. It did this with the denial of the Center for Biological Diversity's petition as well. This renders the denial of the petitions arbitrary and capricious, an abuse of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

72. Based on the above, Defendants' denials of the petitions are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law, and without observance of procedure required by law, contrary to the APA, 5 U.S.C. § 706(2)(A) and (D).

SECOND CLAIM FOR RELIEF

(Violations of ESA §§ 2, 3 and 7 and the APA in denying the petitions for critical habitat)

73. The allegations of paragraphs 1 - 72 are incorporated by reference as if repeated verbatim herein.

74. Section 2(c) of the ESA states that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c).

75. Section 3 the ESA defines conserve, conservation and conserving as, “to use and the use of all methods and procedures which are necessary to bring an endangered species or threatened species to the point at which the measures pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3).

76. Section 7(a)(1) of the ESA requires that all federal agencies “shall ... utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.” 16 U.S.C. § 1536(a)(1).

77. By denying the petitions and not following the FWS procedures and regulations as set forth above, the FWS and DOI are not fully utilizing their authority in furtherance of the purposes of the ESA; not using “all methods and procedures which are necessary to bring an endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary”; and/or they are not fully carrying out their programs for the conservation of the Florida panther.

78. Based on the above, Defendants’ actions are contrary to ESA § 2, 3 and 7, and/or are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law, and without observance of procedure required by law, contrary to the APA, 5 U.S.C. § 706(2)(A) and (D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court find for Plaintiffs and enter a judgment order:

- a) Declaring that in denying Plaintiffs' petitions Defendants' have not complied with the ESA, the FWS regulations and the APA; and that the denials were arbitrary and capricious, an abuse of discretion and not in accordance with law, and without observance of procedure required by law, contrary to the APA, 5 U.S.C. § 706(2)(A) and (D);
- b) Declaring that in denying the Plaintiffs' petitions the Defendants have not met their obligations under ESA §§ 2, 3 and 7, and/or their actions are arbitrary and capricious, an abuse of discretion and not in accordance with law, and without observance of procedure required by law, contrary to the APA, 5 U.S.C. § 706(2)(A) and (D);
- c) Pursuant to 5 U.S.C. § 706(2)(A), entering an order vacating the denial of the petitions;
- d) Entering an injunction remanding the matter to the Defendants, ordering Defendants to make all necessary findings on the petitions, ordering Defendants to initiate rulemaking to designate critical habitat in accordance with the petitions, and setting a reasonable deadline for these tasks to be completed;

- e) Awarding Plaintiffs their costs, expenses and attorneys' fees under the ESA, the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or other applicable law; and
- f) Providing for such other relief as the Court deems just and appropriate.

Respectfully submitted, this 18th day of February, 2009.

s/ Eric E. Huber

Eric E. Huber (Trial Counsel)

Colo. Bar No. 40664

Craig Segall

Ca. Bar no. 260551

Sierra Club

1650 38th St. Ste. 102W

Boulder, CO 80301

(303) 449-5595

(303) 449-6520 (fax)

eric.huber@sierraclub.org

craig.segall@sierraclub.org

Attorneys for Plaintiffs

s/ Marcy I LaHart

Marcy I LaHart, Esq.

Fla. Bar no. 0967009

4804 SW 45th Street

Gainesville, FL 32608

(352) 224-5699

fax (888) 400-1464

Attorney for Plaintiffs

s/ Gary A. Davis

Gary A. Davis

NC Bar No. 25976

Gary A. Davis & Associates

P.O. Box 649

Hot Springs, NC 28743

(828) 622-0044

Fax (828) 622-7610

gadavis@enviroattorney.com

Attorney for the Conservancy
of Southwest Florida