

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

CENTER FOR BIOLOGICAL DIVERSITY,
WATERKEEPER ALLIANCE, INC., and
RIVERKEEPER, INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and ANDREW
WHEELER, in his official capacity as
Administrator of the United States Environmental
Protection Agency

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs Center for Biological Diversity, Waterkeeper Alliance, Inc., and Riverkeeper, Inc. (collectively, “Conservation Groups”) challenge the failure of Defendants U.S. Environmental Protection Agency and Administrator Wheeler (collectively, “EPA”) to comply with their mandatory duties under the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA” or the “Act”). Defendants violated the ESA by failing to initiate and complete ESA Section 7 consultation to ensure that EPA’s actions in response to the COVID-19 pandemic—as described in a March 26, 2020 Memorandum entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” setting forth EPA’s policy regarding suspension of enforcement of environmental legal obligations (the “Non-Enforcement Policy”)—will not result in jeopardy to listed species or in the destruction or adverse modification of such species’ critical habitat.

2. EPA’s Non-Enforcement Policy suspends monitoring and reporting requirements under the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Emergency Planning and Community-Right-to-Know Act. Many permits

issued under these statutes contain specific requirements and limitations designed to protect listed species and critical habitats. Suspension of monitoring and reporting requirements therefore creates an immediate and serious risk to imperiled wildlife, which is heightened by EPA's broad invitation to regulated industries to suspend such activities without any public disclosure.

3. Conservation Groups understand that COVID-19 presents unique challenges and that certain measures may be necessary to protect individuals involved in implementing programs under EPA's jurisdiction. However, this does not mean that EPA may simply ignore its vitally important, and legally required, ESA Section 7 duties and disregard potential impacts on imperiled species and their critical habitats. Section 7 consultation is the heart of the ESA and is vital to ensure that imperiled species are not jeopardized by fully evaluating and averting or mitigating harm.

4. There can be no doubt that EPA's Non-Enforcement Policy triggers the agency's Section 7 consultation obligations. Defendants have taken a discretionary action that effectively authorizes regulated entities to forego actions that are required by law, including routine compliance monitoring, integrity testing, sampling, lab analysis, and reporting or certification requirements where the affected companies and municipalities maintain that such actions are not reasonably practicable due to COVID-19. EPA's policy implicates permits that limit pollution to protect the environment, including for listed species; therefore, the policy "may affect" listed species—the low threshold for triggering the Section 7 consultation requirements—by allowing unchecked pollution in habitats that listed species rely on, placing endangered and threatened species at risk. Section 7 consultation on the EPA Non-Enforcement Policy is thus required by the plain language of the ESA. 16 U.S.C. § 1536(a)(2).

5. EPA has failed, however, to undertake any Section 7 consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the “Services”) on the Non-Enforcement Policy. EPA failed even to follow the Services’ emergency consultation process, which allows agencies to take immediate action without first going through formal consultation in the event of an emergency, but still requires the agencies to notify the Services and complete formal consultation once the emergency is over.

6. EPA did not notify and seek advice from the Services when it instituted the Non-Enforcement Policy, and it has not indicated any plans to undertake the required formal consultation, even once the policy is rescinded. Further, since there is no obligation within the Non-Enforcement Policy for regulated entities to “catch-up” with certain missed monitoring or reporting during the period that the policy will be in effect, absent such consultation there will be no way for EPA to ensure that its actions have not jeopardized listed species or critical habitat, as the ESA requires.

7. According to a memorandum issued by EPA on June 29, 2020, the Non-Enforcement Policy is scheduled to terminate on August 31, 2020. However, there is no assurance that the policy will be rescinded by that date, particularly given the recent surge in COVID-19 cases. Regardless, EPA has failed to initiate any ESA Section 7 consultation to ensure that missed monitoring and reporting requirements and non-enforcement of important legal obligations pursuant to the Non-Enforcement Policy will not jeopardize listed species, in direct violation of EPA’s mandatory duties under the ESA.

8. Conservation Groups therefore bring suit to declare that EPA is in violation of Section 7 of the ESA and to compel EPA to complete formal consultation regarding the impacts of the Non-Enforcement Policy on listed species by a date certain, in order to ensure that EPA’s

suspension of monitoring and reporting obligations has not and will not jeopardize listed species, or adversely modify or destroy the critical habitat of such species, and to enjoin any further reliance on the policy.

JURISDICTION AND VENUE

9. This court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g) (actions arising under the ESA citizen suit provision); 5 U.S.C. § 702 (review of agency action under the Administrative Procedure Act (“APA”)); 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1346 (action against the United States); and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty). The court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g), the APA, 5 U.S.C. §§ 701–706, and 28 U.S.C. § 2201-02 (declaratory and injunctive relief).

10. By written notice to Defendants dated April 21, 2020, Plaintiff Center for Biological Diversity provided notice of its intent to file suit, as required by the ESA. 16 U.S.C. § 1540(g). Further, by written notice to Defendants dated June 10, 2020, Plaintiffs Center for Biological Diversity, Waterkeeper Alliance, Inc., and Riverkeeper, Inc. provided supplemental notice of their intent to file suit more than sixty days prior to filing of this complaint, as required by the ESA. *Id.*

11. Plaintiffs’ notice letters demanded that Defendants advise the Conservation Groups of what steps were being taken to satisfy their obligations and comply with ESA Section 7 consultation requirements regarding the Non-Enforcement Policy.

12. Plaintiffs’ notice letters also demanded that Defendants clarify what actions will be taken to ensure that listed species and their critical habitat have not been and will not be jeopardized by Defendant’s suspension of monitoring, reporting, and enforcement during the COVID-19 pandemic.

13. Defendants have failed to respond or remedy the alleged violations, and therefore an actual, justiciable controversy exists within the meaning of 28 U.S.C. § 2201(a).

14. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(e), as a substantial part of the events or omissions giving rise to the claim occurred in this District, two of the Defendants have offices in this District, and Plaintiffs Waterkeeper Alliance, Inc., and Riverkeeper, Inc., reside or maintain their principal places of business within the Southern District of New York.

PARTIES

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit conservation organization headquartered in Tucson, Arizona, with offices and members throughout the United States and Mexico, including members in New York. Through science, policy, law, and creative media, the Center works to secure a future for all species, great or small, hovering on the brink of extinction. The Center has over 74,000 members throughout the United States and the world. The Center and its members are concerned with, and have concrete interests in, the conservation of imperiled species and the effective implementation of the ESA. The Center’s members have professional, aesthetic, spiritual, and/or recreational interests in imperiled species and are similarly interested in the health of these species’ habitat. These members include those who have studied, viewed, photographed, and otherwise appreciated threatened and endangered species that may be affected by the EPA’s Non-Enforcement Policy; those who live near these species, habitats, and ecosystems; and those who intend to visit and enjoy these species, habitats and ecosystems in the future.

16. Plaintiff WATERKEEPER ALLIANCE, INC. (“Waterkeeper”) is a not-for-profit corporation organized under the laws of New York. Waterkeeper is a member-supported, international environmental advocacy organization with its headquarters in New York. Waterkeeper strengthens and grows a global network of grassroots leaders protecting everyone’s right to clean water. Comprised of more than 350 member and affiliate organizations around the world (including Plaintiff Riverkeeper, Inc.), as well as more than 12,000 individual supporting members, Waterkeeper is the largest and fastest growing non-profit focused solely on clean water. Waterkeeper's goal is drinkable, swimmable, and fishable water everywhere. Under its Clean

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