

**UNITED STATES DISTRICT COURT
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. 1:20-cv-06572 (JSR)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LEGAL FRAMEWORK 3

 I. ENDANGERED SPECIES ACT..... 3

 II. ADMINISTRATIVE PROCEDURE ACT..... 6

STATEMENT OF FACTS 6

STANDARD OF REVIEW 12

ARGUMENT 12

 I. EPA FAILED TO INITIATE AND COMPLETE ESA SECTION 7
 CONSULTATION ON THE NON-ENFORCEMENT POLICY IN
 VIOLATION OF THE ESA 12

 A. EPA’s Policy is an Agency Action That “May Affect” Listed
 Species and Their Critical Habitats Requiring Section 7
 Consultation 13

 B. EPA Failed to Even Follow the Service’s Emergency Consultation
 Process 18

 II. EPA’S FAILURE TO CONSULT CONSTITUTES AN AGENCY ACTION
 UNLAWFULLY WITHHELD IN VIOLATION OF THE APA 20

REMEDY 21

CONCLUSION..... 21

TABLE OF AUTHORITIES

CASES

Aluminum Co. of Am. v. Administrator, Bonneville Power Admin., 175 F.3d 1156 (9th Cir. 1999)6

Bernstein/Glazer, LLC v. Babbitt, No. 99 Civ. 1195, 2000 WL 322778 (S.D.N.Y. March 28, 2000)6, 12

City Club of N.Y. v. U.S. Army Corps of Eng’rs, 246 F. Supp. 3d 860 (S.D.N.Y. 2017).....12

Cottonwood Envtl. Law Ctr. v. United States Forest Serv., 789 F.3d 1075 (9th Cir. 2015).....19

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999).....6

Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006 (9th Cir. 2012) 4, 14, 17

Nat’l Parks Conservation Ass’n v. Jewell, 62 F. Supp. 3d 7 (D.D.C. 2014).....4, 16

National Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) ..19

NRDC v. Muszynski, 268 F.3d 91 (2d Cir. 2001)6

NRDC, Inc. v. Fox, 93 F. Supp. 2d 531 (S.D.N.Y. 2000).....6, 21

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)18

Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).....2, 18

W. Watersheds Project v. Kraayenbrink, 632 F.3d 472 (9th Cir. 2011)3, 17

STATUTES

16 U.S.C. § 15313

16 U.S.C. § 1536 1, 3, 4, 12, 13, 14, 18, 20, 21

33 U.S.C. § 13118

5 U.S.C. § 706..... 6, 12, 20

Fed. R. Civ. P. 56(a).....12

OTHER AUTHORITIES

40 C.F.R. § 131.129
40 C.F.R. § 131.28
50 C.F.R. § 402.02 3, 4, 14
50 C.F.R. § 402.055
50 C.F.R. § 402.124
50 C.F.R. § 402.134
50 C.F.R. § 402.14 2, 3, 4
50 C.F.R. § 402.1615

RULES

51 Fed. Reg. 19,9264, 17
ENDANGERED SPECIES CONSULTATION HANDBOOK5, 18

...

INTRODUCTION

Plaintiffs challenge the U.S. Environmental Protection Agency’s (“EPA”) total failure to comply with the Endangered Species Act (“ESA”) regarding EPA’s decision to suspend myriad environmental legal obligations in light of the COVID-19 pandemic.¹ On March 26, 2020, EPA issued a memorandum entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program,” that established an unprecedented policy whereby EPA voluntarily suspended the enforcement of environmental legal obligations under various regulatory programs, such as the Clean Air Act and Clean Water Act, for all industries during the pandemic (the “Policy”). Pls.’ Rule 56.1 Statement ¶ 1. As a result, many of the key pollution reduction pillars elemental to federal environmental law – including monitoring, reporting, and enforcement – were relaxed or arrested altogether, leading thousands of industrial polluters to bypass their environmental compliance obligations. In easing regulatory programs that are intended to limit pollution and prevent adverse environmental harm, the Policy certainly harms endangered species by increasing the probability of exposure to harmful pollution and further degrading habitats critical to their survival. *See* 16 U.S.C. § 1536(a)(2) (2018). EPA, however failed entirely to consult at all with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”) (collectively the “Services”) on the Policy, in violation of the ESA.

The duty to prevent jeopardy—actions that will reduce an ESA-protected species ability to survive and recover in the wild—in consultation with the Services is one of the ESA’s cornerstones for the conservation of imperiled species. In order to effectuate the substantive

¹ The facts underlying this motion are set forth in Plaintiffs’ Rule 56.1 Statement of Undisputed Facts. (“Rule 56.1 Statement”).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.